(59)

No. 99-699-CSX Title: Boy Scouts of America and Monmouth Council, et al., Petitioners
v.
James Dale

Docketed:
October 26, 1999 Court: Supreme Court of New Jersey

Entry	Date	Proceedings and Orders
	Oct 25 1999	Petition for writ of certiorari filed. (Response due November 25, 1999)
	Oct 25 1999	Appendix of petitioner filed.
	Nov 12 1999	Brief amici curiae of Liberty Counsel and Liberty Alliance filed.
	Nov 19 1999	Brief amicus curiae of Pacific Legal Foundation filed.
	Nov 22 1999	Brief amici curiae of American Center for Law and Justice, et al. filed.
	Nov 24 1999	Brief amici curiae of Gen. Bd. of Church & Society of United Methodist Ch., et al. filed.
	Nov 24 1999	Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed.
	Nov 24 1999	Brief of respondent James Dale in opposition filed.
	Nov 26 1999	Brief amicus curiae of Individual Rights Foundation filed.
	Nov 26 1999	Brief amicus curiae of Agudath Israel of America filed.
	Nov 26 1999	Brief amici curiae of National Catholic Committee on Scouting, et al. filed.
	Nov 26 1999	Brief amici curiae of Public Advocate of the United States, et al. filed.
	Nov 26 1999	Brief amicus curiae of American Civil Rights Union filed.
	Dec 6 1999	Reply brief of petitioners Boy Scouts of America, et al. filed.
	Dec 8 1999	DISTRIBUTED. January 7, 2000
	Jan 10 2000	REDISTRIBUTED. January 14, 2000
	Jan 14 2000	Petition GRANTED. Brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, February 28, 2000. Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, March 29, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 17, 2000. Rule 29.2 does not apply. SET FOR ARGUMENT April 26, 2000. **********
	Jan 14 2000	Motions to file briefs as amicus curiae and any motions relating to oral argument must be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, March 27, 2000. Rule 29.2 does not apply.
	Feb 24 2000	Brief amicus curiae of Pacific Legal Foundation filed.
	Feb 24 2000	Brief amicus curiae of California State Club Association filed.
	Feb 28 2000	Joint appendix filed.
	Feb 28 2000	Joint appendix in three volumes.
	Feb 28 2000	Brief of petitioners Boy Scouts of America and Monmouth Council, BSA filed.
	Feb 28 2000	LODGING consisting of twenty bound copies of selected

3 pp

Entry	Date	Proceedings and Orders
		exhibits submitted by counsel for the petitioners.
	Feb 28 2000	Brief amicus curiae of Agudath Israel of America filed.
	Feb 28 2000	Brief amicus curiae of Claremont Institute Center for Constitutional Jurisprudence filed.
	Feb 28 2000	Brief amici curiae of American Center for Law & Justice, et al. filed.
	Feb 28 2000	Brief amicus curiae of Individual Rights Foundation filed.
	Feb 28 2000	Brief amici curiae of Public Advocate of the United States, et al. filed.
	Feb 28 2000	Brief amici curiae of National Catholic Committee on Scouting, et al. filed.
	Feb 28 2000	Brief amicus curiae of American Civil Rights Union filed.
	Feb 28 2000	Brief amicus curiae of Inst.Public Affairs Union of Orthodox Jewish Congregations filed.
	Feb 28 2000	Brief amicus curiae of Family Research Council filed.
	Feb 28 2000	Brief amicus curiae of Becket Fund for Religious Liberty filed.
	Feb 28 2000	Brief amicus curiae of United States Catholic Conference, et al. filed.
	Feb 28 2000	Brief amicus curiae of Liberty Legal Institute filed.
	Feb 28 2000	Brief amici curiae of Eagle Forum Education & Legal Defense Fund, et al. filed.
	Feb 28 2000	Brief amici curiae of Christian Legal Society, et al. filed.
	Feb 28 2000	Brief amici curiae of John Hurley, et al. filed.
	Feb 28 2000	Brief amicus curiae of Center for Original Intent of the Constitution filed.
	Feb 28 2000	Brief amicus curiae of Gays and Lesbians for Individual Liberty filed.
	Feb 28 2000	Brief amicus curiae of National Legal Foundation filed.
	Feb 28 2000	Brief amici curiae of Family Defense Council and mary Cummiins filed.
	Mar 9 2000	CIRCULATED.
	Mar 14 2000	Record filed.
	Mar 28 2000	Brief amici curiae of Roland Pool and Michael Geller filed.
	Mar 28 2000	LODGING consisting of twenty copies of spiral bound documents submitted by counsel for amici Pool and Geller and distributed.
	Mar 29 2000	Brief of respondent James Dale filed.
	Mar 29 2000	Brief amicus curiae of American Jewish congress filed.
	Mar 29 2000	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Mar 29 2000	Brief amicus curiae of New Jersey filed.
	Mar 29 2000	Brief amici curiae of American Association of School Administrators, et al. filed.
	Mar 29 2000	Brief amicus curiae of American Law Teachers filed.
	Mar 29 2000	Brief amici curiae of Parents,Families and Friends of Lesbians and Gays,Inc.et al. filed.
	Mar 29 2000	Brief amicus curiae of American Psychological Association filed.
	Mar 29 2000	Brief amici curiae of Deans of Divinity Schools and Rabbinical Institutions filed.

No. 99-699-CSX

Entry	Date	Proceedings and Orders
	Mar 29 2000	Brief amicus curiae of Gen.Bd. of Church and Society United Methodist Church,et al. filed.
	Mar 29 2000	Brief amici curiae of Cities of Atlanta, Chicago, Los Angeles, et al. filed.
	Mar 29 2000	Brief amici curiae of New York, et al. filed.
	Mar 29 2000	Brief amici curiae of American Public Health Association, et al. filed.
	Mar 29 2000	Brief amicus curiae of American Bar Association filed.
	Mar 29 2000	Brief amicus curiae of Bay Area Lawyers for Individual Freedom filed.
	Mar 29 2000	LODGING consisting of twenty copies of velo bound material submitted by counsel of the cities of Atlanta, et al.and distributed.
	Apr 17 2000	Reply brief of petitioners Boy Scouts of America, et al. filed.
	Apr 26 2000	ARGUED.

FILED
99 699 OCT 25 1999
OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

PETITION FOR A WRIT OF CERTIORARI

MICHAEL W. McCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

SANFORD D. BROWN
CERRATO, DAWES, COLLINS, SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

36pp

QUESTION PRESENTED

Whether a state law requiring a Boy Scout Troop to appoint an avowed homosexual and gay rights activist as an Assistant Scoutmaster responsible for communicating Boy Scouting's moral values to youth members abridges First Amendment rights of freedom of speech and freedom of association.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America.

2. Respondent James Dale.

Boy Scouts of America and Monmouth Council, Boy Scouts of America are not-for-profit corporations without stockholders. The only affiliate of Boy Scouts of America is Learning for Life, a not-for-profit corporation. Boy Scouts of America charters approximately 318 not-for-profit corporations as local Councils such as Monmouth Council to support Boy Scouting and other Scouting programs in particular geographic areas, and charters numerous religious and other organizations in localities throughout the country to operate Boy Scout Troops and other Scout units.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
Boy Scouts of America	2
Respondent James Dale	5
The Superior Court of New Jersey, Chancery Division	7
The Superior Court of New Jersey, Appellate Division	8
The Supreme Court of New Jersey	8
The Statutory Question	8
The First Amendment	10
REASONS FOR GRANTING THE PETITION	12
A. THE DECISION BELOW ENDANGERS IMPORTANT CONSTITUTIONAL PRINCIPLES OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION	12
B. THE DECISION BELOW CONFLICTS WITH THIS COURT'S UNANIMOUS RULING IN *HURLEY*	20

TABLE OF CONTENTS—Continued

Page

C. THE DECISION BELOW IMPLICITLY CONFLICTS WITH THE DECISIONS OF FOUR STATE SUPREME COURTS AND ONE FEDERAL COURT OF APPEALS 26

CONCLUSION 29

APPENDIX ..... Separately Bound

TABLE OF AUTHORITIES

CASES

Page

Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 12

Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (CA6 1996) 15

Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (CA8 1987) 16

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 952 P.2d 218 (1998) 5, 14, 26

Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981) 17

Downey-Schottmiller v. Chester County Council of the Boy Scouts of America, No. P-3986 (Pa. Human Relations Comm'n July 27, 1999), appeal docketed, No. 2291 CD 1999 (Pa. Commw. Ct. Aug. 27, 1999) 5, 28

EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) 15

Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) 15

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) 25

Gosche v. Calvert High Sch., 997 F. Supp. 867 (N.D. Ohio 1998) 16

Harvey v. YWCA, 533 F. Supp. 949 (W.D.N.C. 1982) 16

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) ..... *passim*

Hutchison v. Thomas, 789 F.2d 392 (CA6 1986) 15

Little v. Wuerl, 929 F.2d 944 (CA3 1991) 15

Maguire v. Marquette Univ., 814 F.2d 1213 (CA7 1987) 16

Mankes v. Boy Scouts of America, Inc., 137 F.R.D. 409 (S.D. Fla. 1991) 5

McClure v. Salvation Army, 460 F.2d 553 (CA5 1972) 15

McConnell v. Anderson, 451 F.2d 193 (CA8 1971) 16

Minker v. Baltimore Annual Conference of United Methodist Church, 894 F.2d 1354 (D.C. Cir. 1990) 15

TABLE OF AUTHORITIES—Continued

	Page
Minnesota ex rel. Beaulieu v. Boy Scouts of America, D.C. File No. MX 92-07717 (Minn. Dist. Ct. Aug. 6, 1992)	5
Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984)	17
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)	12
Natal v. Christian & Missionary Alliance, 878 F.2d 1575 (CA1 1989)	15
New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988)	12
Pool v. Boy Scouts of America, Nos. 93-030-PA, 93-031-PA (D.C. Dep't of Human Rights & Minority Bus. Dev.) (post-hearing briefing concluded May 18, 1998)	5, 28
Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities, 204 Conn. 287, 528 A.2d 352 (1987)	5, 26
Randall v. Orange County Council, Boy Scouts of America, 17 Cal. 4th 736, 952 P.2d 261 (1998)	5, 26-27
Rayburn v. General Conference of Seventh-day Adventists, 772 F.2d 1164 (CA4 1985)	15
Richardson v. Chicago Area Council of Boy Scouts of America, No. CCHR 92-E-80 (Chicago Comm'n on Human Relations 1996), *aff'd in rel. part*, No. 96 CH 3266 (Ill. Cir. Ct. Aug. 12, 1999), *appeal docketed*, No. 99-3018 (Ill. App. Ct. Aug. 23, 1999)	28
Roberts v. United States Jaycees, 468 U.S. 609 (1984)	*passim*
Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (CA8 1991)	15
Schwenk v. Boy Scouts of America, 275 Or. 327, 551 P.2d 465 (1976)	5, 26
Seabourn v. Coronado Area Council, Boy Scouts of America, 257 Kan. 178, 891 P.2d 385 (1995)	5, 26
Welsh v. Boy Scouts of America, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993)	5, 26

TABLE OF AUTHORITIES—Continued

	Page
Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184 (CA7 1994)	15
CONSTITUTION AND STATUTES	
U.S. Const. amend. I	1
U.S. Const. amend. XIV, § 1	1
28 U.S.C. § 1257(a)	1
N.J. Stat. Ann. § 10:5-4 (West 1993)	2
N.J. Stat. Ann. § 10:5-5(l) (West 1993)	2, 9
N.J. Stat. Ann. § 10:5-5(hh) (West 1993)	2, 6
PUBLICATIONS	
National Comm'n on Civil Renewal, *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It* (1999)	13
Alexis de Tocqueville, *Democracy in America* (J.P. Mayer ed. & George Lawrence trans., Harper-Perennial 1969) (1835)	13
Nancy L. Rosenblum, *Membership & Morals: The Personal Uses of Pluralism in America* (1998)	13
Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society (Mary Ann Glendon & David Blankenhorn eds., 1995)	13

PETITION FOR A WRIT OF CERTIORARI

Petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America respectfully petition for a *writ of certiorari* to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The decision of the Supreme Court of New Jersey (1a-101a)[1] is reported at 160 N.J. 562, 734 A.2d 1196 (1999). The decision of the Superior Court of New Jersey, Appellate Division (102a-154a) is reported at 308 N.J. Super. 516, 706 A.2d 270 (1998). The decision of the Superior Court of New Jersey, Chancery Division (155a-224a) is unreported.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on August 4, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions of the First and Fourteenth Amendments to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ; or the right of the people peaceably to assemble . . . ." U.S. Const. amend. I.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

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[1] Numbers followed by "a" refer to pages in the bound Appendix submitted with this Petition. Numbers preceded by "A." refer to pages in the record before the New Jersey Supreme Court.

The pertinent New Jersey statutes, New Jersey Statutes Annotated, title 10, chapter 5, sections 10:5-4, 10:5-5(l), and 10:5-5(hh), N.J. Stat. Ann. §§ 10:5-4, 10:5-5(l) & 10:5-5(hh) (West 1993), are reprinted at 225a-226a.

STATEMENT OF THE CASE

Boy Scouts of America

Boy Scouts of America is a non-profit organization whose mission is to instill the values of the Scout Oath and Law in young people and "to prepare them to make ethical choices over their lifetime in achieving their full potential." (A.2238.) Boy Scouts, boys between the ages of 11 and 17, and their adult leaders must commit themselves to the values of the Scout Oath and Law:

Scout Oath

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

Scout Law

A Scout is . . .

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent

(A.2542-A.2548.)

Boy Scouting activities are conducted primarily in small units, called "Troops," which typically consist of

15 to 30 boys led by several adult volunteers. (A.2224.) Nationally and in New Jersey, over 60 percent of Boy Scout Troops are sponsored by churches or synagogues. (A.2133.) For many churches and synagogues, Boy Scouting is an integral part of their youth programs. (*E.g.*, A.2128-A.2134; A.4684-A.4685 (Catholic); A.4659-A.4661 (Conservative Jewish); A.4664-A.4665 (Lutheran-Missouri Synod); A.4681-A.4682 (Latter-day Saints); A.4687-A.4688 (Baptist).)

Adult volunteer leaders are expected to be role models for the values of the Scout Oath and Law. (A.2234; A.2651.) *The Scoutmaster Handbook* gives leaders the responsibility to set the example for youth in their charge: "Boys learn from the example set by their adult leaders." (A.2652.) Adult leaders guide Boys Scouts on the subject of "moral fitness." (A.2650.) *The Scoutmaster Handbook* also cautions leaders to avoid inconsistencies between their statements and actions: "practice what you preach . . . . The most destructive influence on boys is adult inconsistency and hypocrisy." (A.2695.)

Adult leaders must be approved by the local sponsoring organization (often the church or synagogue) as well as the local Council and Boy Scouts of America. (A.2957-A.2958.) They must satisfy certain requirements. "In addition to the Scout Oath and Law requirements, adult members are bound by the Declaration of Religious Principle, and subject to evaluation according to informal criteria designed to select only individuals capable of accepting responsibility for the moral education and care of other people's children in accordance with scouting values." (38a; A.2976-A.2979.) Agnostics and atheists are ineligible to serve as adult leaders because they do not agree with the "duty to God" and "reverent" requirements of the Oath and Law. Known or avowed homosexuals are ineligible to serve because of Boy Scouts of America's be-

liefs regarding sexual morality, reflected in part in the "morally straight" and "clean" requirements of the Oath and Law.[2] (A.3238-A.3247.) Would-be leaders can be excluded for any number of additional reasons on a case-by-case basis. Boy Scouting takes very seriously its responsibility to place in positions of leadership only those adults who will be appropriate role models for Boy Scouts. No one has a "right" to be a Boy Scout leader.

Boy Scouting "espouses family values" which emphasize marriage and fatherhood. (A.4395.) *The Boy Scout Handbook* describes how a young man attains "[t]rue manliness" by accepting his "responsibility to women," his "responsibility to children" when he marries and has a family, his responsibility to his religious beliefs, and his responsibility to himself. (A.2531-A.2532.) Responsibility for inculcating these values, and other aspects of Boy Scouting, is entrusted to the Scoutmaster. If a boy is in doubt about how to conduct himself, *The Boy Scout Handbook* tells him to look to his Scoutmaster for guidance: "If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your . . . Scoutmaster." (A.2532.) In turn, *The Scoutmaster Handbook* advises adult leaders to be responsive: "Be accepting of their concerns about sex. Be very open and clear when talking with them." (A.2692.)

For most of its history, Boy Scouting did not need to issue specific directives on the subject of homosexual conduct because there was a broad societal consensus on the subject. Homosexual sodomy was a crime in every state.

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[2] Boy Scouting makes no effort to investigate the sexual orientation of members or leaders. (A.3247.) Its expressive purpose is not implicated unless an applicant presents himself as a role model inconsistent with Boy Scouting's understanding of the Scout Oath and Law.

New Jersey itself did not decriminalize homosexual conduct until 1979, and did not add "sexual orientation" to its list of nondiscrimination categories until 1992. Since the early 1980s, however, Boy Scouts of America has faced litigation under public accommodations laws in federal courts, state courts, and state administrative agencies in numerous jurisdictions.[3] As a result, the organization has periodically issued position statements to assist Boy Scouting officials in communicating about membership issues. (A.3241-A.3247.) Throughout this period, Boy Scouts of America has consistently taken the position that homosexual conduct is inconsistent with the principles of the Scout Oath and Law.

Respondent James Dale

As a boy, respondent James Dale was active in Boy Scouting, spending his last three years in Troop 73, which was sponsored by First United Methodist Church in Matawan, New Jersey. (A.3288-A.3289.) He attained the rank of Eagle and was elected to the Order of the Arrow, an honorary organization within Boy Scouting. At

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[3] *See Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993); *Mankes v. Boy Scouts of America, Inc.*, 137 F.R.D. 409 (S.D. Fla. 1991); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998); *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998); *Quinnipiac Council, Boy Scouts of America, Inc. v. Commision on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 325 (1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995); *Minnesota ex rel. Beaulieu v. Boy Scouts of America*, D.C. File No. MX 92-07717 (Minn. Dist. Ct. Aug. 6, 1992); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976); *Downey-Schottmiller v. Chester County Council of the Boy Scouts of America*, No. P-3986 (Pa. Human Relations Comm'n July 27, 1999), *appeal docketed*, No. 2291 CD 1999 (Pa. Commw. Ct. Aug. 27, 1999); *Pool v. Boy Scouts of America*, Nos. 98-030-PA, 98-031-PA (D.C. Dep't of Human Rights & Minority Bus. Dev.) (post-hearing briefing concluded May 18, 1998).

the age of 18, Dale automatically ceased to be a Boy Scout. (A.3336-A.3337.) Dale thereafter registered as an Assistant Scoutmaster for Troop 73, but since he had gone away to college, Dale had very little further involvement with Boy Scouting or the Troop. (A.3251-A.3252; A.3346-A.3350.)

On July 8, 1990, *The Star-Ledger* published a picture of Dale and an article reporting an interview of Dale as a gay activist. (A.1946.) Dale had become Co-President of the Rutgers University Lesbian/Gay Alliance in his sophomore year at college. Having "pretend[ed] to be straight" in high school, Dale testified at deposition that he came to believe while in college that homosexuality "is not immoral," and he "became deeply involved in gay rights issues and maintained a high profile on campus." (A.3371-A.3374; A.3384.) After Monmouth Council headquarters received copies of the article from leaders throughout the Council who were aware of Dale's Boy Scouting position, Dale's registration as an adult leader was revoked. (A.281; A.3576.) Monmouth Council's Scout Executive James W. Kay explained that the grounds for his membership revocation were "the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals." (A.1950.) Upon request for review, higher Boy Scouting authorities informed Dale that he was ineligible to lead Boy Scouts because "Boy Scouts of America does not admit avowed homosexuals to membership in the organization." (A.1957.)

About 18 months later, on January 18, 1992, the public accommodation and other provisions of the New Jersey Law Against Discrimination (the "LAD"), were amended to extend to "affectional or sexual orientation." N.J. Stat. Ann. § 10:5-5(hh) (West 1993). On July 29, 1992, Dale sued petitioners, seeking reinstatement and compensatory and punitive damages, and alleging that volunteer service as an Assistant Scoutmaster was one of the "advantages" of "a place of public accommodation." Upon filing the Complaint, Dale gave an interview, published in *The New York Times,* in which he said:

> I owe it to the organization to point out to them how bad and wrong this policy is . . . . Being proud about who I am is something the Boy Scouts taught me. They taught me to stand up for what I believe in.

(A.3366-A.3367; A.3548.)

The Superior Court of New Jersey, Chancery Division

On the parties' cross-motions for summary judgment, the Superior Court of New Jersey, Chancery Division granted summary judgment for petitioners and dismissed Dale's Complaint. (224a.) The Chancery Division ruled that Boy Scouting was not a place of public accommodation and was exempt from the LAD as a distinctly private institution. The Chancery Division also held that petitioners "have First Amendment freedom of expressive association rights preventing government from forcing them to accept Dale as an adult leader-member." (224a.) The court found:

> Since its inception Scouting has sincerely and unswervingly held to the view that an "avowed", sexually-active homosexual is engaging in immoral behavior which violates the Scout Oath (in which the person promises to be "morally straight") and the Scout Law (whereby the person promises to keep himself "clean"). The exclusion or termination of an adult leader who openly advocates consensual homosexuality is no less rational than excluding one who advocates any other type of behavior (such as promiscuous heterosexual activity) which [Boy Scouts of America] holds to be morally wrong.

(223a.)

The Superior Court of New Jersey, Appellate Division

The Appellate Division reversed by a 2-1 vote, holding that Boy Scouting was covered by the LAD and that Boy Scouts of America and Monmouth Council had no First Amendment right to exclude Dale because of his "statements as a 'gay activist,' " "his 'message,' " or "his avowed homosexuality." (139a.) The majority concluded that Boy Scouting could claim no constitutional "privilege" to exclude Dale "when the sole basis for the exclusion is the gay's exercise of his own First Amendment right to speak honestly about himself." (149a.) Judge Landau dissented on the First Amendment issue: "We may not compel the Boy Scouts to alter a message which they wish to convey by including messages more acceptable to others." (153a) (citing *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 581 (1995)).

The Supreme Court of New Jersey

The Supreme Court of New Jersey affirmed, holding the statute applicable and denying the First Amendment defense.

The Statutory Question. The court ruled that Boy Scouting was a public accommodation on the basis of "various factors" (24a), including Boy Scouting's high visibility in the community, public solicitation of members, and "the symbolism of the Boy Scout uniform" worn in public places. (25a-27a.) Boy Scouting also was a public accommodation because it received certain government benefits, including a federal charter, the support of Presidents and members of Congress, access to some military and other public facilities, and sponsorship of some Troops by governmental entities. (27a-30a.)[4]

[4] Sponsorship by public institutions is dwindling, partly as a result of litigation or political concern regarding Boy Scouting's membership requirements. This case does not involve the question whether public bodies can or should sponsor Boy Scout Troops.

The New Jersey legislature had enacted several exceptions to the public accommodation law to protect the rights of constitutionally protected associations. N.J. Stat. Ann. § 10:5-5(l) (exempting "distinctly private" institutions, clubs or places of accommodation; educational facilities operated or maintained by religious or sectarian institutions; and parents or individuals acting *in loco parentis* to direct the "education and upbringing" of children). The court refused to apply these exceptions to Boy Scouting.

First, Boy Scouting was not "distinctly private" because it encourages local Councils and Boy Scout Troops "to see that *all* eligible youth have the opportunity" to join. (35a-36a.) Even though Boy Scouting "requires members to comply with the Scout Oath and Law," the court ruled that the Scout Oath and Law do not operate as "genuine selectivity criteria" because "the record discloses few instances in which the Oath and Law have been used to exclude a prospective member." (37a.) While adult leadership standards were more restrictive than youth membership, Boy Scouting could not be held to be private only with respect to adult leaders, "a small subset of the larger group." (38a.)

Second, Boy Scouting could not qualify as an " 'educational facility operated or maintained by a bona fide religious or sectarian institution' " because Boy Scouting "is nonsectarian." (39a) (quoting N.J. Stat. Ann. § 10:5-5(1)). Repeated expression of belief in God through membership recitation of the Scout Oath did not qualify Boy Scouting as a religious institution; Boy Scouting's commitment to education did not qualify it as an educational facility. (39a-40a.)

Finally, despite the Scoutmaster's supervisory role during campouts and other activities, the court concluded that Boy Scouting does not act *in loco parentis* because leaders do not " 'maintain, rear and educate' " children in the place of the parent. (40a-41a.)

The First Amendment. The New Jersey Supreme Court held that Boy Scouting is not " 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." (48a.) In the court's opinion, Boy Scouting, composed of Troops of 15 to 30 boys and several adult leaders, was too "large" to warrant protection. (48a.) Other factors included Boy Scouting's "nonselectivity," its attempt at inclusiveness rather than exclusiveness, and its practice of inviting "nonmembers" to attend recruiting meetings and allowing "nonmembers" to attend the boys' Courts of Honor (i.e., award ceremonies). (49a-50a.) The court concluded that adult leaders did not substitute for the boys' parents and did not have private relationships with Troop members. (49a.)

The court rejected the expressive association defense:

> The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scouts members do not associate *for the purpose of* disseminating the belief that homosexuality is immoral; *Boy Scouts discourages its leaders from disseminating any views on sexual issues*; and Boy Scouts include sponsors and members who subscribe to different views in respect of homosexuality.

(52a) (emphasis added). Furthermore, the LAD served "a compelling state interest and 'abridges no more speech or associational freedom than is necessary to accomplish that purpose.' " (63a) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984)).

The court did acknowledge that Boy Scouting engages in expressive activity "designed to build character and in-

still moral principles." (64a.) "We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." (53a.) However, the court found that it was not a " 'shared goal[]' " or "shared view[]" of members to "associate in order to preserve the view that homosexuality is immoral." (52a-54a.) The court opined that the "words 'morally straight' and 'clean' do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral." (55a.) The court disregarded a 1978 Boy Scout position statement as "[un]disseminated" and four later position statements as "self-serving." (54a.) The court decided that Boy Scouting's stated position on homosexuality is based on "prejudice" and "bigotry." (59a; 61a.)

In addressing petitioners' freedom of speech defense, the court distinguished *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), on the grounds that Dale does not come to Boy Scout meetings " 'carrying a banner' " and that his "status as a scout leader is not equivalent to a group marching in a parade." (65a.) The court concluded that "unlike a parade, where the 'speech itself . . . [is] the public accommodation,' " ordering Dale into a position of adult Scout leader "in no way prevents Boy Scouts from 'invok[ing] its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.' " (66a) (quoting *Hurley*, 515 U.S. at 573-74).

In a concurring opinion, Justice Handler concluded that it is "untenable . . . in the absence of a clear, particular, and consistent message to the contrary, that Boy Scouts . . . remains entrenched in the social mores that existed at the time of its inception." (100a.) Boy Scout-

ing must reject "stereotypes" and accept that a homosexual "is no more or less" moral than a heterosexual. (95a-96a.)

REASONS FOR GRANTING THE PETITION

A. THE DECISION BELOW ENDANGERS IMPORTANT CONSTITUTIONAL PRINCIPLES OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION

This case involves constitutional rights at the heart of our free society: the freedom of a private, voluntary, noncommercial organization to create and interpret its own moral code, and to choose leaders and define membership criteria accordingly. This Court has called it "beyond debate" that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (citations omitted). "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

In a trilogy of cases involving freedom of association, *Roberts*, *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), the Court has distinguished between relatively unprotected groups—epitomized by businesses or gatherings for commercial purposes—and "intimate" or "expressive" associations whose character entitles them to the highest level of constitutional protection in defining their missions and in selecting their members and leaders accordingly. "Infringements on that right may be justified

by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623. Most recently, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), this Court unanimously concluded that it is unconstitutional for a state to apply a law forbidding discrimination on the basis of sexual orientation to an expressive private group, where application of the law would interfere with the ability of the group to control its own message.

These principles of freedom of speech and freedom of association are essential to preserving what many call "civil society"—the network of private institutions, societies, and congregations between the individual and the state that enable free people to work together for common ends.[5] These ends may include moral beliefs that are controversial in society at large. As Justice Brennan explained for the Court in *Roberts*: "According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." 468 U.S. at 622.

These First Amendment principles are manifestly endangered by the decision below. This Court's guidance is necessary to ensure that freedom of speech and association

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[5] *See* National Comm'n on Civil Renewal, *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It* (1999); Nancy L. Rosenblum, *Membership & Morals: The Personal Uses of Pluralism in America* (1998); *Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society* (Mary Ann Glendon & David Blankenhorn eds., 1995). A vibrant diversity of private associations has long been the hallmark of American culture. *See* Alexis de Tocqueville, *Democracy in America* 513-14 (J.P. Mayer ed. & George Lawrence trans., HarperPrennial 1969) (1835).

is not undermined by unsympathetic state court interpretation.

Boy Scouts of America is a "charitable, expressive, and social organization" whose "primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose." *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 697, 952 P.2d 218, 236 (1998). As described by the California Supreme Court, "Scouts meet regularly in small groups (often in private homes) that are intended to foster close friendship, trust and loyalty, and scouts are required to participate in a variety of activities, ceremonies, and rituals that are designed to teach the moral principles to which the organization subscribes." *Id.* at 698, 952 P.2d at 236. Indeed, in *Roberts*, Justice O'Connor cited the Boy Scouts and Girl Scouts as examples of expressive associations: "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." 468 U.S. at 636 & n.* (O'Connor, J., concurring) (quoting Paul Fussell's observation that *The Official Boy Scout Handbook* is "another book about goodness").

The New Jersey Supreme Court's decision that a Boy Scout Troop must appoint respondent Dale as a uniformed Assistant Scoutmaster raises important issues affecting Boy Scouting's freedoms of speech and association. The organization interprets its moral code as inconsistent with homosexual conduct. Dale, by his own description, is a sexually active homosexual and was prominent in gay rights causes at Rutgers University. (14a; 110a; A.3384.) He has stated publicly that he disagrees with Boy Scouting's moral position against homosexual conduct and that

he "owe[s] it to the organization to point out to them how bad and wrong this policy is." (A.3548.)

The court's decision to require an organization to put into a leadership position a person who, by word and deed, disagrees with the organization's moral code conflicts with the Constitution in at least three ways.

First, the application of state law here violates Boy Scouting's freedom of speech. The choice of a leader is an inherently expressive decision. Its expressive quality goes far beyond the communication of specific explicit messages. If a Troop were required to accept a known Ku Klux Klansman as its Scoutmaster, this would interfere with the organization's message of racial harmony even if he never uttered a word on the subject of race. In analogous contexts, churches and synagogues have an absolute right to choose their own ministers and rabbis;[6] political parties have the right to select their own leaders. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 229-30 (1989). Expressive associations enjoy a comparable protection to select their leaders without governmental interference.[7]

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[6] *See, e.g., EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 187-88 (CA7 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (CA8 1991); *Minker v. Baltimore Annual Conference of United Methodist Church*, 894 F.2d 1354, 1358-60 (D.C. Cir. 1990); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577-78 (CA1 1989); *Hutchison v. Thomas*, 789 F.2d 392, 393 (CA6 1986); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168-69 (CA4 1985); *McClure v. Salvation Army*, 460 F.2d 553, 560 (CA5 1972).

[7] In the employment context, where constitutional protection is less rigorous, courts permit private organizations to reject inappropriate role models. *See Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 414-15 (CA6 1996) (unmarried pregnant teacher dismissed for not setting Christian example); *Little v. Wuerl*, 929 F.2d 944, 951 (CA3 1991) (Catholic school permitted not to rehire re-

An organization cannot speak except through its agents, which in this context means the adults who serve as volunteer leaders. The positions of Scoutmaster and Assistant Scoutmaster are particularly closely tied to the communication of Boy Scouting's moral message. These leaders are the embodiment of the ideals of Boy Scouting to the boys in the Troop.

Respondent Dale acknowledges that the Scoutmaster serves as "a role model for the younger Scouts and as a counselor to the older Scouts." (A.3383; A.3553.) Troop meetings end with a "Scoutmaster's Minute" in which the leader gives inspirational remarks, usually focusing on a point of the Scout Oath or Law. (A.2228; A.2730-A.2731; A.2812.) The Scoutmaster's role includes communication of the organization's teachings on sexual morality. *The Scoutmaster Handbook* advises that "[m]oral fitness, like emotional fitness, will clearly present oppor-

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married teacher because school could hire only those whose beliefs and conduct were consistent with its purposes); *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 703-705 (CA8 1987) (living by certain code of behavior constitutes bona fide occupational qualification for Girls Club counselors expected to act as role models); *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 (CA7 1987) (plaintiff's controversial beliefs regarding abortion would have prevented Catholic school from hiring plaintiff); *McConnell v. Anderson*, 451 F.2d 193, 196 (CA8 1971) (court rejected plaintiff's argument that he had been refused library employment on basis of his sexual orientation because he sought right "to pursue an activist role in *implementing* his unconventional ideas concerning societal status to be accorded homosexuals and, thereby, to foist tacit approval of this socially repugnant concept upon his employer"); *Gosche v. Calvert High Sch.*, 997 F. Supp. 867, 871 (N.D. Ohio 1998) (Catholic school teacher properly dismissed because her sexual conduct was not fulfilling the legitimate expectation that she would "by word and example . . . reflect the values of the Catholic Church"); *Harvey v. YWCA*, 533 F. Supp. 949, 954-55 (W.D.N.C 1982) (unmarried pregnant woman who wished to role model an alternative lifestyle to teenagers properly discharged because Christian sexual morality was bona fide occupational qualification for position of YWCA girls counselor).

tunities for wise guidance by an alert Scoutmaster." (A.2650.) In a section on "Sexual Curiosity," *The Scoutmaster Handbook* instructs: "If Scouts come to you to ask questions or seek advice, you would give it within your competence." (A.3588-A.3589.) It advises: "Be accepting of their concerns about sex. Be very open and clear when talking with them." (A.2692.)

The New Jersey Supreme Court's assertion that the statute "does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views" (52a), is contrary to the plain fact of the matter. What better way to frustrate Boy Scouting's ability to promote its understanding of sexual morality than to install respondent Dale, or other opponents of Boy Scouting's message, as Troop leaders? As the Court stated in *Hurley*, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." 515 U.S. at 576.

Second, the New Jersey court's decision violates rights of expressive association. The criteria for membership or leadership in an expressive association are themselves expressive, and constitutive of the identity of the organization. The constitutional right to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). *See also Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984) ("the First Amendment guarantees the . . . freedom to associate or not to associate with whom they please"). As Justice O'Connor has explained: "Protection of the association's right to define its membership derives from the recognition that

the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring).

Boy Scouting is an expressive organization with the purpose of instilling in boys and young men certain ideals of what it means to be a man. Youth membership is therefore confined to males, to believers in God, and to those who subscribe to the Scout Oath and Law. All of these criteria—sex, religion, and morality (including sexual conduct)—appear, on their face, to violate New Jersey's LAD. But if the state is permitted to impose its will on Boy Scouting in these respects, Boy Scouting would cease to be recognizable. Application of the LAD would "necessarily affect, change, dilute, or silence" the "collective voice" of Boy Scouting in violation of the First Amendment. *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring).

Third, this case raises important questions regarding freedom of intimate association. This Court has explained that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State." *Roberts*, 468 U.S. at 618-19.

Boy Scout Troops precisely meet this description. They are small groups of boys and adult leaders; their functions are utterly noncommercial and unrelated to business or business opportunities; their activities are not open to the general public; they are an integral part of the youth program of many churches and synagogues; they involve personal communication on moral and intimate subjects; and they involve physical activity on group hikes and

campouts far from the public gaze.[8] Moreover, unlike the relationships characteristic of Rotarian meetings, the relationships within the Troop are the source of "emotional enrichment" and identity formation for the participants. *Roberts*, 468 U.S. at 619. Respondent Dale testified that his Scouting experience as a boy "had an extremely large effect on my socialization." (A.3353.) Boy Scout Troops are more nearly an extension of home, church, and friendship than of the commercial or public sphere. Yet the court below treated a Boy Scout Troop as constitutionally indistinguishable from a Rotary chapter. (48a-50a.) Under that analysis, it is difficult to imagine an association, other than perhaps a family, that would receive constitutional protection.

In short, application of New Jersey's law would affect substantially the speech, expressive character, and personal relationships in Boy Scout Troops. It raises issues of profound constitutional significance not only to the members and leaders involved in Boy Scouting across the country, but to the tens of millions of citizens—young and old—involved in other voluntary associations of a noncommercial character. If a Boy Scout Troop in Monmouth County, New Jersey could be required to accept a leader whose avowed conduct and opinions contradict the stated mission and message of the organization, it is difficult to see what is left of freedom of association.

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[8] The evidence showed that prospective members and their parents were invited to attend a limited number of meetings (including "School Nights") for the very purpose of interesting them in joining. (A.2710-A.2712.) Unlike Rotary Club meetings, nonmembers (other than parents) do not regularly attend Troop meetings, or activities such as hikes, campouts, summer camps, or service projects.

B. THE DECISION BELOW CONFLICTS WITH THIS COURT'S UNANIMOUS RULING IN *HURLEY*

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), this Court held that application of a state public accommodation law to force private organizers of a St. Patrick's Day parade to include the Gay, Lesbian, and Bisexual Group of Boston ("GLIB") was unconstitutional. In a decision almost identical in its reasoning to that of the court below, the Massachusetts Supreme Judicial Court had held that the parade was a "public accommodation" under state law, that exclusion of GLIB from the parade constituted discrimination on the basis of sexual orientation, and that requiring the parade organizers to allow GLIB to march would not violate the organizers' First Amendment rights. *See id.* at 563-64. The Massachusetts court rejected the organizers' First Amendment claim on the rationale that the parade lacked any " 'specific expressive purpose' " that would be threatened by the presence of the marchers. *Id.* at 564 (quoting 418 Mass. 238, 249, 636 N.E.2d 1293, 1299 (1994)).

This Court unanimously reversed. As an initial matter, the Court noted that it had a "constitutional duty to conduct an independent examination of the record as a whole," and was not bound by "the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of nonexpressive conduct." *Id.* at 567. The same standard of review applies in this case. Turning to the question whether the St. Patrick's Day parade was entitled to First Amendment protection, the Court held that a parade is an inherently expressive activity. The Court specifically rejected the argument that "a narrow, succinctly articulable message is . . . a condition of constitutional protection." *Id.* at 569. Nor, according to the Court, did the relative nonselectivity of the

parade organizers in choosing participants deprive the group of the right to exercise selectivity when it chose to do so. "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70.

This Court found that GLIB's participation in the parade was "equally expressive." *Id.* at 570. Notwithstanding the fact that GLIB sought only to display its own name, and not to make any other political or moral statement, the Court recognized that even the mere self-identification of the group would serve the purpose of "celebrat[ing] its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants." *Id.* According to the Court, "GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own." *Id.*

The Court held that requiring the parade organizers to include GLIB in their parade "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. This includes the right to decide " 'what not to say.' " *Id.* (citation omitted). The organizing committee "clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.* at 574. The Court noted that the "message it disfavored" was GLIB's message "bear[ing] witness to the fact that some Irish are gay, lesbian, or bisexual," and its "view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals." *Id.*

Finally, the Court analyzed the issue under the doctrine of expressive association, as reflected in the *Roberts* tril-

ogy. On the assumption that the St. Patrick's Day parade was "large enough" and "a source of benefits," so as to make it analogous to the clubs in those cases, the Court held that "GLIB could nonetheless be refused admission." *Id.* at 580-81. A "private club," the Court explained, has the right to "exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 581.

This case is constitutionally indistinguishable from *Hurley*. Boy Scouting, like the parade, is an expressive association and has a right to control its own message. Under *Hurley*, it would not matter if Boy Scouting had ever promulgated a "narrow, succinctly articulable message" regarding homosexual conduct, 515 U.S. at 569, and it would not matter if its criteria for membership or leadership were selective, *id.* at 569-70. Indeed, the expressive quality of Boy Scouting's association is clearer than that of the parade in *Hurley*. It was not readily apparent what message the St. Patrick's Day parade was intended to communicate, whereas Boy Scouting has a distinct moral message embodied in the Scout Oath and Law. Even the court below conceded: "We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." (53a.) Moreover, respondent Dale's intended participation in Boy Scouting is "equally expressive." As an open and avowed homosexual, he wishes to "celebrate his identity" as an openly gay Scout leader in precisely the same way that the GLIB marchers wished to celebrate their sexual identity, and to "bear witness" to his "view that people of [his] sexual orientation[] have as much claim to unqualified social acceptance as heterosexuals." *Hurley*, 515 U.S. at 574.

Just as including the GLIB group in the St. Patrick's Day parade would "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," *id.* at 573, appointing respondent Dale as Assistant Scoutmaster of a Troop would interfere with Boy Scouting's ability to control the content of *its* message. Dale would not be willing to communicate Boy Scouting's view of sexual morality, and it is not unlikely that he would communicate a view inconsistent with that of Boy Scouting; indeed, his very presence as a role model would interfere with communication of its message.

The attempt by the New Jersey Supreme Court to distinguish *Hurley* does not withstand scrutiny. The court asserted that *Hurley* is "distinguishable" on the ground that "Dale's status as a scout leader is not equivalent to a group marching in a parade. Dale does not come to Boy Scout meetings 'carrying a banner.' Dale has never used his leadership position or membership to promote homosexuality, or any message inconsistent with Boy Scouts' policies." (65a-66a.) But that simply denies the expressive qualities of the Scoutmaster's role. Scoutmasters are entrusted with the responsibility of conveying the organization's values to the youth members. If a single self-identifying banner in a multifarious parade is enough to trigger constitutional protection, surely appointment of a person "whose manifest views were at odds with a position taken by the club's existing members," *id.* at 581, to serve as role model, counselor, and uniformed leader is a far more serious intrusion.

The New Jersey court's other reasons for denying Boy Scouting its rights as an expressive association are even more patently inconsistent with this Court's teachings in *Hurley* and the *Roberts* trilogy. First, the court questioned the accuracy of Boy Scouting's own description of its beliefs. (53a-54a.) The court was "not persuaded" that a " 'shared goal[]' of Boy Scout members is to asso-

ciate in order to preserve the view that homosexuality is immoral." (53a.) That is simply a pejorative characterization of Boy Scouting's goals: Boy Scout members associate in order to promote a certain set of moral values, of which the view that homosexuality is immoral is merely a small part. No doubt, the same could be said of the parade organizers in *Hurley*, but that did not prevent this Court from holding, unanimously, that they had a constitutional right to control the content of their message.

Worse yet, the court took it upon itself to second-guess Boy Scouting's interpretation of the Scout Oath and Law. According to the court, the words "morally straight" and "clean" in the Scout Oath and Law do not "express anything about sexuality." (55a.) Indeed, the court asserted that Boy Scouting's stance on homosexuality "appears antithetical to the organization's goals and philosophy." (59a.) Nothing could be more inconsistent with First Amendment principles than for the state to deny an organization its free speech rights on the ground that the organization does not accurately understand its own philosophy. The "fundamental rule of protection under the First Amendment" is that a speaker (including a group) "has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. The New Jersey court may think that Boy Scouting should interpret its Oath and Law as expressing nothing about sexuality. But Boy Scouting thinks otherwise. "[T]he point of all speech protection," this Court has said, "is to shield just those choices . . . that in someone's eyes are misguided, or even hurtful." *Id.* at 574 (citations omitted).

Relatedly, the New Jersey court maintained that "no single view on this subject functions as a unifying associational goal of the organization," pointing to several religious umbrella groups (whose local churches may or may not sponsor Scouting units) that allegedly "differ in their

views about homosexuality."[9] (55a-56a.) But it is not uncommon for members of expressive groups to disagree about some aspects of the group's beliefs. Some Roman Catholics believe that women should be ordained as priests. That would be no justification for overriding the Church's freedom of association, and forcing the Church to ordain female priests. The First Amendment entitles organizations to resolve internal disagreements for themselves.

Finally, the New Jersey Supreme Court denied protection to Boy Scouting because it views Boy Scouting's moral position on homosexuality as "based on little more than prejudice." (59a.) The court delivered a sermon about "the human price of this bigotry," and insisted that "the principle of equality" take precedence over Boy Scouting's freedom of association. (61a.) Such a line of attack is squarely inconsistent with this Court's insistence that "[d]isapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others." *Hurley*, 515 U.S. at 581. *Accord Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974) ("The freedom to associate applies to the beliefs we share, and to those we consider reprehensible."). The New Jersey Supreme Court's zeal in attacking the "bigotry" of Boy Scouting underscores the need for this Court's review, lest First Amendment rights be sacrificed in the interest of a new orthodoxy.

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[9] The court confused statements that homosexuals should have civil rights with the view that homosexual conduct is moral. (*E.g.*, A.3911; A.3889.)

C. THE DECISION BELOW IMPLICITLY CONFLICTS WITH THE DECISIONS OF FOUR STATE SUPREME COURTS AND ONE FEDERAL COURT OF APPEALS

Prior to the decision below, four state supreme courts and one federal court of appeals had rejected arguments that Boy Scouting is required under public accommodations laws to admit members or leaders in violation of the organization's standards for membership. *See Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998); *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998); *Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976).

Although none of these decisions explicitly reached the federal constitutional question, the opinions indicate that the courts were mindful of the rule of statutory construction that required them to interpret statutory law so as to avoid constitutional difficulties. *See, e.g., Welsh*, 993 F.2d at 1277 (declining to reach constitutional question but stating that court's discussion of Boy Scouting's "purpose and its right to determine whom to admit into membership impacts a constitutional right to Freedom of Association"); *id.* at 1283 (Cummings, J., dissenting) ("My inclination would have been to hold that the Scouts could exclude atheists under a line of free association decisions suggesting that individuals may form groups in the pursuit of political, social, economic, educational, religious and cultural ends."); *Curran*, 17 Cal. 4th at 699, 952 P.2d at 238 (unanimously holding California statute not applicable to Boy Scouts of America, "an expressive social organization," despite precedents applying statute to Boys Club and country club); *id.* at 722, 727, 952 P.2d at 253, 255-56 (Kennard, J., concurring) (noting the "rule of statutory construction" that an "ambiguous statutory term should be construed, if possible, to avoid constitutional difficulties" and citing the right of expressive association as protective of Boy Scouting's right "to exclude applicants with 'manifest views' at odds with those of the organization"); *Randall*, 17 Cal. 4th at 744, 952 P.2d at 266 (holding California statute not applicable to Boy Scouts of America, "a charitable organization with a predominantly expressive social purpose"). These decisions thus conflict in principle with the decision below. The same considerations that led these courts to reject the "public accommodation" argument also support our First Amendment defense.

It would be unfortunate for this Court to avoid decision in this case on account of a lack of explicit conflict on the constitutional question, because in all likelihood one will never arise. Any state supreme court that believes that requiring Boy Scouting to admit members who disagree with the organization's moral values would be unconstitutional would almost certainly interpret the public accommodations law in such a way as to avoid the constitutional question. Public accommodations laws are broadly and vaguely worded, and it requires considerable judicial ingenuity to apply them to Boy Scouting. Courts that think such a result would be unconstitutional would be unlikely to interpret state law to apply to Boy Scouting, and then hold the application to be unconstitutional. Thus, a clear conflict will probably never occur: those courts that agree with Boy Scouting's constitutional position will decide cases on statutory grounds, and only

those courts that disagree with Boy Scouting's constitutional position will reach the federal constitutional issue.

Yet for practical as well as doctrinal reasons, it is urgent that this Court intervene to provide guidance and coherence here. Various people with religious and moral views contradictory to those of Boy Scouting are seeking to use government power to obtain membership and leadership positions.[10] The ability to control the selection of Scoutmasters and Assistant Scoutmasters is a matter of intense concern to Boy Scouting's members, their families, and their sponsoring institutions. (A.4662; A.4685; A.4695-A.4696.) Other organizations are affected as well: the New Jersey court's interpretation of "public accommodation" is so sweeping, and its interpretation of First Amendment protections so stingy, that almost any organization could find itself a victim of a court's desire to foster social change by forcing private associations to conform to its idea of egalitarian values.

We recognize that the issue whether homosexual conduct is moral or immoral is controversial, and that many people of good will believe that Boy Scouting's position is misguided. That is not an issue in this case. Contro-

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10 Pending challenges by those who seek to alter Boy Scouting's moral and religious views include *Richardson v. Chicago Area Council of Boy Scouts of America*, No. CCHR 92-E-80 (Chicago Comm'n on Human Relations 1996), *aff'd in rel. part*, No. 96 CH 3266 (Ill. Cir. Ct. Aug. 12, 1999), *appeal docketed*, No. 99-3018 (Ill. App. Ct. Aug. 23, 1999) (gay activist seeking to be uniformed professional adult leader); *Downey-Schottmiller v. Chester County Council of the Boy Scouts of America*, No. P-3986 (Pa. Human Relations Comm'n July 27, 1999), *appeal docketed*, No. 2291 CD 1999 (Pa. Commw. Ct. Aug. 27, 1999) (atheist activist seeking to be volunteer leader); *Pool v. Boy Scouts of America*, Nos. 93-030-PA, 93-031-PA (D.C. Dep't of Human Rights & Minority Bus. Dev.) (post-hearing briefing concluded May 18, 1998) (openly gay men seeking to be volunteer leaders), *sub judice*.

versial questions of personal morality, often involving religious conviction, are best tested and resolved within the private marketplace of ideas, and not made the subject of government compulsion. We can respect the plea of gay men and lesbians not to have traditional morality imposed upon them. By the same token, we ask that a contrary morality not be forced upon private associations like Boy Scouting, at the expense of First Amendment freedoms of speech and association.

CONCLUSION

The petition for a *writ of certiorari* should be granted.

Respectfully submitted,

MICHAEL W. MCCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

SANFORD D. BROWN
CERRATO, DAWES, COLLINS, SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

Attorneys for Petitioners

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL W. McCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

SANFORD D. BROWN
CERRATO, DAWES, COLLINS, SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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TABLE OF CONTENTS

APPENDIX A: Page

Opinion of the Supreme Court of New Jersey..... 1a

APPENDIX B:

Opinion of the Superior Court of New Jersey, Appellate Division 102a

APPENDIX C:

Opinion of the Superior Court of New Jersey, Chancery Division 155a

APPENDIX D:

N.J. Stat. Ann. §§ 10:5-4, 10:5-5(l), and 10:5-5(hh) 255a

APPENDIX A

SUPREME COURT OF NEW JERSEY
September Term 1997

A-195/196

JAMES DALE,
Plaintiff-Respondent
and Cross-Appellant,

v.

BOY SCOUTS OF AMERICA and
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Defendants-Appellants
and Cross-Respondents.

Argued January 5, 1999—Decided August 4, 1999

On Certification to the Superior Court, Appellate Division

The opinion of the Court was delivered by PORITZ, C.J.

In 1991, the New Jersey Legislature amended the Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -49, to include protections based on "affectional or sexual orientation." This case requires us to decide whether that

law prohibits Boy Scouts of America (BSA) from expelling a member solely because he is an avowed homosexual.

Defendants BSA and Monmouth Council (collectively Boy Scouts) seek review of a decision of the Appellate Division holding that: (1) Boy Scouts is a place of public accommodation as defined by the LAD; (2) Boy Scouts' expulsion of plaintiff James Dale, as assistant scoutmaster, based solely on the club's policy of excluding avowed homosexuals from membership is prohibited by the LAD; and (3) the LAD prohibition does not violate Boy Scouts' First Amendment rights. Plaintiff, James Dale, seeks certification on his common law claim, dismissed by the Appellate Division. We granted both parties' petitions, —— *N.J.* —— (1999), and now affirm.

I

FACTS

A. *Boy Scouts of America*

1. *Organizational Structure and Programs* [1]

BSA, a federally chartered corporation, 36 *U.S.C.A.* § 30901, operates four scout membership programs: Cub Scouts (for boys eight to eleven-and-a-half), Boy Scouts (for boys and young men eleven to seventeen), Varsity Scouts (for young men fourteen to seventeen), and Explorers (for young men and women fourteen to twenty). In addition to these well-known membership programs, BSA publishes *Boys' Life*, *Exploring* and *Scouting* maga-

[1] Although not always specifically designated in the text, our description of Boy Scouts is derived primarily from the BSA Charter, Bylaws, and Rules and Regulations; the *Boy Scout Handbook* (10th ed. 1990); and the *Scoutmaster Handbook* (1990). These publications, taken together, provide a comprehensive view of the organization's structure, programs and missions.

zines, and offers an in-school scouting curriculum called Learning for Life that is taught in many schools throughout the country.

BSA membership is an American tradition. Since the program's inception in 1910 through the beginning of this decade, over eighty-seven million youths and adults have joined BSA. As of December 1992, over four million youths and over one million adults were active BSA members. BSA's success in attracting members is at least partly attributable to its long-standing commitment to a diverse and "representative" membership, as well as its aggressive recruitment through national television, radio, and magazine campaigns. BSA also organizes local membership drives, including "School Nights" conducted in cooperation with schools across the nation and held at school facilities.

This vast network of members is managed through a complex of national, regional and local organizations. The National Council is the highest BSA governing body. Its primary functions include "develop[ing] programs, set[ting] and maintain[ing] quality standards in training, leadership selection, uniform[s], registration records, literature development, and advancement requirements; and publish[ing] *Boy's Life* and *Scouting* magazines." BSA membership programs are also governed by regional committees that are further divided into area committees. Within each area, BSA accepts applications for the creation of local councils. Defendant, Monmouth Council, is one of sixteen local councils in New Jersey, and one of over four hundred local councils nationwide.

Each local council is made up of districts that are governed by district committees. BSA grants unit charters to individual sponsors in the districts consisting of "organizations and groups of citizens" that establish and "maintain units . . . and . . . issue certificates of member-

ship . . . to the officers and members thereof." Unit charters allow the "organization to use the Scouting program under its own leadership to serve the youth and families for which it has concern, to help it accomplish its own objectives." Individual units are based on age groupings and designated as Cub Scout Packs, Boy Scout Troops, Varsity Scout Teams, and Explorer Posts. In 1991, Monmouth Council chartered approximately 215 units comprised of nearly 8500 youth members and over 2700 adult members.

When deciding whether to grant an individual unit charter, BSA investigates "the general objectives, purpose, character, intent, and programs of the prospective chartered organization or community group and its compatibility with the aims and purposes of the Boy Scouts of America." In respect of established groups, BSA also considers the group's "history, length of service, and general reputation." Generally, BSA prefers granting unit charters to sponsors that are "existing organizations," *i.e.*, established religious, civic, or educational groups. In New Jersey, for example, public schools and school-affiliated groups sponsor close to 500 scouting units, comprising approximately one-fifth of the chartering organizations in the State. Other governmental entities, such as law enforcement agencies, fire departments, city governments, and the military, sponsor approximately 250 scouting units in New Jersey. Sponsor approvals "obligate the organization to provide adequate facilities, supervision, and leadership for at least one year[,] and to make an effort to provide youth members with the opportunity for a quality program experience as set forth in the official literature of the Boy Scouts of America."

A unit charter is renewed annually, "upon application, provided a review of past activities, personnel, and plans for the future shows a satisfactory effort to carry out the

scouting program, as set forth in the official handbooks, and [demonstrates compliance] with the Rules and Regulations of the Boy Scouts of America."[2] Each chartered unit is supervised by a "unit committee, consisting of three or more qualified adults, 21 years of age or over, selected by the organization with which the unit is connected, or in the case of a community unit[,] of those who make application for the unit charter, one of whom [is] designated as chairman." In Monmouth Council, the units are run by approximately 3000 volunteer leaders and four paid scouting professionals. Of the 3000 volunteers, some 340 are assistant scoutmasters

Acording to BSA's federal charter, BSA seeks "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues." BSA's Mission Statement also describes BSA's purpose: "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." The Scout Oath and Scout Law set forth the guiding principles of BSA:

Scout Oath

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

---

[2] Although a relatively small percentage of New Jersey unit charters are not renewed each year, we are unaware of applicants having been rejected because of their expressed views on any subject.

Scout Law

A Scout is TRUSTWORTHY. A Scout tells the truth. He keeps his promises. Honesty is a part of his code of conduct. People can always depend on him.

A Scout is LOYAL. A Scout is true to his family, friends, Scout leaders, school, nation, and world community.

A Scout is HELPFUL. A Scout is concerned about other people. He willingly volunteers to help others without expecting payment or reward.

A Scout is FRIENDLY. A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs that are different from his own.

A Scout is COURTEOUS. A Scout is polite to everyone regardless of age or position. He knows that good manners make it easier for people to get along together.

A Scout is KIND. A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not harm or kill anything without reason.

A Scout is OBEDIENT. A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.

A Scout is CHEERFUL. A Scout looks for the bright side of life. He cheerfully does tasks that come his way. He tries to make others happy.

A Scout is THRIFTY. A Scout works to pay his way and to help others. He saves for the future. He protects and conserves natural resources. He carefully uses time and property.

A Scout is BRAVE. A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at him or threaten him.

A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean.

A Scout is REVERENT. A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.

In its briefs below and to this Court, Boy Scouts claims that the language "morally straight" and "clean" in the Oath and Law, respectively, constitutes a rejection of homosexuality. The *Boy Scout Handbook, supra,* at 551, defines "morally straight" as follows:

> To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

The *Boy Scout Handbook* also defines "clean":

> A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.

> You never need to be ashamed of dirt that will wash off. . . .
>
> There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.
>
> Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are the targets of insults.

[*Id.* at 561.]

Although one of BSA's stated purposes is to encourage members' ethical development, BSA does not endorse any specific set of moral beliefs. Instead, "moral fitness" is deemed an individual choice:

> Morality . . . concerns the "principles of right and wrong" in our behavior, and "what is sanctioned by *our* conscience or ethical judgment." . . .
>
> In any consideration of moral fitness, a key word has to be "courage." A boy's courage to do what *his* head and *his* heart tell him is right. And the courage to refuse to do what *his* heart and *his* head say is wrong.

[*Scoutmaster Handbook*, *supra*, at 71 (emphasis added) (additional internal quotations omitted).]

BSA also does not espouse any one religion, explaining in the *Scoutmaster Handbook* that "[t]here is a close association between the Boy Scouts of America and virtually all religious bodies and denominations in the United

States." *Id.* at 227. Consistent with its nonsectarian nature, BSA Bylaws require "respect [for] the convictions of others in matters of custom and religion." Boy Scouts "encourages no particular affiliation, [and does not] assume[] [the] functions of religious bodies," *ibid.*; indeed, in a training manual entitled *Scoutmaster Fundamentals* prepared "for Scoutmasters, Assistant Scoutmasters, Troop Committee members, and parents," BSA categorically states: "Religious instruction is the responsibility of the home and church."

A large and diverse group of religions that subscribe to many different and sometimes contradictory beliefs sponsor BSA units throughout the United States. Some of those sponsors have participated in this case as *amici curiae*, taking a variety of positions in respect of homosexuality, *i.e.*, that homosexuality is "immoral"; that "discrimination based upon sexual orientation" is to be "strongly condemn[ed]." BSA, however, encourages its leaders to refrain from talking about sexual topics. Although the *Boy Scout Handbook*, *supra*, at 528, contains a subchapter entitled "Sexual Responsibility" which states that "[f]or the followers of most religions, sex should take place only between married couples," sexual topics are not formally discussed during Boy Scout activities. Rather, BSA "believes that boys should learn about sex and family life from their parents, consistent with their spiritual beliefs."

2. *Boy Scout Troops*

In 1992, of the five million members of BSA, approximately one million youths and 420,000 adults were involved in the Boy Scout division. Those members belonged to over 44,000 Boy Scout troops throughout the country.

According to the *Boy Scout Handbook, id.* at 2, a boy may become a Boy Scout if he "has completed the fifth grade, or . . . has earned the Arrow of Light Award, or [is at least] 11 years of age but not yet 18" and "[c]omplete[s] the Boy Scout joining requirements." The Boy Scout joining requirements call for the applicant to:

> Submit a completed Boy Scout application and health history signed by [a] parent or guardian.
>
> Repeat the Pledge of Allegiance.
>
> Demonstrate the Scout salute, sign, and handclasp.
>
> Show how to tie the square knot.
>
> Understand and agree to live by the Scout Oath, the Scout Law, the Scout motto, the Scout slogan, and the Outdoor Code.
>
> Describe the Scout badge.
>
> With [a] parent or guardian, complete the exercises in the pamphlet *How to Protect Your Children from Child Abuse and Drug Abuse.*
>
> Participate in a Scoutmaster conference.

[*Id.* at 4.]

Adult applicants are also subject to joining requirements. They must be recommended by the troop representative and approved by the local council, and they must subscribe to the Declaration of Religious Principle,[3] the

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[3] BSA's Declaration of Religious Principle states:

> The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. . . . No matter what the religious faith of the members may be, this fundamental need of good citizenship should be kept before them. The Boy Scouts of America, therefore, recognizes the religious element in the training of the member, but it is absolutely nonsectarian in its attitude

> Scout Oath and the Scout Law. Once an adult member is approved, that person is also qualified to be a leader. Boy Scouts explains that the terms "adult membership and adult leadership. . . . are interchangeable . . . since adults . . . have no other reason to join apart from leadership in service to boys."

B. *James Dale*

James Dale first became a BSA member in 1978 when, at the age of eight, he joined Monmouth Council's Cub Scout Pack 142. He remained a Cub Scout until 1981, when he became a member of Boy Scout Troop 220, also in Monmouth Council. He joined Monmouth Council's Boy Scout Troop 128 in 1983, and Troop 73 in 1985. Until his eighteenth birthday in 1988, he remained a youth member of Troop 73.

Dale was an exemplary scout. Over the ten years of his membership, he earned more than twenty-five merit badges. In 1983, he was admitted into Boy Scouts' Order of the Arrow, the organization's honor camping society, and achieved the status of Virgil Honor. The pinnacle of Dale's career as a youth member came in 1988, when BSA awarded him an Eagle Scout Badge, an honor achieved by only the top three percent of all scouts.

Dale's participation in Boy Scout leadership began at an early age. Throughout his years as a member, Dale was an assistant patrol leader, patrol leader, and bugler, and from 1985 to 1988, Dale served as a Junior Assistant Scoutmaster for Troop 73. He was also invited to speak at organized Boy Scout functions, such as the Joshua Huddy Distinguished Citizenship Award Dinner,

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> toward that religious training. Its policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life.

and attended national events, including the National Boy Scout Jamboree. On March 21, 1989, Dale sought adult membership in Boy Scouts. Monmouth Council and BSA accepted and approved his application for the position of Assistant Scoutmaster of Troop 73 where he served for approximately sixteen months.

At about the same time that Dale applied for adult membership, he left home to attend Rutgers University. While at college, Dale first acknowledged to himself, and to his family and friends, that he was gay. Shortly thereafter, he became involved with, and eventually became the co-president of the Rutgers University Lesbian/Gay Alliance. Then, in July 1990, Dale attended a seminar that addressed the psychological and health needs of lesbian and gay teenagers. The *Star-Ledger* interviewed Dale and published an article on July 8, 1990 that discussed the seminar. The article included Dale's photograph and a caption identifying him as "co-president of the Rutgers University Lesbian/Gay Alliance." Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens, Star-Ledger* (Newark), July 8, 1990, § 2, at 11.

Later that month, Dale received a letter from Monmouth Council Executive James W. Kay, revoking his BSA membership. The letter asked Dale to "sever any relations [he] may have with the Boy Scouts of America," and granted Dale sixty days to request a review of his termination from the Monmouth Council Regional Review Committee.

Dale wrote to Kay on August 8, 1990, and requested the basis for the Monmouth Council's decision. In a letter dated August 10, 1990, Kay notified Dale that the "grounds for [his] membership revocation" were "the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homo-

sexuals."[4] On September 30, 1990, Dale wrote a letter to the Northeast Regional Director, Rudy Flythe, asking for a review of his membership decision and a copy of BSA's leadership standards. Dale also requested permission to attend the review, a right to which he was entitled under the Monmouth Council Review Procedures. The Regional Review Committee acknowledged receipt of Dale's request, but neglected to provide him with a copy of the BSA standards for leadership or a review date.

In another letter dated October 16, 1990, Dale once again asked for a copy of the leadership standards and notice of the review date. On November 27, 1990, Charles Ball, the Assistant Regional Director of the Northeast Region, notified Dale that the "Northeast Region, [BSA] Review Committee supports the decision of the Monmouth Council . . . to deny your registration with [BSA]," and granted Dale thirty days to seek review by the National Council Review Committee. Three weeks later, through counsel, Dale wrote to the Chief Scout Executive of BSA and requested a rehearing and an opportunity to attend the review. BSA's counsel informed Dale on December 21, 1990, that he had been denied the right to attend because: "[BSA] does not admit avowed homosexuals to membership in the organization so no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting." BSA did agree, however, to have the National Council review Dale's membership revo-

---

[4] Dale subsequently learned that in 1978 BSA had prepared a position paper stating that "an individual who openly declares himself to be a homosexual [may not] be a volunteer scout leader [or] . . . a registered unit member[.]" The position paper "was never distributed." Statements were also written in 1991 and 1993 expressing similar positions. These statements were written after the onset of litigation in other states charging the organization with discrimination against members on the basis of sexual orientation.

cation. Because Dale believed that a National Council review "would be futile," he initiated these legal proceedings.

II

PROCEDURAL HISTORY

On July 29, 1992, Dale filed a six-count complaint against BSA and Monmouth Council in the Superior Court of New Jersey. Dale alleged that Boy Scouts had violated the New Jersey Law Against Discrimination and common law by revoking his membership based solely on his sexual orientation. He sought declaratory, injunctive, compensatory and punitive monetary relief, as well as costs and attorney fees.

A. *Chancery Division*

Dale moved for partial summary judgment in September 1993, demanding immediate reinstatement based on his claim that defendants had violated the LAD and New Jersey's public policy. Defendants, in response, cross-moved for summary judgment on all counts. The court denied Dale's motion and granted Boy Scouts' cross-motion. *Dale v. Boy Scouts of Am.*, No. MON-C-330-92 (Ch. Div. Nov. 3, 1995). After concluding that Dale was "a sexually active homosexual," the court found that Boy Scouts had always had a policy of excluding "active homosexual[s]." *Id.* at 6, 38. The court opined that homosexual acts are immoral and attributed to Boy Scouts a longstanding antipathy toward such behavior. *Id.* at 39-40. In the judge's view, "[i]t [was] unthinkable . . . that the BSA could or would tolerate active homosexuality if discovered in any of its members." *Id.* at 40.

As to the applicability of the LAD, the court held that Boy Scouts was not a place of public accommodation, or

alternatively, that Boy Scouts was exempt under the "distinctly private" exception found at *N.J.S.A.* 10:5-51. *Id.* at 55. The court rejected Dale's common law claim, finding that the State's policy "is that established by the NJLAD . . . [and] not some prior common law policy." *Id.* at 45. Because the court believed that Boy Scouts' moral position in respect of active homosexuality was clear, it found that Boy Scouts' First Amendment freedom of expressive association "prevent[ed] government from forcing [the organization] to accept Dale as an adult leader-member." *Id.* at 71.

B. *Appellate Division*

The Appellate Division affirmed the dismissal of Dale's common law claim, but otherwise reversed and remanded for further proceedings. *Dale v. Boy Scouts of Am.*, 308 *N.J. Super.* 516, 523 (App. Div. 1998). In a separate opinion, Judge Landau concurred with the majority's holding that Boy Scouts should restore Dale's membership, but dissented from the majority "to the extent it would compel the Boy Scouts to accept . . . Dale . . . [in] any Scout leadership position." *Id.* at 564.

The majority held that Boy Scouts, a "place of public accommodation," had violated the LAD by denying Dale the "privilege" of serving as a volunteer assistant scoutmaster based solely on his sexual orientation. Boy Scouts was a "public accommodation" because it "invite[d] 'the public at large,'" was "dependent upon the broad-based participation of members of the general public," "engage[d] in advertising and public promotion," shared "many attributes in common with" the places and activities enumerated in the LAD, and had "historic[ally] partner[ed] with various public entities and public service organizations." *Id.* at 536, 539. "For the [same] reasons," the court "summarily" rejected Boy Scouts' argu-

ment that it was exempt from the LAD under the "distinctly private" exception. *Id.* at 540. The court dismissed Dale's common law claim, finding Dale had "not demonstrate[d] that a common law cause of action would vindicate any additional interests." *Id.* at 543. Consequently, the common law claim was held merely "duplicative of the LAD claim." *Id.* at 541.

On Boy Scouts' federal constitutional claims, the Appellate Division ruled that Boy Scouts was not protected by either the right to freedom of intimate association or to expressive association "inferred from other rights and protections guaranteed by the constitution" and found in the First Amendment. *Id.* at 544-45. The court quickly disposed by Boy Scouts' freedom of intimate association argument, observing that the organization "consists of nearly 5,000,000 members[,] . . . is open to all boys[,] . . . engages in aggressive advertising and undertakes a variety of special interest activities in schools and other public forums." *Id.* at 546. Based on those characteristics, the court held that Boy Scouts "lacks the distinctive qualities that might afford constitutional protections under this component of the First Amendment." *Ibid.*

In respect of Boy Scouts' freedom of expressive association claim, the majority "conclude[d] that enforcement of the LAD by granting plaintiff access to the accommodations afforded by scouting will not affect in 'any significant way' BSA's ability to express [its] views and to carry out [its] activities." *Id.* at 550. Noting "the tension between the freedom to associate for the purpose of expressing fundamental views and the compelling state interest in eradicating discriminaton," the court found that the "organization or club asserting the freedom has a substantial burden of demonstrating a strong relationship between its expressive activities and its discriminatory

practice." *Id.* at 548. Although the court accepted the argument that the First Amendment protects Boy Scouts' goals and activities, it determined that the relationship between Boy Scouts' stated goals and Boy Scouts' exclusionary practice was not significant enough to overcome the compelling state interest in eradicating invidious discrimination. *Id.* at 549-50.

In its analysis, the Appellate Division focused on Boy Scouts' " 'expressive purpose,' [which] is not to condemn homosexuality," but to "instill values in young people." *Id.* at 549, 550. The court found that "enforcement of the LAD by granting plaintiff access to the accommodations afforded by scouting will not affect in 'any significant way' [Boy Scouts'] ability to express these views and to carry out these activities." *Id.* at 550. The court observed that the LAD "does not aim at the suppression of speech," and "[n]othing . . . suggests that a male, simply because he is gay, will somehow undermine [Boy Scouts'] fundamental beliefs and teachings." *Id.* at 550, 552. Boy Scouts' 1991 and 1993 position statements were rejected as representations of the "collective 'expression' " of Boy Scouts because these papers were issued at "a time when [Boy Scouts'] anti-gay policy was subject to judicial challenge in California"; "such policy [had] not been incorporated into [Boy Scouts'] bylaws, rules, regulations and handbooks"; the position expressed "hardly squares with the view shared by a substantial percentage of church groups who sponsor local boy scout troops"; and Boy Scouts "has not attempted to exclude" religious institutions and heterosexual scouts who "have condemned [Boy Scouts'] anti-gay policy." *Id.* at 554-55, 556.

The Appellate Division distinguished *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 *U.S.* 557, 115 *S.Ct.* 2338, 132 *L. Ed.* 2d 487 (1995), a case that held parade organizers have "the

autonomy to choose the content of [their] own message," *id.* at 573, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503. The court pointed out that, unlike *Hurley, Dale* does not involve "pure forms of speech" or a "plaintiff [who] is . . . asserting a right . . . to alter the content of [Boy Scouts'] viewpoint." *Dale, supra,* 308 *N.J. Super.* at 559, 560. The court refused to accept Boy Scouts' allegation that Dale's "public declaration that he is gay in and of itself constitutes 'expressive activity' sufficient to forfeit his entitlement to membership in the BSA." *Id.* at 560. "In [the court's] view, there is a patent inconsistency in the notion that a gay scout leader who keeps his 'secret' hidden may remain in scouting and one who adheres to the scout laws by being honest and courageous enough to declare his homosexuality publicly must be expelled." *Ibid.*

Judge Landau concurred with the majority's determination that Dale's adult membership could not be terminated, but dissented on whether Dale could be removed from his leadership position in the troop. Although Judge Landau refused to look behind Boy Scouts' claim that its "fundamental" message would be altered if an avowed homosexual served as an assistant scoutmaster, *id.* at 563, in his view Boy Scouts' message was ultimately irrelevant. According to Judge Landau, "Boy Scouts['] . . . right of unfettered advocacy" is violated when Dale is reinstated as a leader "whether or not the Boy Scouts' stand on homosexuality is fundamental to that organization's creation." *Id.* at 564.

III

STATE LAW CLAIMS

A. *The LAD*

We first consider whether Boy Scouts is subject to the LAD, which provides that "[a]ll persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, . . . without discrimination because of . . . affectional or sexual orientation." *N.J.S.A.* 10:5-4. Boy Scouts must therefore abide by the LAD if Boy Scouts is a place of public accommodation and does not meet any of the LAD exceptions. *See, e.g., N.J.S.A.* 10:5-51 (exempting "distinctly private" entities, religious educational facilities, and parents or individuals acting "in loco parentis" in respect of "the education and upbringing of a child").

1. *Place of Public Accommodation*

"[T]he overarching goal of the [LAD] is nothing less than the eradication 'of the cancer of discrimination.'" *Fuchilla v. Layman,* 109 *N.J.* 319, 334 (quoting *Jackson v. Concord Co.,* 54 *N.J.* 113, 124 (1969)), *cert. denied,* 488 *U.S.* 826, 109 *S. Ct.* 75, 102 *L. Ed.* 2d 51 (1988). "[D]iscrimination threatens not only the rights and proper privileges of the inhabitants of [New Jersey,] but menaces the institutions and foundation of a free democratic State." *N.J.S.A.* 10:5-3. In furtherance of its purpose to root out discrimination, the Legislature has directed that the LAD "shall be liberally construed." *Ibid.* We have adhered to that legislative mandate by historically and consistently interpreting the LAD "'with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.'" *Andersen v. Exxon Co.,* 89 *N.J.* 483, 495 (1982) (quoting *Passaic Daily News v. Blair,* 63 *N.J.* 474, 484 (1973)).

A clear understanding of the phrase "place of public accommodation" is critical. That is because "place of public accommodation" is, in large measure, determinative of the LAD's scope. Certainly, if the statute is broadly applicable, the antidiscriminatory impact of its provisions is greater. The Legislature's finding that the effects of

discrimination are pernicious, and its directive to liberally construe the LAD, has informed our cases interpreting the reach of "place of public accommodation."

a. *Place*

In 1965, the Court held that places of public accommodation were not limited to those enumerated in the statute. *Fraser v. Robin Dee Day Camp*, 44 *N.J.* 480, 486 (1965) (then *N.J.S.A.* 18:25-5(l)). At that time, the statutory definition used the word "include" to preface a list of specific "places" of public accommodation. *See id.* at 485. We reasoned that the Legislature's choice of the word "include" indicated that the "places" expressly mentioned were "merely illustrative of the accommodations the Legislature intended to be within the scope of the statute. Other accommodations, similar in nature to those enumerated, were also intended to be covered." *Id.* at 486. Less than a year later, the Legislature amended the LAD to expressly state that " 'a place of public accommodation' shall include; *but not be limited to*" the various examples identified, *L.* 1966, *c.* 17 (emphasis added). thereby reaffirming our broad construction of the statutory language.[5]

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[5] *N.J.S.A.* 10:5-51 now reads:

"A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air,

Later, the word "place" became a further source of legal dispute. In *National Organization of Women v. Little League Baseball, Inc.*, 67 *N.J.* 320 (1974), we affirmed the decision of the Appellate Division holding that: "[t]he statutory noun 'place' . . . is a term of convenience, not of limitation [,] . . . employed to reflect the fact that public accommodations are commonly provided at fixed 'places.' " 127 *N.J. Super.* 522, 531 (App. Div. 1974). The defendant in *Little League* was a chartered baseball league that excluded girls between the ages of eight and twelve years from participation in its programs. The league contended that it did not come "within the meaning of the statute, primarily because it [was] a membership organization which does not operate from any fixed parcel of real estate in New Jersey of which it had

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any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation in the admission of students.

exclusive possession by ownership or lease." *Id.* at 530. The court rejected that narrow view of "place":

> The "place" of public accommodation in the case of Little League is obviously the ball field at which try-outs are arranged, instructions given, practices held and games played. The statutory "accommodations, advantages, facilities and privileges" at the place of public accommodation is the entire agglomeration of the arrangements which Little League and its local chartered leagues make and the facilities they provide for the playing of baseball by the children.

[*Id.* at 531 (citations omitted).]

In New Jersey, "place" has been more than a fixed location since 1974.

As Boy Scouts correctly observes, other jurisdictions interpreting their antidiscrimination laws have found "place" to be a limiting factor encompassing only a fixed location. *See, e.g., Welsh v. Boy Scouts of Am.*, 993 *F.*2d 1267, 1269 (7th Cir.) (holding that Boy Scouts is not "place of public accommodation" under Title II of Civil Rights Act of 1964 because "Congress when enacting § 2000a(b) never intended to include membership organizations that do not maintain a close connection to a structural facility within the meaning of 'place of public accommodation' "), *cert. denied*, 510 *U.S.* 1012, 114 *S. Ct.* 602, 126 *L. Ed.* 2d 567 (1993); *United States Jaycees v. Richardet*, 666 *P.*2d 1008, 1011 (Alaska 1983) (stating that "the word 'place' . . . would not encompass a service organization lacking a fixed geographical situs"); *United States Jaycees v. Bloomfield*, 434 *A.*2d 1379, 1381 (D.C. 1981) (disagreeing with lower court's conclusion that "it is not necessary that there be a building . . . in order to categorize an existing entity as

a place of public accommodation"); *United States Jaycees v. Iowa Civil Rights Comm'n*, 427 *N.W.*2d 450, 454 (Iowa 1988) (stating that "United States Jaycees is not a 'place' within our definition of 'public accommodation' "); *United States Jaycees v. Massachusetts Comm'n Against Discrimination*, 463 *N.E.*2d 1151, 1156 (Mass. 1984) (finding that Massachusetts antidiscrimination law "does not apply to [a] membership organization, since such an organization does not fall within the commonly accepted definition of 'place' ").

We observe that not all jurisdictions have interpreted "place" so narrowly. The New York Court of Appeals has held that a "place of public accommodation need not be a fixed location, it is the place where petitioners do what they do," including "the place where petitioners' meetings and activities occur." *United States Power Squadrons v. State Human Rights Appeal Bd.*, 452 *N.E.*2d 1199, 1204 (N.Y. 1983). The Supreme Court of Minnesota has also approved a flexible construction of the term "place." In *United States Jaycees v. McClure*, 305 *N.W.*2d 764, 773 (Minn. 1981), the Minnesota court agreed with the *Little League* premise that a " 'place of public accommodation' . . . is less a matter of whether the organization operates on a permanent site, and more a matter of whether the organization engages in activities in places to which an unselected public is given an open invitation."

Despite numerous additions and modifications to the LAD in the twenty-four years since *Little League* was decided, the New Jersey Legislature has not enacted a limiting definition of place. *See Massachusetts Mutual Life Ins. Co. v. Manzo*, 122 *N.J.* 104, 116 (1991) (stating that "[t]he Legislature's failure to modify a judicial determination, while not dispositive, is some evidence of

legislative support for the judicial construction of a statute . . . . [especially when] the Legislature has amended [the] statute several times without altering the judicial construction"). We decline now to construe "place" so as to include only membership associations that are connected to a particular geographic location or facility. As the Appellate Division has so aptly pointed out, "[to] have the LAD's reach turn on the definition of 'place' is irrational because 'places do not discriminate; people who own and operate places do.'" *Dale, supra,* 308 *N.J. Super.* at 533 (quoting *Welsh, supra,* 993 *F.*2d at 1282 (Cummings, J., dissenting)). A membership association, like Boy Scouts, may be a "place" of public accommodation even if the accommodation is provided at "a moving situs." *Little League, supra,* 127 *N.J. Super.* at 531. In this case it is readily apparent that the various locations where Boy Scout troops meet fulfill the LAD "place" requirement.

b. *Public Accommodation*

Our case law identifies various factors that are helpful in determining whether Boy Scouts is a "public accommodation." We ask, generally, whether the entity before us engages in broad public solicitation, whether it maintains close relationships with the government or other public accommodations, or whether it is similar to enumerated or other previously recognized public accommodations.

Broad public solicitation has consistently been a principal characteristic of public accommodations. Our courts have repeatedly held that when an entity invites the public to join, attend, or participate in some way, that entity is a public accommodation within the meaning of the LAD. *See, e.g., Clover Hill Swimming Club, Inc. v. Goldsboro,* 47 *N.J.* 25, 33 (1966) (stating that "[a]n establishment which by advertising or otherwise extends an invitation

to the public generally is a place of public accommodation"); *Sellers v. Philip's Barber Shop,* 46 *N.J.* 340, 345 (1966) (stating that "[a]n establishment which caters to the public or by advertising or other forms of invitation induces patronage generally is a place of public accommodation"); *Fraser, supra,* 44 *N.J.* at 488 (stating that "[i]n light of the nature of the facilities and activities offered to the general public by respondent's day camp, we hold that it is a public accommodation"); *Little League, supra,* 127 *N.J. Super.* at 531 (stating that "Little League is a public accommodation because the invitation is open to children in the community at large"); *Evans v. Ross,* 57 *N.J. Super.* 223, 231 (App. Div.) (stating that LAD requires "an establishment which caters to the public, and by advertising or other forms of invitation induces patronage generally, [not to] refuse to deal with members of the public who have accepted the invitation"), *certif. denied,* 31 *N.J.* 292 (1959); *see also Kiwanis Int'l v. Ridgewood Kiwanis Club,* 806 *F.*2d 468, 475 (3d Cir. 1986) (stating that LAD applies whenever "the organization or club . . . invite[s] an unrestricted and unselected public to join as members"); *Brounstein v. American Cat Fanciers Ass'n,* 839 *F. Supp.* 1100, 1107 (D.N.J. 1993) (stating that "'primary [public accommodation] consideration'" under LAD is "'whether the invitation to gather is open to the public at large'") (quoting *Kiwanis Int'l, supra,* 806 *F.*2d at 474).

BSA engages in broad public solicitation through various media. In 1989, for example, BSA spent more than $1 million on a national television advertising campaign. A *New York Times* article describes one of Boy Scouts' "hip" television ads, quoting a BSA spokesman as stating, "scouting [is] a product and we've got to get the product into the hands of as many consumers as we

can."[6] Kim Foltz, *TV Ad's Hip Pitch: It's 'Cool' to be a Boy Scout, N.Y. Times,* Oct. 30, 1989. BSA has also advertised in widely distributed magazines, such as *Sports Afield* and *Redbook*. Local Boy Scout councils engage in substantial public solicitation. BSA frequently supplies the councils with recruiting materials, such as television and radio public service announcements, advertisements, and other promotional products. Monmouth Council, in particular, has expressly invited the public by conducting recruiting drives and by providing local troops with BSA-produced posters and promotions aimed at attracting new members.

Boy Scout troops also take part in perhaps the most powerful invitation of all, albeit an implied one: the symbolic invitation extended by a Boy Scout each time he wears his uniform in public. *See Sellers, supra,* 46 *N.J.* at 345 (finding that barber shop's pole extended implied invitation to public). A boy in a uniform may well be Boy Scouts' strongest recruiting tool. By encouraging scouts to wear their uniforms to school, and when participating in "School Nights" and public demonstrations, Boy Scouts invites the curiosity and awareness of others in the community. Boy Scouts admits that it encourages these displays in the hope of attracting new members.

On the facts before us, it cannot be controverted that Boy Scouts reaches out to the public in a myriad of ways designed to increase and sustain a broad membership base. Whether by advertising or active recruitment, or through

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[6] Boy Scouts expresses concern that this article is not properly part of the record before us. Although the quoted statement has not been authenticated, we find it descriptive of material in the record respecting BSA's public solicitation and membership recruitment efforts.

the symbolism of a Boy Scout uniform, the intent is to send the invitation to as many members of the general public as possible. Once Boy Scouts has extended this invitation, the LAD requires that all members of the public must "have equal rights . . . and not be subjected to the embarrassment and humiliation of being invited [,] . . . only to find [the] doors barred to them." *Evans, supra,* 57 *N.J. Super.* at 231.

Boy Scouts is a "public accommodation," not simply because of its solicitation activities, but also because it maintains close relationships with federal and state governmental bodies and with other recognized public accommodations. Our cases have held that certain organizations that benefit from relationships with the government and other public accommodations are themselves places of public accommodation within the meaning of the LAD. In *Little League*, for example, the court concluded that Little League was "public in the added sense that local governmental bodies characteristically make the playing areas available to the local leagues, ordinarily without charge." 127 *N.J. Super.* at 531, *aff'd,* 67 *N.J.* 320 (1974). More recently, in *Frank v. Ivy Club*, 120 *N.J.* 73, 79, 110 (1990), a female student sought membership in the all-male eating clubs at Princeton University. Although they did not publicly solicit new members, we held that the clubs' close relationship to the University, a place of public accommodation, rendered them subject to the LAD. *Id.* at 110.

It is clear that Boy Scouts benefits from a close relationship with the federal government. Indeed, BSA was chartered by Congress in 1916, 36 *U.S.C.A.* § 30901, and has been the recipient of equipment, supplies, and services from the federal government, also by act of Congress, 10 *U.S.C.A.* § 2544. Thus, the Secretary of De-

fense, 10 *U.S.C.A.* § 2544(a), and other departments of the federal government, 10 *U.S.C.A.* § 2544(h), have been authorized to

> lend to the Boy Scouts of America, for the use and accommodation of Scouts, Scouters, and officials who attend any national or world Boy Scout Jamboree, such cots, blankets, commissary equipment, flags, refrigerators, and other equipment and without reimbursement, furnish services and expendable medical supplies, as may be necessary or useful to the extent that items are in stock and items or services are available.

[10 *U.S.C.A.* § 2544(a).]

Since its inception, BSA has maintained a special association with each successive President of the United States. According to a BSA public relations fact sheet:

> One of the causes contributing to the success of the Boy Scouts of America has been the thoughful, wholehearted way in which each President of the United States since William Howard Taft in 1910 has taken an active part in the work of the movement. Each served as Honorary President during his term in office.

Another fact sheet states that seventy-eight percent of the members of the 100th Congress participated in scouting.

Boy Scouts also maintains a close relationship with the military. According to a BSA pamphlet entitled *Organizations That Use Scouting*, "military personnel serve Scouting in many capacities." "At many [Army, Navy, Air Force, and National Coast Guard] installations, facilities are available for Scouting shows, meetings, training activities," and other "similar Scouting events." Monmouth Council, in particular, has used the New Jersey military installation known as Fort Monmouth.

Likewise, state and local governments have contributed to Boy Scouts' success.[7] In New Jersey, the Legislature has authorized the Division of Fish, Game and Wildlife in the Department of Environmental Protection to "stock with fish any body of water in this state that is under the control of and for the use of . . . Boy Scouts," *N.J.S.A.* 23:2-3, and has exempted Boy Scouts from having to pay motor vehicle registration fees, *N.J.S.A.* 39:3-27. Local governmental agencies, such as fire departments and law enforcement agencies, serve Boy Scouts by sponsoring scouting units. Nationally, over 50,000 youth members belong to units sponsored by fire departments, whereas in New Jersey alone over 130 units are sponsored by fire departments and over 100 units are sponsored by law enforcement agencies.

Perhaps Boy Scouts' connection to public schools and school-affiliated groups constitutes its single most beneficial governmental relationship. *Organizations That Use Scouting* advises that "the education field holds our greatest potential." Boy Scouts currently recruits many of its members through its presence in and use of school facilities. A large percentage of scouting units nationally, as well as in New Jersey, are chartered by public schools and affiliated organizations.

Moreover, public schools and community colleges often host scouting meetings, activities, and recruiting events such as "School Nights." "School Night for Scouting [is a] recruiting plan operated by many councils in connection with the schools." Under this plan, an open scout

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[7] New Jersey governmental entities are, of course, bound by the LAD. Their sponsorship of, or conferring of special benefits on, an organization that practices discrimination would be prohibited.

meeting is held at a school in order to encourage students to join scouting. Public schools not only aid Boy Scouts by allowing the organization to use their facilities after school, but also during the school day. According to Boy Scouts, "[m]ore and more of our schools are becoming available for other than formal education. . . . In-school Scouting, where the pack, troop, team, or post meets during the school day, is recognized in many areas." In 1992, close to 700,000 students throughout the nation were taught the Boy Scouts' Learning for Life curriculum during the school day.

Given Boy Scouts' public solicitation activities, and considering its close relationship with governmental entities, it is not surprising that Boy Scouts resembles many of the recognized and enumerated places of public accommodation. Similarity to the places of public accommodation listed in the LAD has been a benchmark for determining whether the unlisted entity should be included. *Cf. Board of Chosen Freeholders v. New Jersey*, —— *N.J.* ——, —— (slip op. at 16) (1999) (stating that "[u]nder the *ejusdem generis* principle of statutory construction, when specific words follow more general words in a statutory enumeration, we can consider what additional items might also be included by asking whether those items are similar to those enumerated"). In *Fraser v. Robin Dee Day Camp*, for example, this Court held that a "day camp is the type of accommodation which the Legislature intended to reach" because a "day camp offers accommodations which have many attributes in common with swimming pools, recreation and amusement parks, motion picture houses, theatres, music halls, gymnasiums, kindergarten and primary schools, all of which are specifically enumerated" in the LAD. 44 *N.J.* at 487. The Appellate Division in *Little League* identified Little League's " 'educational or recreational nature' " as a basis

for the court's conclusion that Little League was similar to the types of public accomodations listed in the statute. 127 *N.J. Super.* at 531 (quoting *Fraser, supra,* 44 *N.J.* at 487). Similarly, Boy Scouts' educational and recreational nature, like the day camp in *Fraser* or the baseball teams in *Little League,* further supports our conclusion that Boy Scouts is a "place of public accommodation" under the LAD. *See, e.g, Advancement Guidelines* 4 (1992 ed.) (stating that "[e]ducation and fun are functions of the scouting movement").

2. *LAD Exceptions*

Boy Scouts claims that even if it is a place of public accommodation, it is nonetheless exempt from the LAD under three express exceptions: (1) the "distinctly private" exception; (2) the religious educational facility exception; and (3) the *in loco parentis* exception. *N.J.S.A.* 10:5-51. Because we determine that these exceptions do not apply to Boy Scouts, we hold that Boy Scouts is subject to the LAD.

"While this Court has been scrupulous in its insistence that the [LAD] be applied to the full extent of its facial coverage, it has never found such coverage to exist in the face of an unambiguous exclusion." *Peper v. Princeton Univ. Bd. of Trustees,* 77 *N.J.* 55, 68 (1978) (citations omitted). Nonetheless, despite our adherence to statutory exceptions expressly and unambiguously set forth by the Legislature, we are mindful that "[e]xemptions from remedial statutes should generally be narrowly construed." *Poff v. Caro,* 228 *N.J. Super.* 370, 379 (Law Div. 1987) (citing *Service Armament Co. v. Hyland,* 70 *N.J.* 550, 559 (1976)).

We begin with the "distinctly private" exception. The LAD provides that "[n]othing herein contained shall be

construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private." *N.J.S.A.* 10:5-51. Boy Scouts' status as a bona fide club has not been questioned. Our focus is, therefore, on the meaning of "distinctly private." We agree with the New York Court of Appeals that this language, found in both the New York Human Rights Law, *N.Y. Exec. Law* § 292, and in the LAD, is intended as a narrowly drawn statutory exclusion. *Power Squadrons, supra,* 452 *N.E.*2d at 1204 (stating that this exception "does not refer simply to private clubs or establishments closed to the public but uses more restrictive language excluding from the statute's provisions only clubs which are "distinctly private' "). Boy Scouts bears the burden of proving that it fits within this narrow exception. *Cf. Spragg v. Shore Care & Shore Mem'l Hosp.*, 293 *N.J. Super.* 33, 51 (App. Div. 1996) (holding burden of proof on defendant-employer to prove bona fide occupational qualification exception to LAD).

In deciding whether Boy Scouts is a place of public accommodation, we considered the organization's public solicitation activities. Solicitation of a broad membership base is closely related to the issue of selectivity in membership, which may explain why various courts have considered both factors in their analyses of both "place of public accommodation" and the "distinctly private" exception. *See, e.g., Kiwanis, supra,* 806 *F.*2d at 476 (stating that "distinctly private" exception "represents the other side of the 'public accommodation' coin . . . . because of the emphasis placed on 'selectivity' as the standard for determining 'public accommodation,' as well as for determining if a club is 'distinctly private' "). We have reviewed the multiple ways in which Boy Scouts reaches out to the public and, therefore, will consider the selectivity issue as the principal determinant of "distinctly private"

status. *See Power Squadrons, supra,* 452 *N.E.*2d at 1204 (stating that "the essence of a private club is selectivity in its membership").

Thirty-three years ago, in *Clover Hill Swimming Club, Inc. v. Goldsboro,* we said that "not every establishment using the 'club' label can be considered 'distinctly private.' Self-serving declarations by . . . an accommodation are not determinative of its character." 47 *N.J.* at 34. Although the swimming club had represented to the public that "all applications [for membership] would be subject to approval by club officials," it appeared that Clover Hill was only selective when black families applied. *Ibid.* The Court refused to accept bogus representations concerning the "private" nature of the club when it was quite clear that membership was generally open and had to do with a family's interest in recreation and not much else. *Ibid. Little League,* citing *Clover Hill,* primarily relied on the baseball league's "open [invitation] to children in the community at large, with no restriction (other than sex) whatever" as a basis for the court's finding that the league was a "public accommodation." 127 *N.J. Super.* at 531. The lack of any membership selectivity—except for the prohibition against the admission of girls—weighed in the public accommodation calculus; it also bears upon the "distinctly private" exception.

Kiwanis International v. Ridgewood Kiwanis Club is the only case to hold a club exempt under the "distinctly private" exception. 806 *F.*2d at 477. The Third Circuit, relying on *Little League,* applied a selectivity analysis to determine whether Kiwanis Ridgewood was a public accommodation and, therefore, not "distinctly private." *Id.* at 476-77. The court found that the local club was selective based on its membership practices, which were described as follows:

The Ridgewood club is small, comprised of only twenty-eight members. Ten individuals have been members for over twenty years. Indeed, Kiwanis Ridgewood has admitted no more than twenty members over the course of the pa ecade. Each new member had to be sponsored by a current member, and formally voted in by the Ridgewood Board of Directors. The sponsorship of the existing member acted as a primary screening mechanism in the maintenance of the quality of membership. In addition to national membership requirements, Kiwanis Ridgewood established several local membership requirements, which included, among others, the candidate's willingness to pray at meetings and to recite the pledge of allegiance.

> Although Kiwanis International has encouraged large-scale membership solicitation in the past, the suggested "membership roundup" mailings were sent only to those prospects already known by current members. These individuals would be invited to a Kiwanis meeting to determine their compatibility with the organization's goals and members. The scope of these membership drives was limited. Not only did every solicited individual have to be known by an existing member, but every applicant out of that group of solicited individuals would have to be sponsored by an existing member.

[*Id.* at 475.]

Unlike Kiwanis Ridgewood, which used "sponsorship [by an] existing member . . . as a primary screening mechanism in the maintenance of . . . quality membership," Boy Scouts does not require new members "to be sponsored by a current member." *Ibid.* Nor does Boy Scouts limit its recruiting, or invitations to the public,

to individuals who are "known by an existing member." To the contrary, Boy Scout publications indicate that the organization seeks a broad membership base. In a booklet, entitled *A Representative Membership*,[8] Boy Scouts states that its "national objective, as well as for regions, areas, councils, and districts is to see that *all* eligible youth have the opportunity to *affiliate* with the Boy Scouts of America." *Id.* at 1 (emphasis added). The booklet is emphatically inclusive:

> We have high hopes for our nation's future. These hopes cannot flower if *any* part of our citizenry feels deprived of the opportunity to help shape the future. How can you persuade other Scouters to accept a commitment to a representative membership? Consider these facts:
>
> 1. Our federal charter sets forth our obligation to serve boys. Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of *any* boy. The National Council and Executive Board have always taken the position that Scouting should be available for *all* boys who meet the entrance age requirements.
>
> . . . .
>
> 4. Another aim of Scouting is the development of leadership. Leadership in America is needed in all sections of the country and in all economic, cultural, and ethnic groups.
>
> 5. To meet these responsibilities we have made a commitment that our membership shall be repre-

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[8] Boy Scouts also questions whether this booklet is properly before us. *See supra* at —— n.— (slip op. at 35 n.6). The booklet on its face states that it is a BSA publication prepared for national, council, district, and local board/committee members, and Boy Scouts has not indicated otherwise.

sentative of *all* the population in every community, district, and council.

[*Id.* at 2 (emphasis added).]

Boy Scouts' large membership further undercuts its claim to selective membership. Nationally, over four million boys and one million adults were Boy Scout members in 1992.[9] Since its inception, over 87 million people have joined Boy Scouts. In 1991, Monmouth Council alone had over 8400 youths and over 2700 adult members. The New York Court of Appeals, construing "distinctly private" in *United States Power Squadrons v. State Human Rights Appeal Board*, has suggested that an organization's failure to limit its maximum membership, in and of itself, demonstrates that the club is not private: "Organizations which routinely accept applicants and place no subjective limits on the number of persons eligible for membership are not private clubs." 452 *N.E.*2d at 1204. We note only that the size of the Boy Scout organization certainly implies an open membership policy.

Boy Scouts argues, however, that it is "distinctly private" because its Scout Oath and Scout Law constitute genuine selectivity criteria. In support of its position, Boy Scouts relies in *Welsh v. Boy Scouts of America*, wherein the Seventh Circuit stated:

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[9] Boy Scouts argues that this Court should follow *Kiwanis*, *supra*, 806 *F.*2d at 476 n.14, and limit review of Boy Scouts' membership selection practices to the local, rather than the national level. We decline to follow *Kiwanis* in this case. Boy Scouts' local units, unlike Kiwanis Ridgewood, are not authorized to establish additional "local membership requirements," *id.* at 475, nor are they empowered generally to change BSA's policies. We find that the various levels of scouting are interrelated such that a review of the national organization's membership selection practices—as opposed to the local unit—is most appropriate.

Although the Scouts intentionally admit a large number of boys from diverse backgrounds, admission to membership is not without exercise of sound discretion and judgment. This is evident from the Constitution and By-laws as well as the Boy Scouts' Oath and Scout Law.

. . . We hold therefore that the Scouts organization not only is selective, but that its very Constitution, By-laws and doctrine dictate that it remain selective.

[993 *F.*2d at 1276-77.]

We acknowledge that Boy Scouts' membership application requires members to comply with the Scout Oath and Law. We do not find, however, that the Oath and Law operate as genuine selectivity criteria. To the contrary, the record discloses few instances in which the Oath and Law have been used to exclude a prospective member; in practice, they present no real impediment to joining Boy Scouts. Joining requirements are insufficient to establish selectivity where they do not function as true limits on the admission of members. *See Power Squadrons, supra*, 452 *N.E.*2d at 1204 (requiring examination for basic boating course was not "selective" where club "place[d] no subjective limits on the number of persons eligible for membership"). Here, there is no evidence that Boy Scouts does anything but accept at face value a scout's affirmation of the Oath and Law. *See Roberts v. United States Jaycees*, 468 *US.* 609, 621, 104 *S. Ct.* 3244, 3251, 82 *L. Ed.* 2d 462, 473 (1984) (finding group unselective where "new members are routinely recruited and admitted with no inquiry into their backgrounds").

Most important, it is clear that Boy Scouts does not limit its membership to individuals who belong to a par-

ticular religion or subscribe to a specific set of moral beliefs. Boy Scouts asserts that "[t]here is a close association between the Boy Scouts of America and virtually all religious bodies and denominations in the United States," and that each member's concept of "moral fitness" should be determined by his "courage to do what his head and heart tell him is right." *See supra* at —— (slip op. at 11-12). Moreover, Boy Scouts encourages its members to "respect and defend the rights of others whose beliefs may differ." *Scoutmaster Handbook, supra,* at 561. By its own teachings then, Boy Scouts is inclusive, not selective, in its membership practices.

Boy Scouts also argues that it is "distinctly private" because it is selective in its adult membership. In addition to the Scout Oath and Law requirements, adult members are bound by the Declaration of Religious Principle, and are subject to evaluation according to informal criteria designed to select only individuals capable of accepting responsibility for the moral education and care of other people's children in accordance with scouting values. Several of the Troop 73 leaders who were involved in Dale's adult membership approval have said that they would not have approved Dale's application had they known that Dale was an "avowed" homosexual, thus lending support to BSA's position.

The Appellate Division's analysis of Boy Scouts' adult membership selectivity dispels the notion that an open membership organization can claim the "distinctly private" exception because it is selective as to a small subset of the larger group:

> We reject the suggestion that the BSA organization as a whole is not a place of public accommodation because more stringent membership criteria are applied to a single component of the organization,

> its adult members. Such a result is clearly inconsistent with the remedial purposes of the LAD. Acceptance of the argument would mean that public clubs in *Clover Hill* and *Fraser*, are not places of public accommodation because their member-counselors or lifeguards are subject to more stringent, enhanced training criteria. An extension of defendants' argument would be that the BSA is not a place of public accommodation because of the demanding standards that must be met to become an Eagle Scout.

[*Dale, supra,* 308 *N.J.* at 538 (citations omitted).]

See also Brounstein, supra, 839 *F. Supp.* at 1107-08 (stating that "[t]he fact that an organization is selective with respect to the privileges and benefits it accords to members does not exempt that organization from the proscriptions of the LAD if it is otherwise a 'public place of accommodation' ").

Boy Scouts accepts boys who come from diverse cultures and who belong to different religions. It teaches tolerance and understanding of differences in others. It presents itself to its members and to the public generally as a nonsectarian organization "available to all boys who meet the entrance age requirements". Its Charter and its Bylaws do not permit the exclusion of any boy. Boy Scouts is not "distinctly private" because it is not selective in its membership.

Boy Scouts claims, however, that it is exempt from the LAD because it is an "educational facility operated or maintained by a bona fide religious or sectarian institution." *N.J.S.A.* 10:5-51. This claim deserves little discussion. Boy Scouts repeatedly states that it is nonsectarian. Its Bylaws declare that no member shall be required "to take part in or observe a religious ceremony

distinctly unique" to a church or other religious organization. Boy Scouts emphasizes that religious instruction is better reserved for "the home and the organization or group with which the member is connected." Further, the *Scoutmaster Handbook* instructs its leaders that scouting "is identified with no particular faith, encourages no particular affiliation, nor assumes functions of religious bodies." We cannot say that Boy Scouts is a "bona fide religious or sectarian institution" in the face of the organization's clear pronouncements on this subject.[10]

Finally, Boy Scouts argues that requiring it to admit Dale frustrates "the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control." *N.J.S.A.* 10:5-51. The right of a parent to provide for the custody, care, and nurturing of a child is well-established. *Ginsberg v. New York*, 390 *U.S.* 629, 639, 88 *S. Ct.* 1274, 1280, 20 *L. Ed.* 2d 195, 203 (1968). In limited cases, that right is also extended to persons, like a stepparent, whose intent it is "to assume the parental relationship." *A.S. v. B.S.*, 139 *N.J. Super.* 366, 369 (Ch. Div. 1969). Boy Scouts does not qualify as "one in loco parentis."

Our prior decisions indicate that the status of *in loco parentis* is reserved for individuals who function as a parent. *See, e.g., Miller v. Miller*, 97 *N.J.* 154, 162 (1984) (recognizing stepparent may have *in loco parentis* relationship); *In re M.S.*, 72 *N.J.* 238, 243-44 (1977) (finding juvenile shelter for delinquents stands *in loco parentis*). Characteristics of that relationship include "the

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10 That Boy Scouts' oath expresses a belief in God does not make it a religious institution. Nor does Boy Scouts' commitment to "[e]*ducation* and fun," *see supra* at —— (slip op. at 42) (emphasis added), qualify it as an "educational facility" under *N.J.S.A.* 10:5-51.

responsibility to maintain, rear and educate the child," *Miller, supra*, 97 *N.J.* at 162, as well as the duties of "supervision, care and rehabilitation," *In re M.S., supra*, 72 *N.J.* at 242; *see also A.S., supra*, 139 *N.J. Super.* at 369 (defining role as "one who means to put himself in the situation of the lawful father with reference to the father's office and duty of making provision for the child"). Boy Scouts does not assume those responsibilities or those duties. It does not maintain or rear children. A Boy Scout leader may function as a supervisor of children for limited periods of time; he does not have "the responsibility to maintain, rear and educate" children such that he stands in the place of a parent.

We hold that Boy Scouts is a "place of public accommodation" and is not exempt from the LAD under any of the statute's exceptions.

3. *Have Boy Scouts Violated the LAD?*

N.J.S.A. 10:5-4 states that "[a]ll persons shall have the opportunity to obtain . . . all the accommodations, advantages, facilities, and privileges of any place of public accommodation." Because we hold that an assistant scoutmaster position is a "privilege" and an "advantage" of Boy Scout membership, and because Boy Scouts has "revoked" Dale's registration based on his "avowed" homosexuality, a prohibited form of discrimination under the statute, we conclude that Boy Scouts has violated the LAD.

In Dale's revocation letter, Boy Scouts expressly stated that "BSA membership registration is a privilege." Boy Scouts has also taken the position that "adult membership" and "adult leadership" are "interchangeable" in the scouting world. *See supra* at —— (slip op. at 15). Boy Scouts' statements raise the question whether the organization has waived its right to challenge Dale's claim that

he has been denied a "privilege" within the meaning of the LAD.

We find, nonetheless, the Boy Scout membership is both a "privilege" and "advantage." The organization provides its members with numerous benefits, including opportunities to participate in group activities and to develop a variety of skills, *e.g.*, camping, cooking, first aid, lifesaving. Boy Scout leaders are given the "advantage" of numerous training courses that teach valuable lessons in leadership and management. Scouting indirectly benefits its members through the "advantage" of a large influential network, including Air Force Academy, Annapolis and West Point graduates, Rhodes Scholars, astronauts, United States Presidents and Congressmen, as well as businessmen and community leaders. Indeed, Boy Scouts advertises the "privileges" and "advantages" of being a member in order to attract new members.[11] *See id.* at —— (slip op. at 35). It is undeniable that Dale lost those "privileges" and "advantages" when he was expelled. It necessarily follows that Boy Scouts violated the LAD when it expelled him.

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11 In *Quinnipiac Council Boy Scouts of America v. Commission on Human Rights and Opportunities*, 204 A.2d 352 (Conn. 1987), the Connecticut Supreme Court held that Boy Scouts had not denied a woman an "accommodation," which it interpreted to mean "access to goods and services," when it denied her the opportunity to serve as a scoutmaster. *Id.* at 360. The Connecticut public accommodation statute interpreted by the Connecticut Supreme Court is distinguishable from our New Jersey statute. The LAD is not concerned solely with the denial of an "accommodation" or "goods and services," but rather prohibits places of public accommodation from refusing to provide "accommodations, advantages, facilities [or] privileges." *N.J.S.A.* 10:5-4. While volunteer scoutmaster positions may not be "goods [or] services," they are a "privilege" and an "advantage."

B. *The Common Law*

Dale asserts that Boy Scouts is also prohibited from discriminating against him by the common law. The Legislature did not intend to abrogate all common law causes of action with the enactment of the LAD. *See N.J.S.A.* 10:5-27 ("Nothing herein contained shall bar, exclude or otherwise affect any right or action, civil or criminal, which may exist independently of any right to redress against or specific relief from any unlawful employment practice or unlawful discrimination."); *see also N.J.S.A.* 10:5-3 ("The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed *in combination with other protections* available under the laws of this State.") (emphasis added). In *Shaner v. Horizon Bancorp.*, we recognized that "a plaintiff in appropriate circumstances could pursue an independent action . . . to vindicate particular interests in addition to or aside from those sought to be protected by a LAD action." 116 *N.J.* 433, 454 (1989).

In many cases, however, a common law claim is merely duplicative of a LAD claim and "it might be unnecessary to recognize or create . . . [an] action to vindicate substantially the same rights and provide similar relief." *Ibid.; accord Erickson v. Marsh & McLennan Co.*, 117 *N.J.* 539, 562 (1990). We find that Dale's common law claim, if pursued, would not protect an interest "in addition to or aside from those" protected by his statutory action. *Shaner, supra*, 116 *N.J.* at 454. Accordingly, we hold that Dale's common law claim is duplicative of his LAD claim.

IV

THE FIRST AMENDMENT

Our holding that New Jersey's Law Against Discrimination applies to Boy Scouts requires that we reach Boy Scouts' claim that its First Amendment rights are thereby violated. *See U.S. Const.* amend. I. Boy Scouts asserts the rights of its members "to enter into and maintain . . . intimate or private relationships. . . . [and] to associate for the purpose of engaging in protected speech." *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 *U.S.* 537, 544, 107 *S. Ct.* 1940, 1945, 95 *L. Ed.* 2d 474, 483-84 (1987).

The United States Supreme Court has referred to the constitutionally protected freedom of association in two distinct contexts. "In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Roberts, supra*, 468 *U.S.* at 617-18, 104 *S. Ct.* at 3249, 82 *L. Ed.* 2d at 471. Those cases are typically referred to as "intimate association" cases. "In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618, 104 *S. Ct.* at 3249, 82 *L. Ed.* 2d at 471. Those cases have been described as "expressive association" cases.

Boy Scouts' First Amendment claim requires that we examine the analytical framework within which the United States Supreme Court has discussed this complex of associational rights.

A. *Freedom of Intimate Association*

"[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* at 618, 104 *S. Ct.* at 3250, 82 *L. Ed.* 2d at 471. The freedom to maintain personal relationships or to engage in intimate associations is thus "a fundamental element of liberty protected by the Bill of Rights." *Rotary Club, supra*, 481 *U.S.* at 545, 107 *S. Ct.* at 1945, 95 *L. Ed.* 2d at 484. Although the Supreme Court has never set the "precise boundaries" of this freedom, "[t]he intimate relationships to which [it] has accorded constitutional protection include marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives." *Id.* at 545, 107 *S. Ct.* at 1945-46, 95 *L. Ed.* 2d at 484 (citations omitted). The freedom of intimate association, however, is not restricted to family relationships; rather, the Court has "emphasized that the First Amendment protects those relationships . . . that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life.'" *Id.* at 545, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 484 (quoting *Roberts, supra*, 468 *U.S.* at 619-20, 104 *S. Ct.* at 3250, 82 *L. Ed.* 2d at 472).

Two seminal cases have considered the claims of national membership organizations that the intimate association rights of their members had been abridged by the application of state laws similar to the LAD. In *Roberts v. United States Jaycees*, the Jaycees brought an action contending that application of Minnesota's public accommodations law requiring the organization to admit women

as regular members violated the male members' intimate association rights. Under the Jaycees' Bylaws, men between the ages of eighteen and thirty-five were eligible for regular membership, whereas only "associate membership" was available to women. *Roberts, supra,* 468 *U.S.* at 613, 104 *S. Ct.* at 3248, 82 *L. Ed.* 2d at 468. Unlike regular members, associate members could not vote, hold office, or "participate in certain leadership training and awards programs." *Ibid.* Nonetheless, as associate members, women "attend[ed] various meetings, participate[d] in selected projects, and engage[d] in many of the organization's social functions." *Id.* at 621, 104 *S. Ct.* at 3251, 82 *L. Ed.* 2d at 473.

Based on those facts, the Supreme Court concluded that "the Jaycees chapters lack[ed] the distinctive characteristics that might afford constitutional protection to the decision of its members to exclude women." *Id.* at 621, 104 *S. Ct.* at 3251, 82 *L. Ed.* 2d at 474. Specifically, the Court emphasized that "the local chapters of the Jaycees are neither small nor selective," and that "much of the activity central to the formation and maintenance of the association involves the participation of strangers to that relationship." *Ibid.* At the time of trial, the local chapters involved in the suit had approximately 400 members, *id.* at 621, 104 *S. Ct.* at 3251, 82 *L. Ed.* 2d at 473, and the organization had 295,000 members nationwide, *id.* at 613, 104 *S. Ct.* at 3246, 82 *L. Ed.* 2d at 468. Furthermore, "[a]part from age and sex, neither the national organization nor the local chapters employ[ed] any criteria for judging applicants for membership." *Ibid.*

In *Board of Directors of Rotary International v. Rotary Club of Duarte,* the Court again considered a First Amendment challenge to a state antidiscrimination statute requiring a national membership organization to admit

women. There, the charter of a local chapter of Rotary International was revoked by the national organization because it admitted women members. *Rotary Club, supra,* 481 *U.S.* at 541, 107 *S. Ct.* at 1943, 95 *L. Ed.* 2d at 482. Under the Rotary constitution, women were excluded from membership, although "women [were] permitted to attend meetings, give speeches, and receive awards." *Id.* at 541, 107 *S. Ct.* at 1943, 95 *L. Ed.* 2d at 481. The local chapter and two of its female members brought an action challenging the national organization's exclusionary policy under the California civil rights statute. *Id.* at 541, 107 *S. Ct.* at 1943, 95 *L. Ed.* 2d at 482. Rotary International argued that requiring it to admit women would infringe on its right of intimate association.

Once again the Court concluded that "the relationship among [the organization's] members is not the kind of intimate or private relation that warrants constitutional protection." *Id.* at 546, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 484-85. The Court noted that local chapters ranged in size from "fewer than 20 [members] to more than 900," and that the national organization did not set an "upper limit on the membership of any local Rotary Club." *Id.* at 546, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 485. The Court also emphasized Rotary International's inclusive membership policy, pointing to the organization's own declaration that "[t]he purpose of Rotary 'is to produce an inclusive, not exclusive, membership.' " *Ibid.* In order to fulfill this purpose, "[t]he clubs . . . [were] instructed to 'keep a flow of prospects coming' to make up for . . . attrition and gradually to enlarge membership." *Ibid.* Most important, Rotary International's membership policy was designed to " 'enabl[e] the club to be a true cross section of the business and professional life of the community.' " *Ibid.* On these facts, the Court concluded that "[s]uch an inclusive 'fellowship for service based on

diversity of interest,' . . . does not suggest the kind of private or personal relationship to which we have accorded protection under the First Amendment." *Id.* at 546-47, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 485.

Those cases teach us to consider, among other things, "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship," when we examine membership organizations to determine whether a protectable intimate association right is present. *Id.* at 546, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 485; *see also Roberts, supra,* 468 *U.S.* at 620, 104 *S. Ct.* at 3251, 82 *L. Ed.* 2d at 473 (stating that "factors . . . relevant [to an intimate association analysis] include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent"). As applied to Boy Scouts, we find that its large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not "sufficiently personal or private to warrant constitutional protection" under the freedom of intimate association.

As a preliminary matter, contrary to Boy Scouts' assertion, whether we evaluate the Boy Scout organization at the national or local troop level, the result would be the same. *See supra* at —— (slip op. at 48 n.9). Either way, Boy Scouts cannot claim the right of intimate association for its members. Because Boy Scouts' argument is necessarily stronger at the smaller troop level, we will consider the intimate association factors as applied to local troops.

Boy Scouts informs us that a typical Boy Scout troop consists of between fifteen and thirty boys and several adult leaders. In *Rotary Club*, the Supreme Court specifically held that a local club with as few as twenty members did not qualify as "the kind of intimate or private relation that warrants constitutional protection." 481 *U.S.* at 546, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 484-85. Moreover, Boy Scout troops are unselective in their membership. *See supra* at —— (slip op. at 49-53). Any boy between the ages of eleven and seventeen can join; indeed, Boy Scouts has quite clearly said that "any boy" is welcome. *See id.* at —— (slip op. at 52). Boy Scouts also has not set an upper limit on the number of boys who can join, but instead, actively seeks to interest as many boys as possible through advertising and other outreach methods. *See id.* at —— (slip op. at 35-36). Even if Boy Scouts is more selective in choosing its leaders, leaders do not substitute for the boys' parents, *see id.* at —— (slip op. at 55); nor do they have private or intimate relationships with troop members. Relationships within the troop are simply not the "kind of . . . personal relationship[s] to which [the Supreme Court has] accorded protection under the First Amendment." *Rotary Club, supra,* 481 *U.S.* at 547, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 485.

Boy Scouts' inclusive purpose deserves further discussion in this context. Like the Rotary Clubs analyzed by the Supreme Court, the purpose of Boy Scouts "is to produce inclusive, not exclusive membership." *Id.* at 546, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 485. Boy Scouts has made a commitment to ensure that its membership is "representative of all of the population." *See supra* at —— (slip op. at 48). "Such an inclusive fellowship . . . based on diversity of interest, however beneficial to the members" is also not indicative of a protectable form of intimate association. *Rotary Club, supra,* 481 *U.S.* at 546-47, 107 *S. Ct.* at 1946, 95 *L. Ed.* 2d at 485.

Boy Scouts' practice of inviting or allowing nonmembers to attend certain troop meetings further persuades us that

Boy Scouts cannot claim the right of intimate association. In *Rotary Club*, the Supreme Court observed that "[m]any of the Rotary Clubs' central activities [were] carried on in the presence of strangers. . . . [and that] clubs [were] encouraged to seek coverage of their meetings and activities in local newspapers." *Id.* at 547, 107 *S. Ct.* at 1946-47, 95 *L. Ed.* 2d at 485. In the Court's view, this negated Rotary International's claim that the California Civil Rights Act "interfere[d] unduly with the members' freedom of private association." *Id.* at 547, 107 *S. Ct.* at 1947, 95 *L. Ed.* 2d at 485. Likewise, Boy Scouts' practice of inviting nonmembers to "School Nights" and other similar activities undermines its intimate association claim. *See supra* at —— (slip op. at 5).

We conclude that Boy Scouts has not demonstrated a protectable intimate association right under the First Amendment.

B. *Freedom of Expressive Association*

"An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts, supra,* 468 *U.S.* at 622, 104 *S. Ct.* at 3252, 82 *L. Ed.* 2d at 474. Thus, "the right to engage in activities protected by the First Amendment [carries with it] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Ibid.* The freedom to come together in furtherance of a "collective" purpose provides protection for minority views, thereby fostering "political and cultural diversity." *Ibid.*

When the government attempts "to interfere with the internal organization or affairs of the group," *id.* at 623,

104 *S. Ct.* at 3252, 82 *L. Ed.* 2d at 474, the members' freedom of expressive association may be curtailed. In this regard, the Supreme Court has said that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.* at 623, 104 *S. Ct.* at 3252, 82 *L. Ed.* 2d at 474-75. This does not mean, however, "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *New York State Club Ass'n v. City of New York,* 487 *U.S.* 1, 13, 108 *S. Ct.* 2225, 2234, 101 *L. Ed.* 2d 1, 16 (1988). Rather, the Court has found that a group member infringes upon an organization's freedom of expressive association only if he or she "affect[s] 'in any significant way' the [other members'] ability . . . to . . . advocate public or private viewpoints." *Ibid.; see also Rotary Club, supra,* 481 *U.S.* at 548, 107 *S.Ct.* at 1947, 95 *L. Ed.* 2d at 486 (holding that "the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes"); *Roberts, supra,* 468 *U.S.* at 626-27, 104 *S. Ct.* at 3254, 82 *L. Ed.* 2d at 477 (ruling that "the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association" because "[t]here is . . . no basis in the record for concluding that admission of women . . . will impede the organization's ability to engage in these protected activities or to disseminate its preferred views").

Moreover, "[t]he right to associate for expressive purposes is not . . . absolute." *Roberts, supra,* 468 *U.S.* at 623, 104 *S. Ct.* at 3252, 82 *L. Ed.* 2d at 475. The Supreme Court has held that "[i]nfringements on that right may be justified by regulations adopted to serve compel-

ling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedom." *Ibid.* State laws against discrimination may take precedence over the right of expressive association because "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Id.* at 628, 104 *S. Ct.* at 3255, 82 *L. Ed.* 2d at 478. The right of expressive association must, therefore, be weighed against this compelling interest in each case.

We find that the LAD does not violate Boy Scouts' freedom of expressive association because the statute does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views. The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scouts members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts include sponsors and members who subscribe to different views in respect of homosexuality.

Boy Scouts claims that its members' views regarding homosexuality are evident from its Scout Law and Oath, which embody general moral principles. The Scout Law requires Boy Scout members to be "trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent," whereas the Oath requires each scout to promise: "I will do my best to do my duty to God and my country and to obey the Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and morally straight." Boy Scouts asserts that it teaches those moral principles to its members through scouting activities. BSA Bylaws require

that "in all activities, emphasis [is to] be placed upon practice in daily life of the principles of the Scout Oath." Boy Scouts aims to foster "strength, confidence, and good judgment" by providing boys with "a world full of exciting adventures" and the opportunity "to go places and do things." *Boy Scout Handbook, supra,* at vii. In the words of the Chief Scout Executive:

> As a Scout, you'll hike and camp, learn how to live in the out-of-doors, and discover many ways to care for the land. You can cook your meals over a camp stove and identify all kinds of plants and animals that are part of our environment. No matter what happens, you'll know how to take care of yourself. You'll develop strength, confidence, and good judgment. And you can find out how it feels to be a leader.

[*Ibid.*]

We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members. *Cf. Roberts, supra,* 468 *U.S.* at 636, 104 *S. Ct.* at 3259-60, 82 *L. Ed.* 2d at 483-84, (O'Connor, J., concurring in part and concurring in judgment) (stating "protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service. . . . [and e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement"). We are not persuaded, however, that a "shared goal[]" of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral. *See id.* at 622, 104 *S. Ct.* at 3252, 82 *L. Ed.* 2d at 474 (recognizing that freedom of expressive association pro-

tects an association's "collective effort on behalf of shared goals").

Boy Scouts argues that the words "morally straight" and "clean" in the Scout Oath and Law explicitly or implicitly stand for the proposition that homosexuality is immoral.[12] In support of its position, Boy Scouts relies on the *Boy Scout Handbook* definition of "morally straight" and "clean"

Morally Straight

> To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

Clean

> A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.
>
> You never need to be ashamed of dirt that will wash off. . . .

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12 Boy Scouts also points to a 1978 position paper in support of its argument that it associates for the expressive purpose of advocating the immorality of homosexuality. *See supra* at — (slip op. at 17 n.4). We observe that the position paper was not disseminated to Boy Scout members, and decline, therefore, to view it as representative of the members' shared views.

In addition, Boy Scouts refers to four other position papers, all written after Dale's expulsion. The self-serving nature of these papers is apparent.

> There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.
>
> Swear words, profanity and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are the targets of insults.

The words "morally straight" and "clean" do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral. We doubt that young boys would ascribe any meaning to these terms other than a commitment to be good.

Boy Scouts also argues that the immorality of homosexuality can be implied from the moral principles expressed by the Scout Oath and Law. Yet, Boy Scouts teaches that "moral fitness" is an individual choice and defers the ultimate definition to its members:

> Morality . . . concerns the "principles of right and wrong" in our behavior, and "what is sanctioned by *our* conscience or ethical judgment." . . .
>
> In any consideration of moral fitness, a key word has to be "courage." A boy's courage to do what *his* head and *his* heart tell him is right. And the courage to refuse to do what *his* heart and *his* head say is wrong.

[*Scoutmaster Handbook*, *supra*, at 71 (emphasis added).]

The *Boy Scout Handbook*, *supra* at 551, also acknowledges that a member's concept of morality is intertwined with his "religious beliefs." The record in this case reveals

that Boy Scouts' religious sponsors differ in their views about homosexuality.[13] *Compare* Brief of *Amici Curiae* National Catholic Committee on Scouting et al. at 1 (declaring that Boy Scouts' admission of practicing homosexuals would affect some church sponsors' ability "to advance core moral values, arising from sincere well established religious beliefs") *with* Brief of *Amici Curiae* The Diocesan Council of the Episcopal Diocese of Newark, et al. at 1 (stating that "the teachings of the Episcopal Church . . . affirm[] the rights of lesbians and gay men to the equal protection of the laws and to live free from discrimination based upon affectional or sexual orientation"). On the record before us, it appears that no single view on this subject functions as a unifying associational goal of the organization.

We hold, therefore, that Dale's membership does not violate Boy Scouts' right to expressive association because his inclusion would not "affect in any significant way [Boy Scouts] existing members' ability to carry out their various purposes." *Rotary Club, supra*, 481 *U.S.* at 548, 107 *S. Ct.* at 1947, 95 *L. Ed.* 2d at 486.

That Boy Scout members do not associate to share the view that homosexuality is immoral suggests that Dale's expulsion constituted discrimination based solely on his status as an openly gay man. The United States Supreme Court has not hesitated to uphold the enforcement of a state's antidiscrimination statute against an expressive association claim based on assumptions in respect of status that are not a part of the group members' shared expressive purpose. *See Robert, supra*, 468 *U.S.* at 628, 104 *S. Ct.* at 3255, 82 *L. Ed.* 2d at 478 ("[W]e decline to indulge in the sexual stereotyping that underlies appellee's

[13] We note in passing that Boy Scouts has renewed the charters of sponsors whose positions differ from that alleged by Boy Scouts.

contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech."); *see also New York State Club Ass'n, supra*, 487 *U.S.* at 13, 108 *S. Ct.* at 2234, 101 *L. Ed.* 2d at 16 (upholding antidiscrimination law that "merely prevents an association from using . . . specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership").

Boy Scouts submits that it expelled Dale because he "was pictured and written-up in the *Star-Ledger* as Co-President of the Rutgers University and Gay Alliance." *See supra* at — (slip op. at 17). In the article, Dale states that he is gay. He does not identify himself as a Boy Scout leader or member, nor does he express an opinion about any of Boy Scouts' policies, or suggest that Boy Scouts should allow him openly to advocate acceptance of homosexuality.[14] Indeed, Dale has stated that he accepts and endorses Boy Scouts' moral principles. In Dale's words:

> Scouting appealed to me for many reasons. . . . I admired the purposes for which BSA stands—teaching young people outdoor and camping skills, developing their leadership abilities and sense of community responsibility, and providing them with the tools to make moral choices over the course of their lives.

[14] Boy Scouts argues that Dale's recent public statements about the policy of excluding avowed homosexuals indicate that he has a "moral viewpoint in opposition to that of Boy Scouts and [has] expressed that viewpoint to all who will listen." We have no evidence, however, that when Dale refers to this "policy," he is talking about anything other than the decision to expel him because of his status as co-president of the Rutgers University Lesbian/Gay Alliance.

As a Scout, I promised to live by the Scout Oath. . . . I believed that the Scout Oath stood for my commitment to live an honorable life, to set high standards for myself, and to do my best to serve others. In my more than twelve years as a member of BSA, I strove never to do anything inconsistent with the values embodied in the Scout Oath. . . .

. . . I understood the Scout Oath to represent the high ideals Scouting encouraged each of its members to achieve. In all my years in Scouting, I always tried to live in accordance with the Scout Law and to adhere to the values embodied in it.

As I grew . . . older, my commitment to Scouting deepened. Scouting . . . taught me how to deal with the ethical choices I encountered as a teenager.

Nonetheless, despite Dale's commitment, he was expelled from Boy Scouts shortly after the article was published.

The original termination letter Dale received indicates that Dale was expelled because of his status and not because his membership conflicted with Boy Scouts' message. In it, Boy Scouts told Dale he was being terminated because of his sexual orientation: "The grounds for this membership revocation are the standards for leadership established by Boy Scouts of America, which specifically forbid membership to homosexuals." In subsequent letters, Boy Scouts attempted to connect Dale's termination with his "avowed" homosexuality and Boy Scouts' "policy [to] exclud[e] adults whose views of the morality of homosexual conduct differ from the views held by Boy Scouts of America." Those subsequent letters suggest that Boy Scouts perceived Dale's membership as interfering with its views on "the morality of homosexual conduct"; they do not alter Boy Scouts' original statement. The original

termination letter expresses Boy Scouts' real concern: Dale's status as a homosexual.

Perhaps more revealing is the contradiction between Boy Scouts' current litigation posture on homosexual members and the organization's general philosophy on open membership. Boy Scouts has been firmly committed to a diverse and "representative" membership. It recognizes that the skills it teaches its members are needed "in all economic, cultural, and ethnic groups." *A Representative Membership, supra,* at 2. Its objective is to see to it "that all eligible youth have the opportunity to affiliate with the Boy Scouts of America." *Id.* at 1. As we observed earlier, consistent with this position, Boy Scouts does not seek to limit membership to individuals of a particular religious faith or moral persuasion. *See supra* at — (slip op. at 11, 12, 50). The result of this "all-inclusive" membership policy is the admission of four million boys and over one million adults. *See id.* at — (slip op. at 48).

When contrasted with its "all-inclusive" policy, Boy Scouts' litigation stance on homosexuality appears antithetical to the organization's goals and philosophy. The exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse and "representative" membership. Moreover, this exclusionary practice contradicts Boy Scouts' overarching objective to reach "all eligible youth." We are satisfied that Boy Scouts' expulsion of Dale is based on little more than prejudice and not on a unified Boy Scout position; in other words, Dale's expulsion is not justified by the need to preserve the organization's expressive rights.

The invocation of stereotypes to justify discrimination is all too familiar. Indeed, the story of discrimination is the story of stereotypes that limit the potential of men,

women, and children who belong to excluded groups. By way of example, we observe that certain claimed propensities of character were once invoked to advocate the subjugation of women. *United States v. Virginia* recites the prevailing view of women at the time of the writing of the Constitution: " 'Were our State a pure democracy . . . there would yet be excluded from [our] deliberations . . . women, who, to prevent depravation of morals and ambiguity of issue, should not mix promiscuously in the public meetings of men.' " 518 *U.S.* 515, 531 n.5, 116 *S. Ct.* 2264, 2275 n.5, 135 *L. Ed.* 2d 735, 750 n.5 (1996) (quoting Letter from Thomas Jefferson to Samuel Kercheval (Sept. 5, 1816)). Less than a century later, the exclusion of women from the Illinois State Bar was thought to be justified because

> [t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and function of womanhood. The harmony, not to say identity, of interests and views which belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

[*Bradwell v. Illinois*, 83 *U.S.* (16 *Wall.*) 130, 141, 21 *L. Ed.* 442, 446 (1873) (Bradley, J., concurring).]

See also J.E.B. v. Alabama, 511 *U.S.* 127, 132, 114 *S. Ct.* 1419, 1423, 128 *L. Ed.* 2d 89, 99 (1994) (noting that women were traditionally kept from jury duty because they "were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere").

The sad truth is that excluded groups and individuals have been prevented from full participation in the social, economic, and political life of our country.[15] The human price of this bigotry has been enormous. At a most fundamental level, adherence to the principle of equality demands that our legal system protect the victims of invidious discrimination.

New Jersey has long been a leader in this effort. *See, e.g., Peper, supra*, 77 *N.J.* at 80 (stating that "New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society"). In 1945, the New Jersey Legislature codified its commitment to equality by enacting the LAD, "some twenty years before the effective date of Title VII." *Ibid.*; *see* 42 *U.S.C.A.* §§ 2000a-2000h-6. The Legislature found that "because of discrimination, people suffer personal hardships, and the State suffers a grievous harm." *N.J.S.A.* 10:5-3. In specific, the Legislature determined that victims of discrimination suffer

> economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems.

[*Ibid.*]

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[15] The LAD prohibits discrimination on the basis of "race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex. . . ." *N.J.S.A.* 10:5-4. The scope of the statute is reflective of the breadth of the underlying problems we face as a society.

It is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society.

In 1991, the Legislature amended the LAD, *L.* 1991, *c.* 519, § 2, to add "affectional or sexual orientation" to the list of protected classes. This amendment extends New Jersey's historical commitment to the eradication of discrimination to that group of individuals who face discrimination because of sexual orientation. As the Appellate Division stated:

> By amendment to *N.J.S.A.* 10:5-4 in 1991 (*L.* 1991, *c.* 519, § 2), the Legislature expanded the categories of persons protected to include discrimination based on "affectional or sexual orientation." This was an implicit recognition that discrimination based on "archaic" and "stereotypical notions" about homosexuals that bears no relationship to reality cannot be countenanced. *Roberts, supra,* 468 *U.S.* at 625, 104 *S. Ct.* at 3253, 82 *L. Ed.* 2d at 476. It is also a recognition that the "stigmatizing injury" and denial of equal opportunities that accompanies it is felt no less strongly by this protected group than others who suffer personal hardship because of discriminatory practice. *Ibid.*

[*Dale, supra,* 308 *N.J. Super.* at 549.]

With the amendment of the LAD, the Legislature declared that discrimination in places of public accommodation on the basis of "affectional or sexual orientation . . . [is] a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State." *N.J.S.A.* 10:5-3. Our courts have

recognized the arbitrariness of discriminating against individuals solely because of their sexual orientation. *See, e.g., One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control,* 50 *N.J.* 329, 340-41 (1967) (rejecting argument that permitting "apparent homosexuals" to congregate at bar threatens public welfare); *Poff, supra,* 228 *N.J. Super.* at 381 (stating that "refus[al] to extend . . . [LAD's] protection to homosexuals because they may be more susceptible to a dread disease would mark a return to a past of judging individuals on the basis of ignorance and prejudice"); *In re J.S. & C.,* 129 *N.J. Super.* 486, 489 (Ch. Div. 1974) (stating that "[f]undamental rights of parents may not be denied, limited or restricted on the basis of sexual orientation, *per se*"), *aff'd,* 142 *N.J. Super.* 499 (App. Div. 1976).

A purpose of the LAD is to eliminate sexual orientation discrimination. The statute effectuates this purpose without regard to an organization's viewpoint, "the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services." *Hurley, supra,* 515 *U.S.* at 572, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503 (recognizing that such laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination"); *see also Rotary Club, supra,* 481 *U.S.* at 549, 107 *S. Ct.* at 1948, 95 *L. Ed.* 2d at 487 (upholding Minnesota public accommodations law that made "no distinctions on the basis of the organization's viewpoint"). Like other similar statutes, the LAD serves a compelling state interest and "abridges no more speech or associational freedom than is necessary to accomplish that purpose." *Roberts, supra,* 468 *U.S.* at 629, 104 *S. Ct.* at 3255, 82 *L. Ed.* 2d at 478. Thus, even if Dale's membership " 'work[s] some

slight infringement on . . . [Boy Scouts'] members' right of expressive association," we find that the "infringement is justified because it serves . . . [New Jersey's] compelling interest in eliminating discrimination" based on sexual orientation. *Rotary Club, supra,* 481 U.S. at 549, 107 *S. Ct.* at 1948, 95 *L. Ed.* 2d at 486.

Boy Scouts is an American institution committed to bringing a diverse group of young boys and men together —wealthy and underprivileged, urban and rural, from different cultures and from different religions—to play and to learn. Boy Scouts' activities are designed to build character and instill moral principles. Nothing before us, however, suggests that one of Boy Scouts' purposes is to promote the view that homosexuality is immoral. Accordingly, application of the LAD does not infringe upon Boy Scouts' right of expressive association.

C. *Freedom of Speech*

Boy Scouts relies on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* in support of its alleged First Amendment right to exclude Dale. In *Hurley*, GLIB, an organization comprised of gay, lesbian, and bisexual descendants of Irish immigrants, applied for permission to march in the St. Patrick's Day-Evacuation Day Parade. 515 *U.S.* at 561, 115 *S. Ct.* at 2341, 132 *L. Ed.* 2d at 496. GLIB was formed for the sole purpose of marching in the parade, "to express pride in [the members'] Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express . . . solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade." *Ibid.* The private parade organizers, the South Boston Allied War Veterans Council, refused to allow GLIB to march, and

the group brought suit alleging that the Council's actions violated the state's public accommodations law. *Ibid.*

The *Hurley* Court held that inclusion of the group in the parade would violate the Council's First Amendment rights. The Court observed that the state public accommodations statute had "been applied in a peculiar way," because "[i]ts enforcement [did] not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade . . . . [but rather] the admission of GLIB as its own parade unit carrying its own banner." *Id.* at 572, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503. The Court explained that forcing the Council to include GLIB would "essentially requir[e] [the members] to alter the expressive content of their parade," *id.* at 572-73, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503, because "in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole," *id.* at 577, 115 *S. Ct.* at 2349, 132 *L. Ed.* 2d at 506. Application of the statute in that context was held to "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503. Indeed, application of the statute "had the effect of declaring the sponsors' speech itself to be the public accommodation." *Ibid.*

We find the facts of *Hurley* distinguishable. Dale's status as a scout leader is not equivalent to a group marching in a parade. Dale does not come to Boy Scout meetings "carrying a banner." Dale has never used his leadership position or membership to promote homosexuality, or any message inconsistent with Boy Scouts' poli-

cies. *Cf. Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 *P.*2d 218, 253 (Cal. 1998) (Kennard, J., concurring) (proclaiming that Boys Scouts would have valid First Amendment defense if California's antidiscrimination law applied because Curran sought "membership in order to promote . . . [his] views"). Additionally, there is no indication that Dale intends to actively "teach" anything whatsoever about homosexuality as a scout leader, or that he will do other than Boy Scouts instructs him to do—refer boys to their parents on matters of religion and sex.

Nor is Boy Scout leadership a form of "pure speech" akin to a parade. As the *Hurley* Court explained, "the word 'parade' [is used] to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way." 515 *U.S.* at 568, 115 *S. Ct.* at 2345, 132 *L. Ed.* 2d at 500. Unlike a marcher in a parade, Dale does not participate in Boy Scouts "to make a point" about sexuality, but rather because of his respect for and belief in the organization. And unlike a parade, where the "speech itself . . . [is] the public accommodation," *id.* at 573, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503, permitting Dale to remain in a leadership position in no way prevents Boy Scouts from "invok[ing] its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another," *id.* at 574, 115 *S. Ct.* at 2348, 132 *L. Ed.* 2d at 504. We reject the notion that Dale's presence in the organization is symbolic of Boy Scouts' endorsement of homosexuality. On these facts, we do not find forced speech. *See id.* at 573, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503 (declaring that right to free speech includes right to "decide 'what not to say'") (*quoting Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 *U.S.* 1, 16, 106 *S. Ct.* 903, 912, 89 *L. Ed.* 2d 1, 12 (1986)).

In short, the reinstatement of Dale does not compel Boy Scouts to express any message. To recognize Boy Scouts' First Amendment claim would be tantamount to tolerating the expulsion of an individual solely because of his status as a homosexual—an act of discrimination unprotected by the First Amendment freedom of speech.

V

CONCLUSION

Today, we hold that Boy Scouts is a "place of public accommodation" and is, therefore, subject to the provisions of the LAD. As a "place of public accommodation" it cannot deny any person "accommodations, advantages, facilities, and privileges . . . because of . . . sexual orientation." *N.J.S.A.* 10:5-4. For the reasons set forth in this opinion, application of the LAD does not infringe on Boy Scouts' First Amendment rights.

The judgment of the Appellate Division is affirmed. We remand to the Chancery Division for further proceedings consistent with this opinion.

JUSTICES POLLOCK, O'HERN, GARIBALDI, STEIN, and COLEMAN join in CHIEF JUSTICE PORITZ's opinion. JUSTICE HANDLER has filed a separate concurring opinion.

HANDLER, J., concurring.

I join the Court in holding that the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -49, prohibits the Boy Scouts of America (BSA) and the Monmouth Council of the Boy Scouts of America (collectively, Boy Scouts), as places of public accommodation, from expelling a member based solely on his sexual orientation. I fully endorse the Court's reasoning in reaching that result. I further emphasize, in the context of this case, the significance of the role of "genuine membership selectivity" as a material factor in the characterization of a place of accommodation as "public."

This case also pits an individual's right to be protected under the LAD from discrimination based on his sexual orientation against the First Amendment expressional rights of a public accommodation. In resolving that conflict, we must consider the significance of the connection between the individual's speech and his identity when both relate to his sexual orientation.

I

On July 19, 1990, soon after learning that highly decorated Eagle Scout James Dale was gay, Boy Scouts revoked Dale's membership privileges and requested that he sever all relations with the organization. After Dale inquired about the basis for his explusion, he was first informed that Boy Scouts "forbid[s] membership to homosexuals," and later that "[BSA] does not admit avowed homosexuals to membership in the organization," *Ante* at —— (slip op. at 17, 18). Dale thereafter commenced this lawsuit, charging Boy Scouts with violations of the LAD. Dale specifically contended that Boy Scouts, as a place of public accommodation, illegally expelled him based on his "affectional or sexual orientation," contrary to *N.J.S.A.* 10:5-4.

A.

The critical question in deciding whether Boy Scouts violated the LAD by terminating Dale's membership, as the Court recognizes, is whether Boy Scouts may be deemed a "place of public accommodation." *Ante* at —— (slip op. at 27). The Court observes that the term "place" in the LAD is not limited to a single geographic situs and, therefore, a fixed location is not a prerequisite to satisfying its definition. *Id.* at —— (slip op. at 32). A "place" encompasses any location or facility at which an organization undertakes its activities. Boy Scouts, the Court determines, as an organization that performs its functions at numerous locales, is clearly a "place" under the LAD. *Id.* at — (slip op. at 33). We also conclude that Boy Scouts is an "accommodation" for purposes of the LAD, especially given its uniquely educational and recreational nature. *Id.* at — (slip op. at 41-42). Further, Boy Scouts is sufficiently "public" to be covered by the LAD. *Id.* at — (slip op. at 36-37). If an organization either expressly or impliedly engages in broad public solicitation, it is considered "public" for purposes of the LAD. *Id.* at — (slip op. at 33-35). Because Boy Scouts extends general membership invitations through such media as national broadcast and print advertising, public service announcements, recruiting drives and materials, as well as through the unique symbol of the scout uniform, Boy Scouts qualifies as "public." *Id.* at — (slip op. at 35-36). In addition, Boy Scouts' close relationship with other established public accommodations lends it a "public" character. *Id.* at — (slip op. at 37-41). I fully agree that these characteristics are sufficient to justify the Court's conclusion that Boy Scouts meets the LAD's definition of "place of public accommodation."

B.

A closely related organizational characteristic, "genuine selectivity," also bears on the "place of public accommodation" analysis. The absence of any genuine criteria for membership selectivity reinforces the "public" nature of an organization.

Membership selectivity, as the Court stresses, is a critically important factor in determining whether an organization is "distinctly private" pursuant to *N.J.S.A.* 10:5-51, and therefore exempt from the LAD's proscriptions applicable to an entity that is otherwise a "place of public accommodation." *See ante* at — (slip op. at 44) (noting that "selectivity issue [is] the principal determinant of 'distinctly private' status"). Membership selectivity is equally relevant to whether an organization may be initially considered to be a "place of public accommodation." *See id.* at — (slip op. at 45) (recognizing that absence of membership selectivity "weigh[s] in the public accommodation calculus"). The reason for this confluence is that the "distinctly private" exception is the "other side of the 'public accommodation' coin." *Kiwanis Int'l v. Ridgewood Kiwanis Club*, 806 *F.*2d 468, 476 (3d Cir. 1986), *reh'g denied*, 811 *F.*2d 247 (1987). Realistically, and in most contexts, one characteristic cannot exist without negating the other:

> [I]f an organization "is not a 'place of public accommodation' because of its selective membership practices, it must be private as that term is used in the statute." In contrast, if an organization qualifies as a "place of public accommodation" . . . the "private" club exception . . . does not apply.

[*Brounstein v. American Cat Fanciers Ass'n*, 839 *F. Supp.* 1100, 1106 (D.N.J. 1993) (citation omitted).]

Thus, the selectivity that we require to meet the LAD's "distinctly private" exception also bears on the initial determination of whether a place of accommodation should be characterized as "public." As the Third Circuit Court of Appeals has observed, "unselectivity, unrestrictedness, and open invitation" are critical determinants of whether an organization is a "place of public accommodation." *Kiwanis, supra*, 806 *F.*2d at 476.[1] Of these three, selectivity has been described as the "touchstone of the determination of whether a membership organization is a 'place of public accommodation'." *Brounstein, supra*, 839 *F. Supp.* at 1106.

The focus of that investigation—as the Court requires in the context of our "distinctly private" exception analysis, *ante* at — (slip op. at 49-50)—must be selectivity in practice, *i.e.*, "genuine selectivity." "The genuine selectivity of the membership process is the most important factor in ascertaining private club status." *United States v. Lansdowne Swim Club*, 713 *F. Supp.* 785, 797 (E.D. Pa. 1989), *aff'd*, 894 *F.*2d 83 (3d Cir. 1990); *accord United States v. Trustees of the Fraternal Order of Eagles*, 472 *F. Supp.* 1174, 1175-76 (E.D. Wisc. 1979) (observing that "most important factor" in determining whether club is private and thus not public accommodation sub-

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1 The *Kiwanis* court correctly identified the relevance of "unselectivity, unrestrictedness and open invitation" to the identification of a "place of public accommodation." It overstated those factors, however, as comprising the "test" for satisfying that definition. *Kiwanis, supra*, 806 *F.*2d at 476. If an organization possesses those characteristics, it will certainly qualify as a "place of public accommodation." Nevertheless, the absence or mere partial satisfaction of one or more of those factors does not preclude a finding that an organization is a "place of public accommodation." *See infra* at —— (slip op. at 12-14); *Kiwanis, supra*, 811 *F.*2d 247 (Gibbons, J., dissenting from sur denial of rehearing) (criticizing *Kiwanis* for suggesting that all associations that are not completely open, unselective and unrestrictive are not "public").

ject to Civil Rights Act, is "process which the club actually uses in selecting its members"). The United States Supreme Court has recognized genuine selectivity as an integral characteristic of a private club. *See Tillman v. Wheaton-Haven Recreation Ass'n*, 410 *U.S.* 431, 438, 93 *S. Ct.* 1090, 1094, 35 *L. Ed.* 2d 403, 409-10 (1973). The absence of genuine selectivity in membership decisions constitutes persuasive evidence of the public nature of an organization.

1.

A number of features reflect a club's genuine selectivity in membership practices:

> [T]he substantiality of the membership fee; the numerical limit on club membership (apart from the capacity of the facilties); the membership's control over the selection of new members; the formality of the club's admission procedures; the standards or criteria for admission; and whether and how many [] applicants have been denied membership relative to the total number of [] applicants.

[*Lansdowne Swim Club, supra*, 713 *F. Supp.* at 797 (citations omitted).]

The hallmark of genuine selectivity is that the organization actually uses its stated selection criteria to limit its membership in accordance with those criteria.

The Court's holding that a showing of genuine selectivity is required to satisfy the "distinctly private" exception in the LAD, *ante* at — (slip op. at 49-50) (rejecting application of "distinctly private" exception to Boy Scouts because "w[e] do not find [] that the Oath and Law operate as genuine selectivity criteria"), is consistent with our existing LAD jurisprudence. In *Clover Hill Swimming Club v. Goldsboro*, 47 *N.J.* 25 (1966), both

a sign at a swimming club's entrance and the club's promotional literature referred to itself as a "private" facility. *Id.* at 34. The literature further stated that "all applications would be subject to approval by club officials." *Ibid.* The Court held that such "[s]elf-serving declarations by the owner of an accommodation are not determinative of its character." *Ibid.* The relevant inquiry was whether in practice the club had exercised any actual discretion in its selection of new members.

Other courts have likewise recognized that selectivity in practice is integral to the determination of whether an organization is private and thus exempt from antidiscrimination laws. For example, in *Lansdowne Swim Club, supra*, the Third Circuit relied on principles of genuine selectivity in assessing whether a swimming club, charged with racial discrimination, qualified as a private club, thus exempting it from Title II of the Civil Rights Act of 1964. 894 *F.*2d at 85-86. The court pointed out that although the club required an interview for membership, it was "not probing, having the sole purposes of describing the club and its membership procedures and verifying the names and ages of children in the applicant's family," and that the club undertook virtually no other investigation of an applicant's background. *Id.* at 86 n.4. The court reasoned that "formal membership requirements 'have little meaning when in fact the club does not follow a selective membership policy.'" *Id.* at 86 (quoting *Wright v. Salisbury Club, Ltd.*, 632 *F.*2d 309, 312 (4th Cir. 1980) (citing *Tillman, supra*, 410 U.S. at 438-39, 93 *S. Ct.* at 1094-95, 35 *L. Ed.* 2d at 409-10)). The court further noted that evidence of only a few instances of applicant rejections by the club was probative of a lack of genuine selectivity. *Ibid.*

In *Fraternal Order of Eagles, supra,* the defendant claimed private club status based on an elaborate set of requirements codified in its statutes:

> Those statutes . . . include[d] the following requirements: (1) "[e]very applicant for membership in any Local Aerie shall be recommended by two members of the Order"; (2) "[n]o person shall be eligible to be elected to membership in any Local Aerie unless such person is a male, is of good moral character, and believes in the existence of a Supreme Being, . . ."; (3) "[no] application for membership shall be considered if the applicant shall not reside within the jurisdiction of the Aerie to which such application is submitted"; (4) "[e]ach person desiring to become a member of an Aerie must properly fill out and sign an application . . .;" (5) "[a]ll applications for membership . . . shall be referred to the Investigating Committee"; and (6) "[a]fter the report of the Investigating Committee is submitted, the application shall be voted upon, and, if elected, the Aerie may proceed with the initiation of the applicant."

[472 *F. Supp.* at 1176.]

Despite those formal published criteria, the court rejected private status because the club's formal admissions policy "[stood] in stark contrast to the admission process that . . . the Eagles Club actually uses," and showed little selectivity. *Ibid.* (noting further that club in one year turned down only three of over 1000 applicants and had 7000 to 8000 members at any one time).

A number of other cases, in considering the public versus private nature of an organization, have demanded that selectivity be actually employed in practice in accordance with formal admissions criteria. *See Nesmith v.*

Young Men's Christian Ass'n, 397 *F.*2d 96, 101 (4th Cir. 1968) (noting that despite "some of the trappings of a private club," including membership application, regularly recorded list of members, substantial dues, and membership cards to gain access to club facilities, "[e]xamination [] must go beyond these mere superficialities," and concluding that club is public establishment because almost every applicant is accepted to membership); *Rogers v. International Ass'n of Lions Clubs*, 636 *F. Supp.* 1476, 1479-80 (E.D. Mich. 1986) (characterizing club as public despite formal admissions criteria—including requirements that new member have "good moral character and good reputation in his community," be sponsored by current members, complete application forms, pass background investigation, and secure Board approval—concluding that "[w]hile it is true that this application procedure has the appearance of being elaborate, formal, and structured, in reality, it is not selective and almost all men who apply are admitted to membership"); *New York v. Ocean Club, Inc.*, 602 *F. Supp.* 489, 494-96 (E.D.N.Y. 1984) (concluding that uninformative application form, absence of background investigation of applicant, interview that merely informed applicant about club and its facilities without probing into applicant's background and character, and fact that no member was ever rejected, all demonstrated club was not genuinely selective, notwithstanding formal admission criteria in club constitution and bylaws requiring sponsorship and Board approval); *Brown v. Loudon Golf and Country Club, Inc.*, 573 *F. Supp.* 399, 402-03 (E.D. Wa. 1983) (holding that admission fee, membership ceiling, and requirements that two members sign, and Board approve, application were insufficient, without more. to show that procedures operated in practice to make club's membership practices selective).

2.

If an accommodation engages in little or no selectivity in choosing its members, this constitutes strong evidence that it is "public," and thus subject to the proscriptions of the LAD. *Accord Concord Rod and Gun Club, Inc. v. Massachusetts Comm'n Against Discrimination*, 524 *N.E.*2d 1364, 1367 (Mass. 1988) (noting that "determinative factor" in characterizing organization—already stipulated by parties as being "place" and "accommodation"—as "public," and thus subject to state antidiscrimination law, is "total absence of genuine selectivity in membership").

The mere fact that there is some genuine selectivity in acceptance of members is not incompatible with "public" status. That principle is supported by the understanding and practice of the Division on Civil Rights (Division), the administrative agency that is empowered under the LAD to enforce its antidiscrimination provisions. *See Nelson v. Board of Educ.*, 148 *N.J.* 358, 364 (1997) ("The interpretation of a statute by the administrative agency charged with its enforcement is entitled to great weight.").

The Division has held that some genuine selectivity may be rendered inconsequential when balanced with other overwhelmingly unselective membership criteria. *See Hinden v. United States Power Squadrons*, No. PO2S-105 (Div. on Civil Rights Dec. 21, 1973), *aff'd*, No. A-3104-73 (App. Div. July 18, 1975), *certif. denied*, 69 *N.J.* 382 (1975), *cert. denied*, 426 *U.S.* 943, 96 *S. Ct.* 3160, 49 *L. Ed.* 2d 1180 (1976). In *Hinden*, the Division held that the Power Squadrons, a national boating organization that had local chapters in New Jersey, was a public accommodation operating in violation of the LAD because it refused admission to women. The Power

Squadrons exhibited some genuine selectivity in the selection of new members, requiring the successful completion of a basic piloting course as a prerequisite for admission. The Division, however, recognized that the piloting course was itself a public accommodation because it was open to all members of the public free of charge, and regardless of sex or any other limitation. *Hinden, supra*, No. PO2S-105, slip op. at 2 (incorporating Sylvia B. Pressler, hearing examiner (now Presiding Judge, Appellate Division), *Findings of Fact and Conclusions of Law* 14 (June 1, 1973)). "Moreover, and almost without exception, every man who passe[d] the basic piloting examination [was] invited to membership," while every woman who passed was excluded. *Ibid.* The Division concluded that, despite the fact that the piloting test was used in the ad- missions process and was a genuine criterion in that a passing grade was required, on balance the Power Squadrons's "membership invitation [was] basically as publicly oriented as [was] the public piloting course itself." *Ibid.*

Additionally, other factors, traditionally relied upon in the determination of whether a place of accommodation is "public," may outweigh the presence of genuine selectivity in ultimately finding that an organization is subject to the LAD. *See ante* at — (slip op. at 33) (noting that broad public solicitation, maintenance of close relationships with government or other public accommodations, or similarity to enumerated or previously recognized public accommodations are factors that are helpful in determining whether organization is "public accommodation"); *Frank v. Ivy Club*, 120 *N.J.* 73, 104 (1990) (holding that eating club with very selective membership criteria was public accommodation because of its "symbiotic relationship" with university, which was itself subject to LAD).

In sum, membership selectivity is relevant but may not be determinative of whether an organization meets the LAD's definition of "place of public accommodation." Such membership selectivity, genuinely applied in practice, may show that a place of accommodation that is otherwise "public" satisfies the LAD's "distinctly private" exception. Conversely, the absence of genuine selectivity is always persuasive proof that an organization qualifies as "public."

3.

The reality is that Boy Scouts rarely, if ever, denies membership based on any selection criteria other than age or gender. *See ante* at — (slip op. at 46-51). According to *A Representative Membership*, a Boy Scouts publication prepared in 1975 for BSA Executive Board members; national and local council presidents, members and staff; district committee members; and commissioners:

> *Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy.* The National Council and Executive Board have always taken the position that Scouting should be made available for *all boys who meet entrance age requirements.*

[*Id.* at 2 (emphasis added).]

As a result of Boy Scouts' unselective membership criteria, the organization has more than five million youth and adult members in the United States, and over 100,000 in New Jersey.

Boy Scouts' lack of genuine selectivity is further underscored by the testimony of James William Kay, the highest ranking employee in Monmouth Council and the official who first made the decision to terminate Dale. Kay stated in deposition that he was not aware of any previous rejection by BSA's National Council of an adult application

for membership in Monmouth Council. Kay was likewise unaware of any membership rejection in the previous council with which he was affiliated for eight and one-half years. Moreover, the fact that Boy Scouts does not require new members to be sponsored by a current member is further evidence that Boy Scouts does not engage in a genuine selection process. *See Kiwanis, supra,* 806 *F.*2d at 475.

The Appellate Division properly viewed Boy Scouts' "undisputed invitation for membership in its literature to 'all boys,' " as rendering its stated " 'selectivity' criteria inconsequential." 308 *N.J. Super.* 516, 538.[2] The absence

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[2] Courts and jurists of other jurisdictions have reached a similar conclusion. For example, in *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 *P.*2d 218, 236 (Cal. 1998), although the California Supreme Court held that the Boy Scouts is not the functional equivalent of "a classic 'public accommodation or amusement' " under California's common law, the court noted that "Boy Scouts is generally nonselective in its admission policies." *See also Welsh v. Boy Scouts of Am.*, 993 *F.*2d 1267, 1283 (7th Cir.) (Cummings, J., dissenting) (observing that "[m]embership [in Boy Scouts] is not selective"; "[o]ther than the mention of God in the oath, which must exclude an extremely small—though indeterminate—number of children, the only substantive requirement for membership is age, which is not so much a matter of selectivity as a basic common denominator"), *cert. denied*, 510 *U.S.* 1012, 114 *S. Ct.* 602, 126 *L. Ed.* 2d 567 (1993); *Schwenk v. Boy Scouts of Am.*, 551 *P.*2d 465, 473 (Or. 1976) (O'Connell, J., dissenting) ("[I]t is commonly known that membership in the Boy Scouts of America is open to any boy within the specified age group without any other limitation whatsoever."); *Merino v. San Diego County Council of the Boy Scouts of Am.*, No. 659236, slip op. at 9 (Cal. App. Dep't Super. Ct. July 7, 1994) (finding that "membership criteria for both juvenile and adult members [of Scouting] are non-selective"). *But see Welsh, supra,* 993 *F.*2d at 1276 ("Although the Scouts intentionally admit a large number of boys from diverse backgrounds, admission to membership is not without the exercise of sound discretion and judgment. This is evident from the Constitution and By-laws as well as the Boy Scouts Oath and Scout Law.").

of any evidence of genuine selectivity on the part of Boy Scouts compels the conclusion that Boy Scouts is "public."

II

Boy Scouts maintains that even if it is deemed a "place of public accommodation" that is subject to the LAD, its decision to expel Dale based on his expression of his sexual orientation is protected under the First Amendment. The Court rejects that defense because Boy Scouts has failed to demonstrate a sufficiently protectable expressive interest in respect of homosexuality. *Ante* at — (slip op. at 69-70).

The crux of the First Amendment analysis lies in an identification of the expressive interests of the organization and a determination of whether those interests are undermined or frustrated by the membership of the excluded person. Central to that inquiry is the question of whether membership was denied based on the person's identity or status *per se*, or alternatively, on the person's expressed views. We recognize today that Boy Scouts engaged in status-based discrimination when it terminated Dale. *Id.* at — (slip op. at 75, 77-78, 89). I fully concur in that reasoning and result. The Court's holding is especially significant because of the distinctive interdependence of expression and identity for lesbians and gay men, and the effect of that merger of speech and status on an organization's First Amendment freedom of expressive association.

A.

A hallmark of the case law defining the contours of the right of expressive association is an identifiable demarcation between a person's status and expression. *See Board of Directors of Rotary Int'l v. Rotary Club*, 481

U.S. 537, 548, 107 *S. Ct.* 1940, 1947, 95 *L. Ed.* 2d 474, 486 (1987) (noting that because clubs "do not take positions on 'public questions,' including political or national issues," the inclusion of women, as such, as members will not "affect in any significant way the existing members' ability to carry out their various purposes"); *see also New York State Club Ass'n v. City of New York*, 487 *U.S.* 1, 13, 108 *S. Ct.* 2225, 2234, 101 *L. Ed.* 2d 1, 16 (1988) ("If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of . . . legitimate criteria for determining membership."); *Roberts v. United States Jaycees*, 468 *U.S.* 609, 627, 104 *S. Ct.* 3244, 3254, 82 *L. Ed.* 2d 462, 477 (1984) (holding that law prohibiting sex discrimination was not violative of all-male organization's freedom of expressive association in part because it "imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members").

The rationale for drawing a distinction between status and expression, as explained in *Roberts, supra,* is that "unsupported generalizations" and stereotypes based on a person's identity are not permissible means of ascertaining the particular views of that person:

> In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations, or that the organization's public positions would have a different effect if the group were not "a purely young men's association," the Jaycees relies solely on unsupported generalizations about the relative interests

> and perspectives of men and women. . . [W]e have repeatedly condemned legal decisionmaking that relies uncritically on such assumptions. . . . [W]e decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech.

[468 *U.S.* at 627-28, 104 *S. Ct.* at 3255, 82 *L. Ed.* 2d at 478.]

In contrast to exclusion based on status-based stereotypes, when the denial of membership is premised on actual expression, the organization can legitimately claim a basis for its assessment that the excluded person would "change the content or impact of the organization's speech." *Id.* at 628, 104 *S. Ct.* at 3255, 82 *L. Ed.* 2d at 478.

Organizations may rely on their First Amendment right to exclude potential members solely on the basis of status in certain narrowly prescribed circumstances. As the United States Supreme Court has explained:

> It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.

[*New York State Club Ass'n, supra*, 487 *U.S.* at 13, 108 *S. Ct.* at 2234, 101 *L. Ed.* 2d at 16.]

Thus, for example, when an organization has a unifying purpose that motivates its members to join together as an association or group, *i.e.*, a core purpose, and the inclusion of a particular person would be inconsistent or incompatible with that purpose, the expressive association rights of the organization would support the exclusion. *See Invisible Empire of the Knights of the Ku Klux Klan v. Town of Thurmont*, 700 *F. Supp.* 281, 289 (D. Md. 1988) (upholding exclusion of African American participants in political march because "group's primary purpose is to advocate one main concept—that blacks and whites should not mix. Allowing blacks to march with the KKK would change the primary message which the KKK advocates."). A "specific expressive purpose" is frequently, although not necessarily, the core or primary purpose of an organization. Such a central purpose, if compromised, would most evidently inhibit an association's ability to effectively advocate its viewpoints. The critical point is that a "specific expressive purpose" must be clear, particular, and consistent.

These considerations bear relevantly on the right of expressive association. The line between status-based and speech-based exclusion has been decisive to expressive association jurisprudence, even when that distinction was not readily apparent. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 *U.S.* 557, 115 *S. Ct.* 2338, 132 *L. Ed.* 2d 487 (1995), the Supreme Court held that GLIB, an organization of Irish lesbians and gay men, was properly excluded from marching in Boston's St. Patrick's Day parade under a banner conveying a message of Irish and lesbian and gay pride. The Supreme Court noted that it was this expression, and not the homosexual identity of the marchers themselves, that formed the petitioning parade organizers' basis for the exclusion of GLIB:

> [Petitioners do not object to] the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. Petitioners disclaim any intent to exclude homosexuals as such,

> and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.

[*Id.* at 572, 115 *S. Ct.* at 2347, 132 *L. Ed.* 2d at 503.]

The Supreme Court observed that "the record [] corroborates the expressive nature of GLIB's participation." *Id.* at 570, 115 *S. Ct.* at 2346, 132 *L. Ed.* 2d at 502. Specifically, the Supreme Court determined that "GLIB was formed for the very purpose of marching in [the parade] . . . in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade." *Ibid.*, 115 *S. Ct.* at 2346, 132 *L. Ed.* 2d at 501.

The Supreme Court also determined that the parade itself is a "form of expression, not just motion." *Id.* at 568, 115 *S. Ct.* at 2345, 132 *L. Ed.* 2d at 500. For that reason, the Supreme Court noted that "GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own," *id.* at 570, 115 *S. Ct.* at 2346, 132 *L. Ed.* 2d at 501, and that by engaging in that form of expressional activity, GLIB's inclusion was incompatible with or compromised the expressional activities of the parade itself.

Fundamental to the analysis of the Supreme Court, then, was its extrapolation from the record of a basis for concluding that GLIB had sought to engage in expression that was conspicuously and unmistakenly separate from simply serving to identify its members. The Supreme

Court's description of that expression as distinct from status was central to its *Hurley* holding.

1.

This case does not squarely fall within the paradigm suggested by those authorities defining the contours of the expressive association right because the speech here is so closely intertwined with the identity of the speaker. Thus, as the Court recognizes, while Boy Scouts frames its expulsion of Dale as grounded on an objection to his expression of his homosexuality, that exclusion is tantamount to one based on Dale's status as a homosexual. *Ante* at — (slip op. at 89); *cf. Able v. United States*, 880 *F. Supp.* 968, 973 (E.D.N.Y. 1995) (noting in challenge to constitutionality of military's "don't ask, don't tell" policy that plaintiffs, in stating that they are homosexuals, "have done no more than acknowledge who they are, that is, their status," and that such speech "implicates the First Amendment value of promoting individual dignity and integrity"), *vacated*, 88 *F.*3d 1280 (2d Cir. 1996) (vacating primarily on ground of judicial deference to military).[3]

The Court's recognition of the speciousness of drawing a distinction between discrimination grounded in expression versus status in this context, *ante* at —— (slip op. at 89), was previously recognized by Justice Brennan who observed that sometimes " 'speech' [] is better evaluated as no more than a natural consequence of [a person's] sexual orientation." *Rowland v. Mad River Local Sch. Dist.*,

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[3] The District Court in *Able* further rejected as unconstitutional "a policy that purportedly directs discharge based on 'conduct' " while "defining 'conduct' to include statements revealing one's homosexual status" because such policy transmogrifies "a mere acknowledgment of status" into "an admission of misconduct." 880 *F. Supp.* at 975.

470 *U.S.* 1009, 1017 n.11, 105 *S. Ct.*, 1373, 1379 n.11, 84 *L. Ed.* 2d 392, 397 n.11 (1985) (Brennan, J., dissenting from denial of cert.). In *Rowland*, the jury found that the petitioner, a schoolteacher, had been dismissed from her job "for no other reason" than "because she was a homosexual who revealed her sexual preference." *Id.* at 1009, 105 *S. Ct.* at 1373, 84 *L. Ed.* 2d at 392 (citation omitted). Justice Brennan likened the petitioner's expression of her sexual identity to fellow employees to the generally held knowledge of co-workers about "whom their fellow employees are dating or to whom they are married." *Ibid.* In such instances, wrote Justice Brennan, "it is realistically impossible to separate [] spoken statements from [] status." *Ibid.*

The confluence of status and expression when both relate to the speaker's sexual orientation is "self-identifying speech." Such expression as 'the statement 'I am gay' is illocutionary— like the statements 'J'accuse,' 'I thee wed,' or 'I bet you,' it not only describes, but performs, the action named." Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 *Yale L.J.* 485, 550 (1998) (footnote omitted). Self-identifying speech "makes the connection between speech and status," and is illustrated by the ACT UP slogan, "I am out, therefore I am." *Ibid.* (footnotes omitted). Some scholars maintain that the ability to self-identify is critical to being a lesbian or gay man. *See* Brian C. Murchison, *Speech and the Self-Realization Value*, 33 *Harv. C.R.-C.L. L. Rev.* 443, 468 (1998) ("Self-realization [] is what speech (including expressive activity) makes possible."); Nan D. Hunter, *Identity, Speech, and Equality*, 79 *Va. L. Rev.* 1695, 1718 (1993) ("Self-identifying speech does not

merely reflect or communicate one's identity; it is a major factor in constructing identity.").

For purposes of antidiscriminaton laws, the relevance of self-identifying speech is not so much in realizing identity, as in its singular role in revealing identity. The importance of self-identifying speech inheres in its legal effect—that is, in the functional capacity of such speech to disclose or clarify the status of a person when that status is entitled to protection against discrimination. A person covered by the LAD has the right to enjoy his or her protected status without suffering discrimination because of who he or she is. If the very means of making those characteristics known—self-identification—can legitimately justify discrimination against that person, then the antidiscrimination protections of the LAD are illusory.

The interdependence of identity and speech is particularly evident where a distinguishing characteristic of identity is not readily apparent, as in the case of sexual orientation. In that regard, there is a clear parallel between status based on sexual orientation and that based on religion. *See* David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 *Ohio St. L.J.* 491 (1994). Unlike characteristics that are obvious upon casual observation, religion and sexual orientation are unknowable unless the person self-identifies.

Courts have recognized that expression and identity can be interdependent in the context of religion. *See Islamic Center v. City of Starkville*, 840 *F.*2d 293, 300 (5th Cir. 1988) (noting that expression of religious beliefs "communicates to outsiders the identity of the group and [a person's] own identity as a member of it, a form

of self-expression"). Accordingly, the United States Supreme Court has held that in order to adequately insulate religion from state interference, government may not "impose special disabilities on the basis of religious views or religious status." *Employment Div., Dep't of Human Resources v. Smith*, 494 *U.S.* 872, 877, 110 *S. Ct.* 1595, 1599, 108 *L. Ed.* 2d 876, 884 (1990).

The significance of the connection between identity and expression in respect of sexual orientation has been similarly recognized by New Jersey's Legislature in enacting protections for sexual minorities in the LAD. *See ante* at —— (slip op. at 82-84). When amending the LAD in 1991 to prohibit discrimination based on "affectional or sexual orientation," the Legislature defined the scope of protection to encompass both concepts:

> "Affectional or sexual orientation" means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, *identity or expression*, having a history thereof or being perceived, presumed or identified by others as having such an orientation.

[*N.J.S.A.* 10:5-5(hh) (emphasis added).]

In so doing, the Legislature affirmed the significant role of self-identifying speech for lesbians and gay men, much in the same way that the Supreme Court has acknowledged that role in respect of religion.

2.

A prime example of self-identifying speech is the language of "coming out," that is, publicly acknowledging one's self as lesbian or gay. Dale's acknowledgement of his homosexuality, therefore, constitutes self-identifying speech, and his exclusion from Boy Scouts cannot be based solely on that expression. As self-identifying speech,

"it is realistically impossible to separate [Dale's] spoken statements from [his] status." *Rowland, supra*, 470 *U.S.* at 10017 n.11, 105 *S. Ct.* at 1379 n.11, 84 *L. Ed.* 2d at 397 n.11. Thus, as the Court concludes, Dale's expulsion was not based on his expression of views, but on his sexual orientation. *Ante* at —— (slip op. at 75, 77, 89).

The Court explains that Dale first acknowledged his own sexual orientation to himself, his family, and his friends while he was a student at Rutgers University. *Id.* at —— (slip op. at 16). Boy Scouts became aware of Dale's sexual orientation only by way of a newspaper article,[4] *id.* at —— (slip op. at 16-17), which identified Dale as gay:

> James Dale, 19, co-president of the Rutgers University Lesbian/Gay Alliance . . . said he lived a double life while in high school, pretending to be straight while attending a military academy.
>
> He remembers dating girls and even laughing at homophobic jokes while at school, only admitting his homosexuality during his second year at Rutgers.
>
> "I was looking for a role model, someone who was gay and accepting of me," Dale said, adding he wasn't just seeking sexual experiences, but a community that would take him in and provide him with a support network and friends.

[Kinga Borondy, *Seminar Addresses Needs of Homosexual Teens, Star-Ledger* (Newark), July 8, 1990, § 2, at 11.] To treat this public identification as only expression ig-

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[4] The article reported on a conference held at Rutgers University, sponsored by several groups including the National Association of Social Workers-New Jersey Task Force on Lesbian/Gay Issues and Rutgers University School of Social Work, which addressed the unique problems faced by homosexual teenagers struggling to come to terms with their sexual orientation, including an alarmingly high incidence of suicide attempts.

nores the reality that such speech is inextricably linked to Dale's status as a gay man. As an editorial commenting on the Appellate Division's judgment in this case recognized:

> The Boy Scouts would never have known if James Dale hadn't told them. That has always been the difference about the movement for gay rights. Homosexuals aren't visible. They have to stand up and identify themselves in order to be discriminated against.

[*The Invisible Victory, N.Y. Times*, March 12, 1998, at A26.]

Had Dale expressed more general views on the morality, social implication, history, or etiology of homosexuality in his role as a Boy Scouts leader, which directly conflicted with Boy Scouts' stated positions, Boy Scouts could claim that its discrimination was based purely on expression.[5] Dale's statement of his identity, however, does not express a view about homosexuality generally or specifically advocate that homosexuality is moral. *See Merino, supra*, No. 659236, slip op. at 16 (noting that "acknowledgment of homosexuality does not translate to a 'teaching' that homosexuality is proper or improper any more than a Scout admitting he is Catholic amounts to a 'teaching'

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5 A recent California case, wherein a young man was denied Boy Scouts membership after he stated to a local council's executive director that he wanted to join the Boy Scout program "because he so firmly believed personally in a homosexual lifestyle that there was . . . not anything wrong with it, and he wanted to make sure that other kids understood that," illustrates this distinction. *See Curran, supra*, 952 *P.*2d at 254 (Kennard, J., concurring) (observing that requiring plaintiff's membership would have violated Boy Scouts' right to expressive association). Here, unlike in *Curran*, Dale did not seek membership in order to challenge Boy Scouts' purported views on homosexuality or to project his own views on other scouts.

that Catholicism is the only proper religion"). As the Court recognizes, "Dale has never used his leadership position or membership to promote homosexuality, or any message inconsistent with Boy Scouts' policies. . . . [and] there is no indication that Dale intends to actively 'teach' anything whatsoever about homosexuality as a scout leader, or that he will do other than Boy Scouts instructs him to do—refer boys to their parents on matters of religion and sex." *Ante* at —— (slip op. at 87).

3.

Because Boy Scouts excluded Dale based on his status as a homosexual, Boy Scouts must demonstrate a "specific expressive purpose" in respect of homosexuality for that exclusion to be permissible. *See supra* at —— (slip op. at 20-21). That requirement demands a showing of a clear, particular, and consistent message. *Supra* at —— (slip op. at 21).

Boy Scouts' position in respect of homosexuality cannot be characterized as clear or particular. While Boy Scouts advocates traditional moral values through its Boy Scout programs, *ante* at —— (slip op. at 71), it is not at all apparent that this position embraces any view concerning homosexuality. Further, while Boy Scouts professes that the terms "morally straight" and "clean" in the Scout Oath and Law stand for the proposition that homosexuality is immoral, those terms fail to convey any clear or particular message on homosexuality or the precept that homosexuality is immoral. *See ante* at — (slip op. at 72-73). This fact is underscored by Dale's testimony, as well as the affidavits of hundreds of other scouts, that they were unaware of any BSA position on the morality of homosexuality.

The inconsistency and vagueness of Boy Scouts' position regarding its members' views on morality generally,

and homosexuality in particular, further belies the existence of a "specific expressive purpose" in this regard. *See id.* at —— (slip op. at 73-75). Boy Scouts acknowledges that "moral fitness" is an individual choice and defers its ultimate definition to its members:

> Morality . . . concerns the "principles of right and wrong" in our behavior, and "what is sanctioned by our conscience or ethical judgment." . . . In any consideration of moral fitness, a key word has to be "courage." A boy's courage to do what *his head* and *his heart* tell *him* is right. And the courage to refuse to do what *his heart* and *his head* say is wrong.

[*Scoutmaster Handbook* 71 (1990) (emphasis added).] Dale appears to have heeded and lived by Boy Scouts' dictate that individual conscience should guide a Scout's moral decision-making. Dale wrote in his affidavit:

> As a Scout, I promised to live by the Scout Oath. . . . I believed that the Scout Oath stood for my commitment to live an honorable life, *to set standards for myself*, and to do my best to serve others. . . . As I grew older, my commitment to Scouting deepened . . . Scouting . . . *taught me how to deal with the ethical choices I encountered* as a teenager.

Boy Scouts' official position on issues of sexuality is that "boys should learn about sex and family life from their parents, consistent with their spiritual beliefs." *Ante* at — (slip op. at 13). Numerous religious denominations sponsoring Boy Scout units subscribe to the view that homosexuality is compatible with their religious precepts. *Id.* at — (slip op. at 12-13). Boy Scouts' directive that its members should follow those entities on matters of individual morality, including sexual mores, indicates that tolerance concerning homosexuality is implicit in Boy Scouts' own message on morality. *See id.* at — (slip. op. at 79) (noting that exclusion of members solely on basis of their homosexuality is "antithetical to the organization's goals and philosophy" and "inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership").

Moreover, BSA only charters and approves sponsoring organizations that are "'compatib[le] with the aims and purposes of [Boy Scouts].'" *Id.* at — (slip op. at 6). The Court recognizes that the fact that BSA has repeatedly renewed the charters of religious organizations adhering to a view that homosexuality is moral, negates and undermines the alleged consistency of a contrary message. *See id.* at — (slip op. at 74-75). Additionally, approximately one-fifth of the BSA chartering organizations in New Jersey are public schools and school affiliated groups, and over two hundred Boy Scout units are sponsored by other public entities, such as fire departments and law enforcement agencies. *Ante* at — (slip op. at 7). The LAD mandates that those entities may not discriminate on the basis of affectional or sexual orientation. *N.J.S.A.* 10:5-4. The continued sponsorship of Boy Scouts units by such public entities is at odds with Boy Scouts' purported view on homosexuality, and thus constitutes further direct evidence of the inconsistency of Boy Scouts' message.

Because Boy Scouts has not established a clear, particular, and consistent message concerning homosexuality, the First Amendment cannot excuse Boy Scouts' status-based discrimination against a member, based solely on his sexual orientation, in violation of the LAD.

B.

Self-identifying speech that serves only to reveal the status of the speaker is always vulnerable to misinterpretation and misunderstanding based on stereotypes that are associated with the speaker's status. The reliance on such stereotypes to import additional meaning to self-identifying speech is impermissible.

The Court observes that "[t]he United States Supreme Court has not hesitated to uphold the enforcement of a state's antidiscrimination statute against an expressive association claim based on assumptions in respect of status that are not part of the group members' shared expressive purpose." *Ante* at — (slip op. at 75). The very reason for the distinction between status-based and speech-based exclusion in the Supreme Court's expressive association jurisprudence is that such stereotypical assumptions may not be relied upon to ascertain a person's views. *See supra* at — (slip op. at 19-20). In contrast, an organization may rely on expression to justify a speaker's expulsion from membership when that speaker's expression encompasses "ideolog[y] or philosoph[y that is] different from those of [the organization's] existing members." *Roberts, supra,* 468 *U.S.* at 627, 104 *S. Ct.* at 3254, 82 *L. Ed.* 2d at 477. When an organization does not ground its decision to exclude on stereotypes, but rather on the expressed views of the speaker, that decision is based on a verifiable measure of whether the speaker's membership would be antithetical to the organization's purposes. *See supra* at — (slip op. at 20).

In the context in which speech serves to identify the speaker, expression of one's sexual orientation is inseparable from status. *See supra* at — (slip op. at 23-28). Under that construct, status itself is revealed and realized by speech. It follows that expression that serves only to

self-identify cannot be further infused with additional content that is derived from status-driven generalizations or stereotypical assumptions serving as "shorthand measures" of a person's unexpressed views. *See New York State Club Ass'n, supra,* 487 *U.S.* at 13, 108 *S. Ct.* at 2234, 101 *L. Ed.* 2d at 16. Stripped of all adverse implications that rest solely on such stereotypes, statements like "I am gay" express nothing more than the sexual orientation of the speaker; no legitimate inference about the speaker's morality can be drawn. Accordingly, a homosexual cannot be said to interfere with the expressive associational rights of Boy Scouts merely because he publicly self-identifies as such.

The same repudiation of status-based stereotypes compelled by the Supreme Court's First Amendment jurisprudence is demanded by the LAD. *See ante* at — (slip. op. at 79-82) (observing that "[t]he invocation of stereotypes to justify discrimination is all too familiar," and that LAD is intended to "eliminate the destructive consequences of discrimination from our society"). The Appellate Division soundly observed that by amending the LAD in 1991 to protect persons from discrimination based on "affectional or sexual orientation," the Legislature "implicit[ly] recogni[zed] that discrimination based on 'archaic' and 'stereotypical notions' about homosexuals that bears no relationship to reality cannot be countenanced." *Ante* at — (slip op. at 82-83) (quoting 308 *N.J. Super.* at 549). Accordingly, we emphatically reject the use of stereotypical assumptions about homosexuals as justification for discrimination based on "affectional or sexual orientation." *Id.* at — (slip op. at 83-84).

One particular stereotype that we renounce today is that homosexuals are inherently immoral. That myth is repudiated by decades of social science data that con-

vincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in and contribute responsibly and positively to society. *See* Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research* 1 *L. & Sexuality* 133, 134 (1991) (presenting "considerable body of social science data" that counter "longstanding cultural myths and stereotypes that depict lesbians and gay men as immoral, criminal, sick, and drastically different from what most members of society would consider 'normal' "). Like stereotypes about an individual based on sex or race, similar assumptions about a lesbian or gay man are false and unfounded, and reveal nothing about that individual's moral character, or any other aspect of his or her personality:

> A homosexual orientation tells nothing reliable about abilities or commitments in work, religion, politics, personal and social relationships, or social activities, except to the extent that in many areas the lives of gay people are frequently conditioned by the attitudes of others.

[*Gay Rights Coalition v. Georgetown Univ.*, 536 *A*.2d 1, 37 (D.C. App. 1987) (citations omitted).]

In short, a lesbian or gay person, merely because he or she is a homosexual, is no more or less likely to be moral than a person who is a heterosexual. Accordingly, as the Appellate Division recognized below, there is no reason to view "a gay scoutmaster, solely because he is a homosexual, [as lacking the] strength of character necessary to properly care for [and] impart BSA humanitarian ideals to the young boys in his charge." 308 *N.J. Super.* at 552. "Plaintiff's exemplary journey through the BSA ranks is testament enough that these stereotypical notions about homosexuals must be rejected." *Ibid.*

The Appellate Division also observed that another particularly pernicious stereotype about homosexuals is implicit in Boy Scouts' arguments: "the sinister and unspoken fear that gay scout leaders will somehow cause physical or emotional injury to scouts." *Id.* at 551. The myth that a homosexual male is more likely than a heterosexual male to molest children has been demolished. *See* Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 *Pediatrics* 41 (1994) (concluding that most child abuse appears to be committed by situational child abusers who present themselves as heterosexuals); A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 *Archives Sexual Behav.* 175, 180-81 (1978) (concluding that "[h]omosexuality and homosexual pedophilia are not synonymous . . . . [and] that the adult heterosexual male constitutes a greater sexual risk to underage children than does the adult homosexual male"); *see also* Herek, *supra*, 1 *L. & Sexuality* at 152-56 (citing studies and concluding that "[i]t appears from these studies that gay men are no more likely than heterosexual men to molest children"); David Newton, *Homosexual Behavior and Child Molestation: A Review of the Evidence*, 13 *Adolescence* 29 (1978) (surveying data concerning male homosexuality and child molestation and concluding that "there is no reason to believe that anything other than a random connection exists between homosexual behavior and child molestation").

In light of this evidence, the belief that a gay scoutmaster poses a risk to young boys because of his sexual orientation is patently false, and cannot in any way bolster Boy Scouts' First Amendment defense. Accordingly, it must be rejected as an unfounded stereotype. *Accord Doe v. British Univ. N.A. Club*, 788 *F. Supp.* 1286, 1292

(D. Conn. 1992) (rejecting argument that child molestation was "foreseeable consequence of [] sexual orientation," noting that plaintiff "offers not one scintilla of credible evidence to suggest that homosexuals pose a greater risk of committing sexual molestation, assault, or criminal conduct than heterosexuals. . . . To find otherwise would be to hold that homosexuals are predisposed towards molesting or sexually assaulting minor males simply by virtue of their sexual orientation. The court cannot and will not adopt such a position absent sufficient evidentiary support.").

The trial court in this case impermissibly invoked stereotypical assumptions about homosexuals to give a specific meaning to "traditional morality," which it then ascribed to Boy Scouts. *Dale v. Boy Scouts of Am.*, No. MON-C-330-92, slip op. at 39-41 (Ch. Div. Nov. 3, 1995). The court, equating homosexuality with sodomy, expressed the view that because at the founding of Boy Scouts in 1910, "sodomy was a serious criminal offense in every state in the Union. . . . [t]o suggest that Boy Scouts had no policy against active homosexuality is nonsense."[6] *Id.* at 39-40. The court reasoned that sodomy laws were expressive of societal moral values, and from that concluded that Boy Scouts adopted and continues to adhere to those mores today.

Sodomy laws, as applied against homosexuals, reflect the same stereotypical thinking that we now recognize as invidious, including untenable assumptions about the morality of homosexuals, that have long been superseded

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[6] In addition to the court's reliance on stereotypes, its failure to differentiate between Dale's status as a homosexual and homosexual conduct was manifestly in error. *E.g.*, Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 *Va. L. Rev.* 1721, 1736 (1993).

and overcome. In successfully defending the constitutionality of its sodomy statute, for example, the State of Georgia relied on the stereotypes of homosexuals as immoral people and child molesters. *See Bowers v. Hardwick*, 478 *U.S.* 186, 195, 106 *S. Ct.* 2841, 2847, 92 *L. Ed.* 2d 140, 149 (1986); Lynne N. Henderson, *Legality and Empathy*, 85 *Mich. L. Rev.* 1574, 1641-49 (1987) (discussing arguments of Georgia Attorney General in *Bowers*). That same sodomy statute was later struck down as unconstitutional under the Georgia State Constitution. *Powell v. State*, 510 *S.E.*2d 18 (Ga. 1998). The 1979 repudiation of New Jersey's sodomy statutes, *N.J.S.A.* 2A:143-1, -2, is further evidence of the evolution in social thinking about homosexuality.

Sodomy laws and their implicit moral assumptions about homosexuals very much parallel miscegenation statutes, which were grounded in similar stereotypical notions concerning the morality of African Americans. *See Bowers, supra*, 478 *U.S.* at 210 n.5, 106 *S. Ct.* at 2854 n.5, 92 *L. Ed.* 2d at 158 n.5 (Blackmun, J., dissenting) (noting that parallel between miscegenation and sodomy laws "is almost uncanny"); *id.* at 216 n.9, 106 *S. Ct.* at 2857 n.9, 92 *L. Ed.* 2d at 162 n.9 (Stevens, J., dissenting) (observing that "miscegenation was once treated as a crime similar to sodomy"). Miscegenation laws, which existed in many states at Boy Scouts' founding in 1910, were grounded in antiquated notions of race and morality and were considered valid "measures designed to maintain White Supremacy"[7] until declared unconstitutional by

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[7] The trial court in *Loving*, for example, cited the following justification for Virginia's miscegenation statute:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no

the United States Supreme Court. *Loving v. Virginia*, 388 *U.S.* 1, 11-12, 87 *S. Ct.* 1817, 1823-24, 18 *L. Ed.* 2d 1010, 1017-18 (1966). The indefensibility of basing contemporary moral views regarding race on those laws is obvious. The same is true of placing current reliance on the archaic moral views underlying sodomy laws, which are totally inconsistent with present day conceptions of homosexuality.

It is not tenable to conclude that because at one time "traditional moral values" were based on unsupportable stereotypes about homosexuals, those values have survived and endured unchanged in contemporary times. It is similarly untenable to conclude, in the absence of a clear, particular, and consistent message to the contrary, that Boy Scouts—a federally chartered and nationally recognized organization with significant ties to governmental institutions and public entities that fully adhere to contemporary laws rejecting anachronistic stereotypes about homosexuality—remains entrenched in the social mores that existed at the time of its inception.

Stereotypes cannot be invoked to extend the meaning of self-identifying expression of one's own sexual orientation, and thereby become a vehicle for discrimination against homosexuals. Such stereotypes, baseless assumptions, and unsupported generalizations reflecting a discredited view of homosexuality as criminal, immoral and improper are discordant with current law and public policy. Accordingly, they cannot serve to define contemporary social mores and morality. Boy Scouts' adherence to "traditional moral values," its "belief in moral values" and its uncontroverted purpose to "encourage the moral development of its members," *ante* at — (slip. op.

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cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

[*Id.* at 3, 87 *S. Ct.* at 1819, 18 *L. Ed.* 2d. at 1013.]

at 71), remain undisturbed and undeterred by Dale's open avowal of his homosexuality.

III

For the foregoing reasons, I concur in the opinion of the Court.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2427-95T3

JAMES DALE,
Plaintiff-Appellant,
v.

BOY SCOUTS OF AMERICA and
MONMOUTH COUNCIL BOY SCOUTS OF AMERICA,
Defendants-Respondents.

Argued December 8, 1997—Decided Mar. 2, 1998

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County

Before Judges Havey, Landau and Newman.

The opinion of the court was delivered by HAVEY, P.J.A.D.

Plaintiff James Dale was expelled from his position as an Assistant Scoutmaster with defendant Monmouth Council, Boy Scouts of America when he publicly declared he was a homosexual. He was expelled by the Boy Scouts of America (BSA) because of its policy excluding avowed

homosexuals from membership in its organization. We conclude that: (1) the BSA is a place of public accommodation under New Jersey's Law Against Discrimination (LAD), *N.J.S.A.* 10:5-1 to -42; (2) the BSA's expulsion of plaintiff from his position with the BSA violated the LAD by depriving him of a public accommodation; and (3) the LAD's prohibition of the BSA's policy of excluding gay members does not infringe upon defendants' freedom of expressive association. Accordingly, except to affirm the dismissal of plaintiff's common law claim, we reverse and remand for further proceedings.

The BSA charters local groups to maintain units including Cub Scout Packs (boys under eleven), Boy Scout Troops (boys eleven to eighteen), and Explorer Posts (young men and women fourteen through twenty). The troops are sponsored by religious, civic, fraternal or educational organizations, and other groups whose goals are compatible with those of the BSA.

As of December 1992, the BSA reported 3,453,315 youth members and 1,172,485 adults registered in 123,045 traditional Scout units. The national organization is headed by a National Council and divided into regional administrative units and subdivided into local councils. Monmouth Council has jurisdiction over the geographical area in which plaintiff served. There are approximately 400 local councils. Monmouth Council was incorporated in 1924. In 1991, Monmouth Council had 9,446 youth members and 2,781 adults registered in 215 units.

The BSA was chartered by an Act of Congress in 1915, with its stated purpose:

> to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scout-

craft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now in common use by Boy Scouts.

The BSA's bylaws provide: "In achieving this purpose, emphasis shall be placed upon its educational program and the oaths, promises, and codes of the Scouting program for character development, citizenship training, mental and physical fitness." The BSA Mission Statement provides:

> It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.
>
> The values we strive to instill are based on those found in the Scout Oath and Law:

SCOUT OATH

On my honor I will do my best
To do my duty to God and my
country and to obey the Scout Law;

To help other people at all times;

To keep myself physically strong
mentally awake, and morally straight.

SCOUT LAW

A Scout is:

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent

According to the 1990 Boy Scout Handbook, understanding and agreeing to live by the Scout Oath and the Scout Law are among the joining requirements. According to the Declaration of Religious Principle in the BSA bylaws, although scouting is nonsectarian, all members must recognize an obligation to God.

The Scout Law, set forth in the 1911 Official Handbook for Boys, has remained fundamental and unchanged. The 1936 Handbook for Scoutmasters described the Scout Law as "the foundation upon which the whole Scout Movement rests." It explained:

> The genius of Scouting is most evident in the Law of the Movement. It was based upon the codes of old, transformed into a positive, living ideal for the modern boy, devised as *a guide to his actions rather than as repressive of his faults*. That is what makes the Scout Law outstanding.

The Scout Law neither commands nor prohibits, but positively states these desired qualities.

Plaintiff became a Cub Scout at the age of eight and remained an extremely active and successful youth member of the BSA, achieving the rank of Eagle Scout. In March 1989, seven months after his eighteenth birthday on August 2, 1988, he applied for adult membership and was approved. He then served as an Assistant Scoutmaster for Troop 73 in Matawan, during periods when he was not away at college.

Plaintiff has been a devoted and exemplary Boy Scout. He earned thirty merit badges, advanced to the highest rank, and held numerous trooper leadership positions, including Junior Assistant Scoutmaster. In addition, he was active in the Order of the Arrow, an affiliated honor camping association. In the Order of the Arrow, he was

chosen for the highest possible honor, Vigil, and also held numerous offices. Plaintiff was also selected as a delegate to the 1985 National Boy Scout Jamboree, and was chosen to speak at Monmouth Council functions on more than one occasion.

On August 5, 1990, plaintiff, twenty years old at the time, received a letter dated July 19, 1990, from James W. Kay, Council Executive of Monmouth Council, informing him that his registration was revoked. Registration is a prerequisite for service as a volunteer adult leader. The letter said in part:

> After careful review, we have decided that your registration with the Boy Scouts of America should be revoked. We are therefore compelled to request that you sever any relations that you may have with the Boy Scouts of America.
>
> You should understand that BSA membership registration is a privilege and is not automatically granted to everyone who applies. We reserve the right to refuse registration whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth.

Plaintiff answered by letter dated August 8, 1990, asking the grounds of the decision. In a letter dated August 10, 1990, Kay responded: "The grounds for this membership revocation are the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals." Kay explained later in a deposition that he became aware that plaintiff was an affirmed homosexual through a newspaper article. The article, published on July 8, 1990, in the Newark Star Ledger, was entitled, "Seminar addresses needs of homo-

sexual teens." It pictured plaintiff, a Rutgers student; identified him as co-president of the Rutgers University Lesbian/Gay Alliance; and quoted him as saying that he had pretended to be straight while in high school, "only admitting his homosexuality during his second year at Rutgers." According to Kay, plaintiff demonstrated his failure to live by the Scout Oath and Law by publicly avowing that he was a homosexual.

By letter dated November 27, 1990, Charles D. Ball, Assistant Regional Director, Northeast Region, BSA, informed plaintiff that the Northeast Region Review Committee supported the decision of Monmouth Council. After further correspondence, a December 21, 1990, letter from BSA's legal counsel David K. Park to plaintiff's counsel explained: "As your client is apparently an avowed homosexual and the Boy Scouts of America does not admit avowed homosexuals to membership in the organization, no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting."

According to plaintiff, he was "devastated" by the instruction to sever relations with scouting, which he interpreted to mean that he was not only removed from his position as Assistant Scoutmaster, but also stripped of all his scouting honors, including his Eagle Scout status. However, according to Kay, plaintiff was not stripped of any awards he had earned as a youth, including his attainment of Eagle Scout rank, and his membership revocation was kept confidential.

According to the BSA Rules and Regulations, to serve in an adult leadership position, an individual must be recommended by the scout executive, approved by the council executive board, and be at least twenty-one (eighteen for assistant leaders). All leaders must be commissioned annually. The BSA bylaws provide: "No per-

son shall be approved as a leader unless, in the judgment of the Corporation, that person possesses the moral, educational, and emotional qualities deemed necessary for leadership and satisfies such other leadership qualifications as it may from time to time require." The 1990 Troop Committee Guidebook lists "[h]igh moral standards" and "[c]ommitment to the ideals of Scouting" as the top two characteristics sought in a Scoutmaster. It also suggests that the same standards used to choose a Scoutmaster should be used to qualify Assistant Scoutmasters (eighteen and up).

The 1972 Scoutmaster's Handbook emphasized the leaders' duty as role models, and advised:

> You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons.
>
> . . . .
>
> What you are speaks louder than what you say. This ranges from simple things like wearing a uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.

According to Parvin L. Bishop, National Director of Program of the BSA, the requirements that a scout be "morally straight" and "clean" are inconsistent with homosexuality, and therefore known or avowed homosexuals or those who advocate to scouting youth that homosexual conduct is morally straight or clean, will not be registered as adult leaders. The BSA literature does not detail prohibited sexual conduct, but the 1990 Boy Scout Handbook includes a section on "Sexual Responsibility," which summarizes responsibilities to women, to children, to the scout's beliefs, and to himself. It says in part:

> For the followers of most religions, sex should take place only between married couples. . . .
>
> An understanding of wholesome sexual behavior can bring you lifelong happiness. . . .
>
> You owe it to yourself to enrich your life by learning what is right.

In a policy statement dated March 17, 1978, addressed to Executive Committee Members, the National Council asserted that an individual who openly declares himself to be a homosexual would not be selected to be a volunteer scout leader, be registered as a unit member, or be employed as a professional or nonprofessional. This was the earliest express statement concerning homosexual members that defendants produced. Later Position Statements affirmed that stance.

In a Position Statement dated January 1993, several years after the revocation of plaintiff's membership, the BSA stated in part:

> The Boy Scouts of America does not ask prospective members about their sexual preference, nor do we check on the sexual orientation of boys who are already Scouts.
>
> The reality is that Scouting serves children who have no knowledge of, or interests in, sexual preference. We allow youth to live as children and enjoy Scouting and its diversity without immersing them in the politics of the day.
>
> Membership in Scouting is open to all youth who meet basic requirements for membership and who agree to live by the applicable oath and law.

It summarized the BSA position:

> The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization.
>
> We do not believe that homosexuals provide a role model consistent with these expectations.
>
> Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.

Plaintiff filed a six-count complaint in the Superior Court, Chancery Division, alleging that defendants' revocation of his membership and his expulsion as an Assistant Scoutmaster violated the LAD, as well as certain common law rights. In the complaint he seeks both reinstatement and damages. Plaintiff filed a notice of motion for partial summary judgment seeking a declaration that he had been deprived of an accommodation in violation of the LAD. He also demanded an immediate reinstatement to his position as Assistant Scoutmaster. Defendants filed a cross-motion for summary judgment on all counts.

In granting summary judgment to defendants, the trial judge determined that the parties had stipulated that plaintiff was "a sexually active homosexual." The judge found that the BSA had consistently excluded from youth and adult membership any self-declared homosexual and that the BSA considered homosexual conduct neither "morally straight" under the Scout Oath nor "clean" under the Scout Law. The judge relied on the entrenched biblical and historical view of homosexuality as not only morally wrong, but criminal, as a basis for the presumption that, from its inception, the BSA implicitly subscribed to that historical view as well.

The judge concluded that plaintiff had no cause of action under the LAD because the BSA was not a "place of public accommodation" as defined by the Act. The judge also agreed with defendants that they qualified for the LAD exclusion in *N.J.S.A.* 10:5-5(*l*) for any "institution . . . which is in its nature distinctly private[.]" Finally, the judge concluded that defendants' "First Amendment freedom of expressive association rights prevent[ed] government from forcing them to accept [plaintiff] as an adult leader-member" in view of defendants' historical belief that homosexual conduct was morally wrong, and "[t]he presence of a publicly avowed active homosexual as an adult leader of boy scouts is absolutely antithetical to the purpose of Scouting."

The parties agree that there are no genuine issues of material fact. Accordingly, the issues raised by this appeal may be resolved as a matter of law.

I

Plaintiff contends that the BSA is a place of public accommodation under the LAD, prohibited from discriminating on the basis of affectional or sexual orientation. Plaintiff argues that his expulsion from the Boy Scouts and his position as an Assistant Scoutmaster violated the LAD by depriving him of the privileges and advantages of scouting based solely on his sexual orientation.

The LAD provides:

> All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national

origin, ancestry, age, marital status, *affectional or sexual orientation,* familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

[*N.J.S.A.* 10:5-4 (emphasis added).]

The categories "affectional or sexual orientation" were added in 1991. *L.*1991, *c.* 519, § 2. " 'Affectional or sexual orientation' means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." *N.J.S.A.* 10:5-5hh.[1]

The LAD renders unlawful certain employment practices or discriminations. *N.J.S.A.* 10:5-12. Plaintiff asserts in his complaint (first cause of action) that defendants have violated *N.J.S.A.* 10:5-12f, which provides in pertinent part that it is unlawful:

> For any owner, . . . agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, . . . on account of the . . . affectional or sexual orientation . . . of such person. . . .

In its definitions, the LAD lists, expressly without limitation, numerous places of public accommodation, which

1 Although plaintiff's membership was revoked in 1990, before the category for sexual orientation was added to the LAD, he later sought reinstatement in reliance on the LAD amendment. Defendants do not contend the "affectional or sexual orientation" provision of the LAD is inapplicable.

"shall include" such places as hotels, camps, shops, restaurants, theaters, swimming pools, hospitals, libraries, colleges and universities. *N.J.S.A.* 10:5-5(*l*). It further provides:

> Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any education facility operated or maintained by a bona fide religious or sectarian institution. . . .

[*Ibid.*]

The trial judge held that:

> BSA is not a "place of accommodation" under *N.J.S.A.* 10:5-12(f) and as defined in *N.J.S.A.* 10:5-5(*l*). The lengthy list set forth in the definition is a list of *places*—not one of organizations. A physical place to which one may point is clearly intended.

He added:

> A Boy Scout troop bears no similarity to the enumerated places of public accommodation. It consists of a small group of boys and their adult leaders who meet together in various places, viz. their regular meeting hall, in tents during summer camp or at other scout gatherings on scout-owned properties. None of those activities or places are open to the public. The benefits to the boys spring not from the "facility" but from their interaction, training and experiences as a group. Those goals and objectives are totally different from "places" to which the public is invited.

The question whether the BSA is a "place of public accommodation" or "business" has been the subject of

lively debate in recent years in other jurisdictions. *See generally* John E. Theuman, Annotation, *Exclusion or Expulsion From Association or Club As Violation of State Civil Rights Act*, 38 *A.L.R.* 4th 628 (1985) (collecting cases). The extreme divergence of views on the social issues implicated is emphasized by the prevalence of vigorous dissenting opinions in most cases.

In *Welsh v. Boy Scouts of Am.*, 993 *F.*2d 1267 (7th Cir.), *cert. denied*, 510 *U.S.* 1012, 114 *S.Ct.* 602, 126 *L.Ed.*2d 567 (1993), the BSA denied membership to a boy who refused to affirm a belief in God, as required by the Boy Scout Oath. *Id.* at 1268. The Seventh Circuit held that the BSA was not a place of public accommodation under Title II of the Civil Rights Act of 1964, 42 *U.S.C.A.* § 2000a, because the statute by its own terms included only an entity that serves the public and may be classified as an "establishment," "place," or "facility," and did not include a membership organization unconnected to a structural facility. *Id.* at 1269. Likewise, the Kansas Supreme Court in *Seabourn v. Coronado Area Council, BSA*, 891 *P.*2d 385 (Kans. 1995), gave a narrow interpretation of "public accommodation" under the Kansas Act Against Discrimination. The court held that the BSA was entitled to reject plaintiff's application for an adult leadership position on the basis that he was a professed atheist. *Id.* at 391. The *Seabourn* court rejected an interpretation of public accommodations that divorced them from business establishments and contrasted the personal, private and on-going relationships fostered by scouting with the impersonal, economic and occasional interactions typical in business. *Id.* at 406.[2]

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[2] Several California courts have considered the issue of whether the Boy Scouts constituted a "business establishment" subject to the Unruh Civil Rights Act. In *Yeaw v. Boy Scouts of America*, 64 *Cal. Rptr.*2d 85, 91-92 (Ct. App.), *review granted and opinion superseded*, 942 *P.*2d 415 (Cal. 1997), the court held that the BSA could exclude females because it was not a "business establishment" under the Unruh Act. In *Curran v. Mount Diablo Council of BSA (Curran II)*, 29 *Cal. Rptr.*2d 580 (Ct. App.), *review granted and opinion superseded*, 874 *P.*2d 901 (Cal. 1994), the court determined that forcing the BSA to accept a homosexual as a troop leader would violate the First Amendment. In *Randall v. Orange County Council, BSA*, 28 *Cal. Rptr.*2d 53 (Ct. App.), *review granted and opinion superseded* 874 *P.*2d 900 (Cal. 1994), the court upheld application of the Unruh Act to prevent exclusion from a cub scout pack of twin boys who denied a belief in God. The Supreme Court has "depublished" all three decisions while the cases are pending before it, thereby nullifying their precedential value. *See Cal. Rules of Court* 976, 977 and 979.

In contrast to the *Welsh* view, Connecticut has interpreted its state public accommodations statute as regulating "the discriminatory conduct and not the discriminatory situs of an enterprise which offers its services to the general public." *Quinnipiac Council, BSA v. Commission on Human Rights and Opportunities*, 528 *A.*2d 352, 357 (Conn. 1987). However, the Supreme Court of Connecticut declined to rest its holding on this issue. Rather, it held that the BSA did not violate Connecticut's public accommodations statute by refusing to permit a woman to serve as a scoutmaster because there was no denial of "access to its goods and services" and therefore the woman was not deprived of an "accommodation," as that word was used in the statute. *Id.* at 358.

We reject the narrow interpretation given by *Welsh* to "place of public accommodation." In defining the term we must be mindful that the LAD is remedial "and should be read with an approach sympathetic to its objectives." *National Org. for Women v. Little League Baseball, Inc.*, 127 *N.J. Super.* 522, 530 (App. Div.), *aff'd*, 67 *N.J.* 320 (1974). "[T]he overarching goal of the [LAD] is nothing less than the eradication 'of the cancer of discrimina-

tion.'" *Fuchilla v. Layman*, 109 *N.J.* 319, 334 (1988) (quoting *Jackson v. Concord Co.*, 54 *N.J.* 113, 124 (1969)). Its provisions must be construed liberally to effectuate that purpose. *N.J.S.A.* 10:5-3 ("[t]he Legislature intends . . . that this act shall be liberally construed in combination with other protections available under the laws of this State"). The LAD should be (and has consistently been) construed broadly and "'with that high degree of liberality which comports with the preeminent social significance of its purposes and objects.'" *Andersen v. Exxon Co.*, 89 *N.J.* 483, 495 (1982) (quoting *Passaic Daily News v. Blair*, 63 *N.J.* 474, 484 (1973)).

Applying *Welsh*'s view that Title II applies only to a "place" would frustrate our goal of eradicating "the cancer of discrimination" in New Jersey. To have the LAD's reach turn on the definition of "place" is irrational because "places do not discriminate; people who own and operate places do." *Welsh, supra*, 993 *F.*2d at 1282 (Cummings, C.J., dissenting). No one can seriously argue that those who operate from a fixed "place" are more apt to discriminate than those who meet at varying locales. *Ibid.* Moreover, such a reading indiscriminately targets those who have the financial wherewithal to own or operate a "place," and excludes those who do not.

Indeed, New Jersey has rejected the narrow view advanced by *Welsh*. In *Little League, supra*, 127 *N.J. Super.* at 531, we held that Little League Baseball, Inc., is a "place of public accommodation" subject to the LAD. In rejecting Little League's assertion that it was not a "place of public accommodation" because it had no "place" or "situs," Judge Conford for the court observed that the term was one "of convenience, not of limitation." *Ibid.* He added

> The "place" of public accommodation in the case of Little League is obviously the ball field at which tryouts are arranged, instructions given, practices held and games played. The statutory "accommodations, advantages, facilities and privileges" at the place of public accommodation, *N.J.S.A.* 10:5-12(f), is the entire agglomeration of the arrangements which Little League and its local chartered leagues make and the facilities they provide for the playing of baseball by the children.

[*Ibid.*]

In the *Little League* court's view, the dispositive factor making Little League a public accommodation was that its invitation was "open to children in the community at large, with no restriction (other than sex) whatever." *Ibid.*

Even before *Little League* was decided, our Supreme Court had held that facilities and activities "offered to and . . . dependent upon the broad-based participation of members of the general public" are the types of accommodation the Legislature intended to reach through the LAD. *Fraser v. Robin Dee Day Camp*, 44 *N.J.* 480, 488 (1965). In *Fraser*, the owner of a day camp advertised the availability of its facilities to children from two to fourteen years of age. *Id.* at 482-83. Plaintiff's application to enroll his children was rejected because he was "colored." *Id.* at 483. No evidence was adduced before the Division on Civil Rights that the children had not met the health, physical and emotional standards required by the day camp. *Id.* at 484.

The Supreme Court in *Fraser* rejected the day camp's argument that, since it was not one of the enumerated "places" under the act, it was excluded, noting that the statute began by stating that a place of public accommodation "shall include," a term of "enlargement and not of limitation." *Id.* at 485; *see also Zorba Contractors,*

Inc. v. Housing Auth. of Newark, 282 *N.J. Super.* 430, 434 (App. Div. 1995). The *Fraser* Court observed that the day camp had offered many accommodations in common with swimming pools, recreation and amusement parks, motion picture houses, theaters, gymnasiums and schools, "all of which are specifically enumerated" in the statute as places of public accommodation. 44 *N.J.* at 487. The day camp was therefore "the type of accommodation which the Legislature intended to reach." *Ibid.*

In *Clover Hill Swimming Club v. Goldsboro*, 47 *N.J.* 25, 33 (1966), the Supreme Court revisited the issue and found that a private swimming club was a public accommodation under New Jersey's anti-discrimination statute because of the club's advertising and its extending "an invitation to the public generally" to join. The Court observed that the decision to operate as a private club "should not be permitted to obscure the accommodation's non-private nature." *Id.* at 34. " 'No device, whether innocent or subtly purposeful, can be permitted to frustrate the legislative determination to prevent discrimination.' " *Ibid.* (quoting *Jones v. Haridor Realty Corp.*, 37 *N.J.* 384, 396 (1962)); *see also Sellers v. Philip's Barber Shop*, 46 *N.J.* 340, 348 (1966) (a barber shop is a place of public accommodation because it caters to the public or by advertising or other form of invitation induces patronage generally). Similarly, in *Evans v. Ross*, 57 *N.J. Super.* 223, 231 (App. Div.), *certif. denied*, 31 *N.J.* 292 (1959), Judge Goldmann observed:

> [A]n establishment which caters to the public, and by advertising and other forms of invitation induces patronage generally, cannot refuse to deal with members of the public who have accepted the invitation, because of their race, creed, color, national origin or ancestry. The law is designed to insure

> that all citizens of this State shall have equal rights as members of the public and not be subjected to the embarrassment and humiliation of being invited to an establishment, only to find its doors barred to them. *Once a proprietor extends his invitation to the public he must treat all members of the public alike.*

[Emphasis added.]

We conclude that the BSA and its local councils are places of public accommodation. The BSA invites "the public at large," *Little League, supra*, 127 *N.J.* at 530, to join its ranks, and is "dependent upon the broad-based participation of members of the general public." *Fraser, supra*, 44 *N.J.* at 488. As of 1993, scouting had nearly 5,000,000 youth and adult members nationwide, and over 100,000 members in New Jersey alone. Plaintiff points out that nearly 90,000,000 boys and men have joined the scouting ranks since 1910. This is no doubt so because the BSA emphasizes open membership in order to maintain its vitality and to reach every aspect of society. Its publication "A Representative Membership" announces that:

> Our federal charter sets forth our obligation to serve boys. *Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy.* The National Council and Executive Board have always taken the position that *Scouting should be made available for all boys who meet entrance age requirements*

[Emphasis added.]

Moreover, the BSA engages in advertising and public promotion to encourage new membership. *Fraser, supra*, 44 *N.J.* at 488. Local councils run radio and television spots and conduct "school nights." The BSA has under-

taken national television campaigns, hired public relations firms and has produced magazine inserts in national magazines promoting the benefits of scouting. One BSA spokesman has explained "I think of scouting as a product and we've got to get the product into the hands of as many consumers as we can."

Citing *Kiwanis Int'l v. Ridgewood Kiwanis Club*, 806 *F.*2d 468 (3d Cir. 1986), *reh'g denied*, 811 *F.*2d 247 (3d Cir.), *cert. dismissed*, 483 *U.S.* 1050, 108 *S.Ct.* 362, 97 *L.Ed.*2d 812 (1987), the BSA argues that it is not a place of public accommodation because its membership practices and policy do not "reflect an open and unrestricted invitation to the community at large to join" the organization. *Id.* at 476. The BSA points to the fact that it engages in "selectivity" in that membership "is restricted to those willing and able to understand and live by the Scout Oath and Scout Law."

Kiwanis Int'l involved a federal action between Kiwanis International and one of its local clubs, Kiwanis Ridgewood. Kiwanis International sought to revoke the local club's license to use the Kiwanis "marks" because the club had admitted a woman in violation of Kiwanis International bylaws. *Id.* at 470-71. The Third Circuit concluded that Kiwanis Ridgewood was not a place of public accommodation under New Jersey's LAD because of the selective criteria for membership in Kiwanis Ridgewood. *Id.* at 471. The evidence was that Kiwanis Ridgewood had only twenty-eight members. *Id.* at 475. Each new member had to be sponsored; sponsorship "acted as a primary screening mechanism in the maintenance of the quality of membership." *Ibid.* Moreover, the local club engaged in a selective, rather than large scale membership solicitation by sending invitations only to prospects already known by current members. *Ibid.* The court concluded:

> This evidence of membership practices and policy does not reflect an open and unrestricted invitation to the community at large to join Kiwanis Ridgewood. Rather, all the evidence points totally in the opposite direction. If the test of "place of public accommodation" is unselectivity, unrestrictedness, and open invitation, as *Little League* informs us that it is, it is evident Kiwanis Ridgewood's practices do not pass the test.

[*Id.* at 476.]

The BSA contends that membership in its organization is "no less selective than membership in a local Kiwanis club."

Kiwanis Int'l is clearly distinguishable. There the focus was on the attributes and membership criteria of a small local club. Here, plaintiff was expelled because of the BSA's enforcement of its national policy precluding avowed homosexuals from its membership. Thus, we focus on the membership criteria of the BSA as a national organization. The BSA's national membership criteria are clearly less restrictive than those applied by the local club in *Kiwanis Int'l.* The BSA's criteria, acceptance of the Scout Oath and adherence to its laws, are conditions not significantly different from the boys' willingness to abide by the standards of the Little League: requiring tryouts; demanding adherence to the rules of the game; and requiring the physical attributes and skills to play it. *See Little League, supra,* 127 *N.J.* at 530-31. Considering the undisputed invitation for membership in its literature to "all boys," we deem the BSA's "selectivity" criteria inconsequential.

The BSA adds that we should focus on the "even more restricted and selective" criteria for adult membership in deciding whether the BSA is a place of public accommodation. It points to the fact that troop committees weigh

prospective adult leaders according to various characteristics including: (1) high moral standards; (2) commitment to the ideals of scouting; (3) ability to relate to boys; (4) ability to keep a "cool head" under pressure; and (5) organizing ability.

We reject the suggestion that the BSA organization as a whole is not a place of public accommodation because more stringent membership criteria are applied to a single component of the organization, its adult members. Such a result is clearly inconsistent with the remedial purposes of the LAD. Acceptance of the argument would mean that the private clubs in *Clover Hill, supra,* 47 *N.J.* at 34 and *Fraser, supra,* 44 *N.J.* at 485, are not places of public accommodation because their member-counsellors or lifeguards are subject to more stringent, enhanced training criteria. An extension of defendants' argument would be that the BSA is not a place of public accommodation because of the demanding standards that must be met to become an Eagle Scout.

In any event, selectivity for membership is not necessarily dispositive. For example, colleges and universities are places of public accommodation, *see N.J.S.A.* 10:5-5(*l*), despite the rigorous admission requirements imposed by many. Moreover, the majority of New Jersey decisions do not embrace the notion, advanced by *Kiwanis Int'l* and the BSA here, that the litmus test in determining whether an organization is subject to the LAD is whether it employs selective membership criteria. For example, in *Frank v. Ivy Club,* 120 *N.J.* 73 (1990), *cert. denied,* 498 *U.S.* 1073, 111 *S.Ct.* 799, 112 *L.Ed.*2d 860 (1991), the issue was whether Princeton University's private eating clubs were "distinctly private" and thus exempt from the LAD. *Id.* at 102. Membership in certain eating clubs was by invitation only after the applicant submitted

to a "Bicker" process, involving interviews and a demanding selection process. *Id.* at 84-85. The Court concluded that the eating clubs were subject to the LAD notwithstanding these selective membership criteria because of the integral and "symbiotic relationship" between the eating club and the University, a place of public accommodation. *Id.* at 108. *See also Clover Hill, supra,* 47 *N.J.* at 31-32 (despite selectivity criteria employed by privately-owned swim club, the club was a place of public accommodation because it had extended an invitation to the public generally by advertisement or otherwise).

Other factors support the conclusion that the BSA is a place of public accommodation. The BSA offers accommodations which "have many attributes in common with [the places and activities enumerated under *N.J.S.A.* 10:5-5(*l*)] . . . which can be characterized either as educational or recreational in nature." *See Fraser, supra,* 44 *N.J.* at 487. The BSA seeks to establish in its members self-sufficiency, physical strength, cleanliness and healthiness through such outdoor activities as camping, biking and hiking. It also stresses educational topics such as democracy, civics, respect for the family and personal development.

Further, although the BSA may not have the type of integral and "symbiotic relationship" with a place of public accommodation, as existed in *Frank, supra,* 120 *N.J.* at 104, we cannot ignore the BSA's historic partnership with various public entities and public service organizations. Local BSA units are chartered by public schools, parent-teacher associations, firehouses, local civic associations, and the United States Army, Navy, Air Force and National Guard. The BSA's "learning for life" program has been installed in many public school classrooms throughout the country. Many troops meet in public

facilities. These relationships benefit the BSA. The BSA in turn provides essential services through its scouts to the public and quasi-public organizations. This close relationship underscores the BSA's fundamental public character.

For the foregoing reasons, we conclude that the BSA is a place of public accommodation under the LAD.

II

For the reasons above-expressed, we reject summarily the trial judge's conclusion that defendants qualified for the LAD exclusion in *N.J.S.A.* 10:5-5(*l*) for any "institution . . . which is in its nature distinctly private[.]" The characterization of "distinctly private" has been interpreted to represent merely "the other side of the 'public accommodation' coin." *Kiwanis Int'l, supra,* 806 *F.*2d at 476. *Accord Brounstein v. American Cat Fanciers Ass'n,* 839 *F.Supp.* 1100, 1107 (D.N.J. 1993). Because we conclude that the BSA is a place of public accommodation, it cannot be characterized as "distinctly private."

We also find unpersuasive defendants' alternative argument that they are exempt from the LAD because they qualify as an "educational facility operated or maintained by a bona fide religious or sectarian institution." *N.J.S.A.* 10:5-5(*l*). The BSA is expressly nonsectarian. Even if its requirement that members profess a belief in God were sufficient to render it a bona fide religious or sectarian institution, it does not qualify as an "educational facility." It also does not fall within the exception in the LAD respecting "the right of a natural parent or one *in loco parentis* to direct the education and upbringing of a child under his control." *Ibid.* The BSA's temporary charge of young members does not place it in loco parentis. The status in loco parentis derives from the intent to assume

the parental relationship. *A.S. v. B.S.,* 139 *N.J. Super.* 366, 369 (Ch. Div. 1976), *aff'd,* 150 *N.J. Super.* 122 (App. Div. 1977). Scouting, no matter how significant a role it may play in a boy's development, does not purport to take the place of parents.

III

The trial judge also found that plaintiff was not denied accommodations, advantages, facilities or privileges under *N.J.S.A.* 10:5-12f. He reasoned that plaintiff suffered "no legally remedial adverse consequences . . . from his termination" and "lost nothing of compensable value," since he was merely a volunteer assistant scoutmaster. We disagree. Clearly, the opportunity to serve as a volunteer must be construed as a privilege within the meaning of the LAD, whether despite, or because of, the duties attached. *See Brounstein, supra,* 839 *F.Supp.* at 1108 (designation of cat show judge was privilege or advantage offered by association to certain of its members, and therefore a privilege under the LAD).

Quinnipiac Council, BSA, supra, 528 *A.*2d at 360, relied on by defendants, is distinguishable. There, the Connecticut Supreme Court held that a local boy scout council did not violate the state public accommodation statute by refusing to permit a woman to serve as a scoutmaster. This was so, the Court held, because Connecticut's public accommodation statute guarantees "access to its goods and services," but not the opportunity to offer services. *Id.* at 358. In contrast, the LAD prohibits denial of "accommodations, advantages, facilities or privileges." *N.J.S.A.* 10:12-5f. Defendants do not argue persuasively that serving as an assistant scoutmaster does not constitute an advantage or privilege.

IV

Plaintiff's count in his complaint that he is protected by the common law right not to be expelled from membership on grounds contrary to public policy is duplicative of the LAD claim, and consequently must be dismissed.

"It is well-settled that courts will invalidate an expulsion from a private organization when the expulsion is based on reasons that violate public policy." *Rutledge v. Gulian*, 93 *N.J.* 113, 119 (1983). The basis for relief from wrongful expulsion is the member's valuable personal relationship to the organization. *Id.* at 118. However, where the plaintiff was entitled to bring a similar claim under the LAD, it is unnecessary to consider whether a common law action would have been possible. *Catalane v. Gilian Instrument Corp.*, 271 *N.J. Super.* 476, 491 (App. Div.), *certif. denied*, 136 *N.J.* 298 (1994).

Plaintiff is correct that his BSA membership conferred the kind of status that merits judicial protection. However, he nevertheless fails to establish that, either at the time of his expulsion or at present, the public policy of New Jersey required greater regulation of discrimination within membership organizations than that required by the LAD. New Jersey's public policy against discrimination based on affectional or sexual orientation is now codified in the LAD. *See Brounstein, supra*, 839 *F.Supp.* at 1111 (public policy against discrimination based on religion made explicit in LAD). We have held that "supplementary common law causes of action may not go to the jury when a statutory remedy under the LAD exists." *Catalane, supra*, 271 *N.J. Super.* at 492.

The LAD does not "bar, exclude or otherwise affect any right or action, civil or criminal, which may exist independently of any right to redress against or specific relief from any unlawful employment practice or unlawful

discrimination." *N.J.S.A.* 10:5-27. Nor does the LAD preclude other remedies. "All remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any provided by this act or any other statute." *N.J.S.A.* 10:5-13. The Legislature declared:

> Such harms [those suffered because of discrimination] have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State

[*N.J.S.A.* 10:5-3.]

This passage has been interpreted to express a legislative intent to read the LAD to encompass all those claims and damages previously available at common law, rendering unnecessary a separate common law claim for discrimination in employment. *Catalane, supra*, 271 *N.J. Super.* at 492. *Accord DeJoy v. Comcast Cable Communications, Inc.*, 941 *F.Supp.* 468, 475-76 (D.N.J. 1996). There is no reason not to apply the same rule to claims for discrimination by places of public accommodation.

Prior cases support the principle that where a separate claim for relief is based on the same discrimination allegations underlying the LAD claim, and the court determines that the LAD was not violated, no additional consideration is needed. *Erickson v. Marsh & McLennan Co., Inc.*, 117 *N.J.* 539, 561 (1990). Also, if the LAD creates a remedy, it may be unnecessary to recognize or create a common law action to vindicate substantially the same rights and provide similar relief. *Shaner v. Horizon Bancorp*, 116 *N.J.* 433, 454 (1989).

In contrast, in some circumstances a plaintiff could pursue an independent action "to vindicate particular interests in addition to or aside from those sought to be protected by a LAD action." *Ibid.* Plaintiff does not demonstrate that a common law cause of action would vindicate any additional interests. He provides no support for a theory that the common law would go farther than the LAD in forbidding discrimination based on affectional or sexual orientation within private organizations as well as places of public accommodation. He argues instead merely that a parallel common law claim should have been permitted. We disagree.

V

The trial judge, as an alternative basis for dismissing plaintiff's complaint, held that the First Amendment freedom of association sheltered defendants from the LAD's reach. The judge accepted defendants' assertion that the BSA's fundamental right of freedom of expression permits it to exclude avowed homosexuals who represent and espouse values that are antithetical to boy scout teachings and activities. Defendants' argument, accepted by the trial judge, is that its mission to instill the values of the Scout Oath and Scout Law in boys who join the boy scout troops would be undermined if the state intrudes into its internal affairs by forcing it to accept homosexual members. This contention is predicated on the BSA's policy of excluding avowed homosexuals because homosexuality conflicts with the Scout Oath, demanding that the scout be "morally straight," and the Scout Law, requiring scouts to be "clean."

The trial judge endorsed this view. He stated:

> It is abundantly clear from the proofs presented by BSA that from its inception Scouting has excluded from membership and adult leadership any person who openly declares himself a homosexual and that such policy has continued unchanged, to the present. Such policy applies, a fortiori, to one who engages in homosexual conduct. It is the firm position of BSA that such conduct is not "morally straight" under the Scout Oath nor is it "clean" under the Scout Law

The judge thereupon gave the generally-recognized definitions of "sodomy" and "buggery," and cited the Judeo-Christian tradition condemning sodomy as a "gravely serious moral wrong." The judge also noted that sodomy in New Jersey was a crime until 1979. He concluded:

> To suggest that the BSA had no policy against active homosexuality is nonsense. It was an organization which from its inception had a God-acknowledged, moral foundation. It required its members, youth and adult, to take the Scout Oath that they would be "morally straight." It is unthinkable that in a society where there was universal governmental condemnation of the act of sodomy as a crime, that the BSA could or would tolerate active homosexuality if discovered in any of its members. . . .
>
> According to its mission and purpose, BSA has determined that an assistant scoutmaster who is an active sodomist is simply incompatible with scouting and is not "morally straight." Does the NJLAD require a fundamental, court-imposed, change in its policies? The short answer is No.

The federal constitution does not expressly recognize the right to freedom of association. However, the right may be inferred from other rights and protections guaranteed by the constitution. Freedom of association was first recognized in 1958 in *NAACP v. Alabama*, 357 *U.S.*

449, 460, 78 *S.Ct.* 1163, —, 2 *L.Ed.*2d 1488, 1498 (1958), where the Supreme Court observed that "[e]ffective advocacy of both public and private points of view . . . is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between freedoms of speech and assembly." *Ibid.* It is therefore "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Ibid.*

Early freedom of association cases involved civil rights groups. *See ibid*; and *see* Sally Frank, *The Key to Unlocking the Clubhouse Door: The Application of Anti-Discrimination Laws to Quasi-Public Clubs*, 2 *Mich. J. Gender & Law*, 27, 57 (1994). Later, unpopular political groups asserted the protection to shield themselves from election laws regulating financial disclosure. *Ibid*; *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 *U.S.* 87, 89, 103 *S.Ct.* 416, —, 74 *L.Ed.*2d 250, 254 (1982); *Buckley v. Valeo*, 424 *U.S.* 1, 74, 96 *S.Ct.* 612, —, 46 *L.Ed.*2d 659, 719 (1976). The early cases did not involve state attempts to bar discrimination under public accommodation.

In *Roberts v. United States Jaycees*, 468 *U.S.* 609, 104 *S.Ct.* 3244, 82 *L.Ed.*2d 462 (1984), the United States Supreme Court provided a framework for analyzing constitutional claims of freedom of association in the context of protection against application of a state's public accommodation law. The Court cited cases affording constitutional protection to freedom of association in two distinct senses: freedom of intimate association, and freedom of expressive association. *Id.* at 617-18, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 471.

Freedom of intimate association shields against unjust government intrusion into individual's choice to maintain intimate or private associations with others. *Id.* at 618-19, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 471-72. The intimate relationship accorded this constitutional protection includes such relationships as marriage, child bearing, education and cohabitation with relatives. *Id.* at 619-20, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 472. The protection applies only to those groups having such attributes as "relative smallness," a high degree of selectivity in decision making, and seclusion from others. *Id.* at 620, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 472.

Freedom of intimate association is not implicated here. The BSA consists of nearly 5,000,000 members. It is open to all boys. The BSA engages in aggressive advertising and undertakes a variety of special interest activities in schools and other public forums. Thus, the BSA lacks the distinctive qualities that might afford constitutional protections under this component of the First Amendment.

Freedom of expressive association is a correlative right to an individual's freedom to speak. *Id.* at 622, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 474. Implicit in the "right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." *Ibid.* Generally speaking, "[o]vertly political organizations [or organizations formed to advance gender or race based interests] are the ones most likely to demonstrate successfully a genuine relationship between their discriminatory practices and their objectives." Frank, *supra*, at 59-60. Justice Brennan, for the *Roberts* Court, observed:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than

> a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Roberts, supra, 468 *U.S.* at 623, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 474-75.]

The Court cautioned, however, that:

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

[*Id.* at 623, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 475.]

Applying this framework, the Supreme Court in *Roberts* held that Minnesota's public accommodations law, by requiring the admission of women to the Jaycees, did not unconstitutionally infringe upon the male members' freedom of expressive association. *Id.* at 628-29, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 478. The Court found no basis for concluding that the law would require any change in the organization's creed, or impose any restrictions on its "ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Id.* at 627, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 477. *See generally,* Eunice A. Eichelburger, Annotation *Civil Rights Laws Prohibiting Organization's Membership Restrictions as Violating Organization's or its Members' Rights of Association Under Federal Constitution's First Amendment,* 82 *L.Ed.*2d 1040 (1986) (collecting cases).

Three years later, the United States Supreme Court applied the *Roberts* analytical framework in holding that California's Unruh Act did not violate the First Amendment right of expressive association by requiring a Rotary Club to admit women, where the members' ability to carry out their purposes would not be affected "in any significant way." *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 *U.S.* 537, 548, 107 *S.Ct.* 1940, —, 95 *L.Ed.*2d 474, 486-87 (1987). The Court observed that Rotary Clubs do not take positions on political issues and, although they "engage in a variety of commendable service activities that are protected by the First Amendment," the Unruh Act "does not require the clubs to abandon or alter any of these activities." *Id.* at 548, 107 *S.Ct.* at —, 95 *L.Ed.*2d at 486. The Court added:

> Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women.

[*Id.* at 549, 107 *S.Ct.* at —, 95 *L.Ed.*2d at 486.]

One year later, the Court rejected a challenge to the facial validity of a New York City law forbidding discrimination by certain clubs with more than 400 members, finding that it did not infringe on the members' private associational rights in any significant way. *New York State Club Ass'n, Inc. v. City of New York,* 487 *U.S.* 1, 13, 108 *S.Ct.* 2225, —, 101 *L.Ed.*2d 1, 16 (1988). The law did not require the clubs "to abandon or alter" any activities protected by the First Amendment, because, as long as prohibited categories were not used as shorthand identification of rejected individuals, the law did not prevent exclusion of individuals who did not share the

views the members wished to promote. *Ibid.* The Court added a caveat, however:

> It is conceivable, of course, that an association might be able to show that *it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.*

[*Ibid,* (emphasis added).]

What emerges from this trilogy of cases is a recognition of the tension between the freedom to associate for the purpose of expressing fundamental views and the compelling state interest in eradicating discrimination. *Roberts, supra,* 468 *U.S.* at 623, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 475. Conciliation of these competing forces is achieved if the state's enforcement of its anti-discrimination law is unrelated to the suppression of ideas and will not "affect in any significant way the existing members' ability to carry out their various purposes." *Board of Dir. of Rotary Int'l, supra,* 481 *U.S.* at 548, 107 *S.Ct.* at —, 95 *L.Ed.*2d at 486. Thus, the organization or club asserting the freedom has a substantial burden of demonstrating a strong relationship between its expressive activities and its discriminatory practice. Any lesser showing invites scuttling of the state's anti-discrimination laws based on pretextual expressive claims. *See* Frank, *supra,* at 63.

By enacting the LAD, the Legislature declared that the practices of discrimination are a matter of concern to the government and that "such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State." *N.J.S.A.* 10:5-3. The Legislature recognized that because of discrimination, "people

suffer personal hardships, and the State suffers a grievous harm." *Ibid.* New Jersey prides itself on being in "the vanguard in the fight to eradicate . . . unlawful discrimination of all types . . ." *Peper v. Princeton Univ. Board of Trustees,* 77 *N.J.* 55, 80 (1978). Thus, the "overarching goal of the [LAD] is nothing less than the eradication" of discrimination. *Fuchilla, supra,* 109 *N.J.* 334.

By amendment to *N.J.S.A.* 10:5-4 in 1991 (*L.*1991, c. 519, § 2), the Legislature expanded the categories of persons protected to include discrimination based on "affectional or sexual orientation." This was an implicit recognition that discrimination based on "archaic" and "stereotypical notions" about homosexuals that bears no relationship to reality cannot be countenanced. *Roberts, supra,* 468 *U.S.* at 625, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 476. It is also a recognition that the "stigmatizing injury" and denial of equal opportunities that accompanies it is felt no less strongly by this protected group than others who suffer personal hardship because of discriminatory practice. *Ibid.*

VI

Will New Jersey's compelling interest in eradicating discrimination by enforcement of the LAD significantly impair the BSA's ability to express its fundamental tenets and to carry out its social, educational and civic activities? For purposes of discussion, we accept the proposition that such goals and activities are protected by the First Amendment freedom of expressive association. *See id.* at 622, 104 *S.Ct.* —, 82 *L.Ed.*2d at 474.

We start with the undisputed fact that BSA's collective "expressive purpose" is not to condemn homosexuality. Its reason to be is not to provide a public forum for its members to espouse the benefits of heterosexuality and the "evils" of the homosexual lifestyle. As plaintiff convinc-

ingly observes, "[b]oys are not urged to join Scouting to learn the 'evils' of being gay, nor are adult leaders recruited to advance some anti-gay agenda." Motivation to advance such anti-gay views was not what "brought [the original members] together." *Id.* at 623, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 475.

Rather, a definition of the BSA's mission, purposes and fundamental beliefs is found in its Congressional Charter, bylaws, rules and regulations, and handbooks. The BSA was chartered by Congress with a stated purpose "to promote . . . the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues. . . ." To achieve these goals, the BSA's bylaws provide that emphasis shall be placed upon its "educational program and the oaths, promises and codes of the Scouting program for character development, citizenship training, mental and physical fitness." The BSA's mission is to "serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." To that end, the BSA trains and educates boys in camping and other outdoor activities, democracy, civics, respect for the family, personal strength and development, self-sufficiency and sexual responsibility. True to the Scout Oath and Scout Law, adult scout leaders endeavor to impart in the scouts the traditional values of trustworthiness, honesty, independence, physical and moral courage, commitment, cleanliness and fidelity.

We conclude that enforcement of the LAD by granting plaintiff access to the accommodations afforded by scouting will not affect in "any significant way" BSA's ability to express these views and to carry out these activities. On its face, the LAD "does not aim at the suppression of speech nor does it distinguish between prohibited and permitted activity on the basis of viewpoint . . . ." *Id.* at 623, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 475. As applied to the facts before us, it cannot convincingly be argued that the LAD's proscription against discrimination based on "affectional or sexual orientation" impedes the BSA's ability to express its collective views on scouting, or to instill in the scouts those qualities of leadership, courage and integrity to which the BSA has traditionally adhered. The LAD does not in any manner require the BSA to abandon or alter any of its laudable activities and programs. The focal point of its prohibition is the act of discrimination against individuals respecting access to public accommodations. Its application here leaves in place the integral workings of the BSA and its constitutional right to carry out its mission.

Indeed, the goals of the BSA are in many respects compatible with the purposes sought to be achieved by the LAD. Its Congressional Charter states that the BSA's bylaws and rules shall not be "inconsistent with the law of the United States of America, or any State thereof . . . ." 36 *U.S.C.A.* § 22. Such "laws," of course, include anti-discrimination laws. The BSA's publications stress that neither its federal charter nor its bylaws "permits the exclusion of any boy." Consequently, the BSA has a long-term commitment "to a membership that is representative of all economic and racial groups," and encourages its local councils to establish membership that is "representative of *the total population* of the council or district." (Emphasis added). This commendable quality of inclusion is not at all inconsistent with the purposes of New Jersey's anti-discrimination law.

We reject as irrelevant the trial judge's conclusion that "[a]ccording to its mission and purposes, BSA has determined that an assistant scoutmaster who is an active sodomist is simply incompatible with scouting and is not morally straight." The question here is whether the BSA

discriminated against plaintiff because of his "affectional or sexual orientation." The BSA excluded plaintiff because he was an avowed homosexual, not because he was an "active sodomist." The observation also raises, no doubt inadvertently, the sinister and unspoken fear that gay scout leaders will somehow cause physical or emotional injury to scouts, or will instill in them ideas about the homosexual lifestyle. "The prevalence of homophobia and stereotypical conceptions of homosexuality within society as a whole, and within the legal system in particular, have been well documented." Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation & Dissemination Efforts*, 41 *Wayne L. Rev.* 1, 37 (1994). *Accord* Frank, *supra*, at 27 n.60; David P. Russman, *Alternative Families: In Whose Best Interests?*, 27 *Suffolk U. L. Rev.* 31, 58-59 (1993); Darryl Robin Wishard, *Out of the Closet & Into the Courts: Homosexual Fathers & Child Custody*, 93 *Dick. L. Rev.* 401, 406 (1989). *Roberts* cautions that, in examining an association's freedom of expressive association claim, "legal decision making that relies uncritically on such [unproven] assumptions" must be condemned. 468 *U.S.* at 628, 104 *S.Ct.* at —, 82 *L.Ed.*2d at 478. Such assumptions, predicated on stereotypical generalizations, rather than fact, cannot be employed as "shorthand measures" in place of legitimate factors justifying First Amendment protection. *New York State Club Ass'n, Inc., supra*, 487 *U.S.* at 13, 108 *S.Ct.* at —, 101 *L.Ed.*2d at 16.

There is absolutely no evidence before us, empirical or otherwise, supporting a conclusion that a gay scoutmaster, solely because he is a homosexual, does not possess the strength of character necessary to properly care for, or to impart BSA humanitarian ideals to the young boys in

his charge. Nothing before us even suggests that a male, simply because he is gay, will somehow undermine BSA's fundamental beliefs and teachings. Plaintiff's exemplary journey through the BSA ranks is testament enough that these stereotypical notions about homosexuals must be rejected.

Nevertheless, defendants appear to focus on plaintiff's statements as a "gay activist." They claim that his "message," his avowed homosexuality, is "at odds" with scouting's expressive purposes set forth in the Scout Oath and Scout Law. Defendants reason that plaintiff "could hardly be an effective role model for Scouting's morally straight value when he 'stands up' for a view of morality which is inconsistent with that value."

The Boy Scout Oath requires a boy scout to be "morally straight." To be morally straight, one must be:

> of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

The Scout Law requires a scout to be "clean," that is, a scout "keeps his body and mind fit and clean. He chooses the company of those who live by the same ideals. He helps keep his home and community clean." Defendants argue that "morally straight" and "clean" are collective "expressive" ideals of the BSA which will be compromised if avowed homosexuals are admitted as scout leaders.[3]

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[3] The only reference to homosexuality we could find in the voluminous record is in the Scoutmaster's Handbook. The scout-

This focus on "morally straight" and "clean" as a basis for excluding avowed homosexual scoutmasters is only of recent vintage. The first reference to homosexuals is found in a March 17, 1978 "memorandum" to the BSA's exclusive executive council from its Chief Scout Executive. It states that a "declare[d]" homosexual may not be a volunteer scoutmaster because "the [BSA] is a private, membership organization and [participation in the program] is a privilege and not a right." Significantly, the reason cited for the exclusion is the BSA's view that it is a "private" organization, not because homosexuals cannot be "morally straight" or "clean."

Plaintiff was expelled from the BSA on July 19, 1990. In the BSA's expulsion letter, the BSA explains that plaintiff "should understand that BSA membership registration is a privilege" and "is not automatically granted to everyone who applies." No reference is made to the "morally straight" or "clean" criteria under the Scout Oath or Scout Law.

On June 6, 1991, eleven months after plaintiff's expulsion, the BSA issued a "Position Statement" which, for the first time declares:

> We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout

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master is directed that he should not instruct scouts in the subjects of sex and family life because such subjects are not within "Scouting's proper area" and that scoutmasters are not qualified to address the subjects. The handbook directs that if a scoutmaster is confronted with homosexual activity between two boy scouts, the scoutmaster must distinguish between "youthful acts of innocence, and the practices of a confirmed homosexual who may be using his Scouting association to make contacts." The scoutmaster is instructed to "keep quiet" about these instances and to refer the offending boy scout to appropriate counselling programs. Notably, this directive refers to homosexual boy scouts, not scout leaders.

> be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts.
>
> Because of these beliefs, the Boy Scouts of America does not accept homosexuals as members or as leaders, whether in volunteer or professional capacities.
>
> Our position on this issue is based solely upon our desire to provide the apropriate environment and role models which reflect Scouting's values and beliefs.

That "Position Statement" was repeated from time to time until January 1993, when the BSA refined it, stating:

> The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization.
>
> We do not believe that homosexuals provide a role model consistent with these expectations.
>
> Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.

We cannot accept the proposition that this "Position Statement," issued for the first time seventy-six years after Congress granted the BSA its Charter, represents a collective "expression" of ideals and beliefs that brought the boy scouts together. Coincidentally, these 1991 and 1993 "Position Statements" were expressed by the BSA during a time when their anti-gay policy was subject to judicial challenge in California. *See Curran, supra,* 29 *Cal. Rptr.* 2d at 583-85. The First Amendment freedom of expressive association issue was squarely before the *Curran* Court. *Ibid.* It is therefore not unrealistic to view these "Position Statements" as a litigation stance taken by the

BSA rather than an expression of a fundamental belief concerning its purposes.

In any event, aside from the undebatable fact that this so-called "position" was not even set forth in a written document when plaintiff was expelled, it is undisputed that such policy has not been incorporated into the BSA's bylaws, rules, regulations and handbooks. It was not contained in plaintiff's application for the adult scoutmaster position. As far as we can determine from the record, the "Position Statement" has not been disseminated throughout the BSA hierarchy and, except during litigation, has not been presented to the public as representative of BSA's official position. Indeed, the appendix is rife with affidavits from past and present boy scouts and adult leaders stating that during their tenure they had no knowledge that such a policy even existed.

Moreover, this "Position Statement" hardly squares with the view shared by a substantial percentage of church groups who sponsor local boy scout troops. For example, retired Bishop Melvin Wheatly, Jr., of the United Methodist Church, states in his certification:

> The United Methodist Church has a particularly strong relationship with and commitment to Boy Scouts of America ("BSA") and the values represented by BSA. BSA is an organization which fosters values such as honesty, loyalty, reverence, integrity and commitment in boys and young men. It is because of these values that The United Methodist Church has been the largest single supporter of BSA nationally, sponsoring more than 200 BSA troops in New Jersey alone. BSA's discrimination against homosexuals, however, is inconsistent with the clearly expressed condemnation by The United Methodist Church of discrimination on the basis of

> sexual orientation and has no apparent relation to the values that form the basis of The United Methodist Church's commitment to BSA.
>
> BSA's discrimination against homosexuals offends the human dignity of such persons. The United Methodist Church has been very clear in condemning discrimination on the basis of sexual orientation.

Further, the Union of American Hebrew Congregations, representing 900 congregations and over 1,500,000 reformed Jews, has called upon the BSA to "open its membership and leadership to all . . . men and boys without regard to the sexual orientation." Other religious groups, including the organizations joined as *amici*, many of whom sponsor boy scout troops, have publicly declared their opposition to the BSA's anti-gay position. Some of the groups in fact petitioned the New Jersey Legislature to amend the LAD to prohibit discrimination based on "affectional or sexual orientation." Finally, the record contains certifications from many boy scout leaders recording their efforts to change the Executive Board's policy on gays.

What is clear is that the BSA's preemptive exclusion of avowed homosexuals is employed without regard for the diverse ideological differences among the religious institutions and other groups who support the BSA's ideals and activities. As plaintiff and *amici* persuasively argue, the BSA has not attempted to exclude these religious institutions on the basis that the institutions have condemned the anti-gay policy. Nor has it moved in a wholesale manner to expel heterosexual scouts who have condemned the practice. In contrast, a gay scout leader who says absolutely nothing about the morality or lifestyle of homosexuals is subject to expulsion if he discloses his sexual orientation. These facts belie the BSA's argument that its

collective purpose is to "exclude individuals who do not share the views that the club's members wished to promote." *New York State Club Ass'n, Inc., supra,* 487 *U.S.* at 13, 108 *S.Ct.* at —, 101 *L.Ed.*2d at 16. The facts diminish the BSA's assertion that its policy excluding avowed gays was a collective view that "brought [its members] together." *Roberts, supra,* 468 *U.S.* at 623, 104 *S.Ct. at* —, 82 *L.Ed.*2d at 475.

Defendants argue that because plaintiff's "manifest" views as an avowed homosexual are "at odds" with positions taken by the BSA, plaintiff may be excluded from membership under the United States Supreme Court's holding in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 *U.S.* 557, 115 *S.Ct.* 2338, 132 *L.Ed.*2d 487 (1995).

In *Hurley,* the South Boston Allied War Veterans Council (Council) was authorized by the City of Boston to organize and conduct the St. Patrick's Day—Evacuation Day parade. *Id.* at 560, 115 *S.Ct.* at 2341, 132 *L.Ed.*2d at 495. The Council refused a place in the 1993 parade to GLIB, an Irish-American gay group joined together for the sole purpose of marching in the parade as a way to express its members' pride in their Irish heritage as openly gay, lesbian and bisexual individuals. *Id.* at 561, 115 *S.Ct.* at 2341, 132 *L.Ed.*2d at 496. The state court admitted GLIB into the parade, holding that a parade was a public accommodation under Massachusetts law, and that mandating inclusion of GLIB did not infringe upon the Council's right of expressive association. *Id.* at 562-63, 115 *S.Ct.* at 2341-42, 132 *L.Ed.*2d at 496-97.

In reversing, the United States Supreme Court focused on the Council's First Amendment freedom of speech,

of its freedom of expressive association. Defining parades as "public dramas of social relations," *id.* at 568, 115 *S.Ct.* at 2345, 132 *L.Ed.*2d at 500, the Court determined that "[t]he protected expression that inheres in a parade is not limited to its banners and songs," but extends to its communicated symbolism as well. *Id.* at 569, 115 *S.Ct.* at 2345, 132 *L.Ed.*2d at 500-01.

The South Boston parade involved people marching in costumes and uniforms, carrying flags and banners with all sorts of messages (*e.g.,* "England get out of Ireland," "Say no to drugs"), with marching bands, pipers and floats. *Id.* at 569, 115 *S.Ct.* at 2345, 132 *L.Ed.*2d at 501. The Court rejected the notion that a private speaker forfeits his constitutional freedom of expression protection "simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70, 115 *S.Ct.* at 2345, 132 *L.Ed.*2d at 501. The Court compared the Council's role in assembling and administrating the parade with a newspaper's edited compilation of other people's speech on its editorial page, a constitutionally protected activity. *Id.* at 570, 115 *S.Ct.* at 2346, 132 *L.Ed.*2d at 501.

The Court found that the Massachusetts public accommodations law had been "applied in a peculiar way" in that its enforcement did not address the fact that the Council had not excluded homosexuals as such; they could participate in the parade as a member of any group that the Council had approved to march. *Id.* at 572, 115 *S.Ct.* at 2347, 132 *L.Ed.*2d at 503. Despite this fact, GLIB demanded that it march in the parade as a single unit "carrying its own banner." *Ibid.*

The Court held that the Massachusetts courts' application of the public accommodation law "produced an order

essentially requiring [the Council] to alter the expressive content of [its] parade." *Id.* at 572-73, 115 *S.Ct.* at 2347, 132 *L.Ed.*2d at 503. By making the Council's "speech" itself to be the public accommodation, "any contingent of protected indviduals with a message would have the right to participate in [the Council's] speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own." *Id.* at 573, 115 *S.Ct.* at 2347, 132 *L.Ed.*2d at 503. This use of the state's power "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Ibid.* This freedom involves not only the choice of what is to be said, but what is to be left unsaid. *Ibid.* Thus, whatever the reason the Council had in excluding GLIB, "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575, 115 *S.Ct.* at 2348, 132 *L.Ed.*2d at 504.

The Court concluded:

> When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.

[*Id.* at 578, 115 *S.Ct.* at 2350, 132 *L.Ed.*2d at 507.]

Applying *Hurley*, defendants argue that plaintiff's affirmation of his homosexuality is "expressive activity"

which presents the same "potential for a clash of views as the gay, lesbian and bisexual contingent which sought to march in Boston's St. Patrick's Day—Evacuation Day Parade."

As noted, *Hurley* is a First Amendment speech case. It involves "the choice of a speaker [the Council] not to propound a particular point of view" in its South Boston parade which communicated diverse and ethnic social messages. *Id.* at 574-75, 115 *S.Ct.* at 2348, 132 *L.Ed.*2d at 504. In other words, the Court was protecting a form of pure speech, the collective expressive views of the parade itself. Significantly, the Court did not undertake a freedom of expressive association analysis under the *Roberts* trilogy of cases. This was so no doubt because of the Court's "initial recogniton in its analysis that the Parade itself constituted expression." Kristine M. Zaleskas, *Pride, Prejudice or Political Correctness? An Analysis of Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 29 *Colum. J.L. & Soc. Probs.* 507, 547 (1996).

In *Roberts*, and the other freedom of expressive association cases, the Court was called upon to decide whether or not the public accommodations statutes would require the organization to "alter substantially its activities." *Zaleskas, supra*, at 547. Consequently, the Court's focus was on those activities, not the content of any speech associated with those activities. *Id.* at 548. Indeed, *Hurley* appears to preserve the holding and analysis of the *Roberts* trilogy of cases, noting that in those cases, by compelling access to the benefits afforded by the activity of the organizations, the state had not trespassed on the organizations' message itself. *Hurley, supra*, 515 *U.S.* at 580, 115 *S.Ct.* at 2351, 132 *L.Ed.*2d at 508. In *dictum*, the *Hurley* Court observed parenthetically that GLIB would still lose, applying the *Roberts* analysis, be-

cause it could be "refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 580-81, 115 *S.Ct.* at 2351, 132 *L.Ed.*2d at 508.

In our view, *Hurley* is not dispositive here. In *Hurley*, both the Council's parade (reflecting diverse ethnic and social values) and GLIB's desire to participate (to express as a unit its pride in its members' Irish heritage and homosexuality) were expressive activities. As plaintiff observes, both the parade and GLIB's participation were pure forms of speech. To enforce inclusion of GLIB's message in the parade had the effect of altering the expressive context of the speaker's (the Council's) purpose in conducting the parade. Unlike a parade, where the "marchers . . . are making some sort of collective point," *id.* at 568, 115 *S.Ct.* at 2345, 132 *L.Ed.*2d at 500, the BSA is a national organization focusing its energy and resources on activities aimed at the physical, moral and spiritual development of boys and young men. The public accommodation law implicated here simply demands access to those activities; it does not attempt, directly or indirectly, to hamper the BSA's ability to carry out these activities or express its views respecting their benefits.

Also, plaintiff is not asserting a right under the LAD to alter the content of the BSA's viewpoint. He merely seeks access to a public accommodation, participation in boy scout activities. His public acknowledgment that he is a homosexual is hardly comparable to a banner in a parade declaring his pride in his homosexuality.

Finally, we cannot accept the proposition that plaintiff's public declaration that he is gay in and of itself

constitutes "expressive activity" sufficient to forfeit his entitlement to membership in the BSA. The BSA's argument that this "message" given by plaintiff's declaration conflicts with the BSA "morally straight" and "clean" policies falters, when one considers other scout laws to which scouts promise to subscribe. The scout promises to be "trustworthy," that is, to tell the truth. "Honesty is part of his code of conduct. People can depend always on him." A scout also promises to be "brave," that is, to have the courage "to stand for what he thinks is right even if others laugh at him or threaten him." In our view, there is a patent inconsistency in the notion that a gay scout leader who keeps his "secret" hidden may remain in scouting and the one who adheres to the scout laws by being honest and courageous enough to declare his homosexuality publicly must be expelled. We also cannot accept the proposition that the BSA has a constitutional privilege of excluding a gay person when the sole basis for the exclusion is the gay's exercise of his own First Amendment right to speak honestly about himself.

The dismissal of plaintiff's common law claims is affirmed. Otherwise, the summary judgment order is reversed, and the matter is remanded for further proceedings.

LANDAU, J.A.D. (concurring and dissenting)

It is unlikely, in my view, that the New Jersey Legislature originally intended that private groups, large or small, would be deemed to be "places" of public accommodation, akin to hotels, stores, restaurants, theaters and the like, whose discriminatory conduct troubled our collective conscience when the LAD was enacted in 1945. Use of the words "other real property" in *N.J.S.A.* 10:5-4 in the phrase "place of public accommodation, publicly assisted housing accommodation, and other real property" would incline me to a property-based interpretation, were this truly a matter of first impression. *See also N.J.S.A.* 10:1-5; 10:5-5(*l*).

I am persuaded, nonetheless, partly by the enduring, legislatively undiluted, vitality of the *Little League* [1] opinion in this State, and partly by the authorities cited in the majority's carefully crafted opinion, that notwithstanding authority to the contrary, *see, e.g., Welsh v. Boy Scouts of Am.*, 993 *F.*2d 1267 (7th Cir.), *cert. denied*, 510 *U.S.* 1012, 114 *S.Ct.* 602, 126 *L.Ed.*2d 567 (1993), judicial interpretation has generally transformed organizations which extend an open invitation to public membership as broad as that of the Boy Scouts into places of public accommodation for purposes of statutes such as the LAD.

What has been lost in the majority's opinion is our traditional focus upon the special facts of the case on appeal. James Dale, who excelled as a Boy Scout, has been prominently publicized as an avowed, practicing homosexual and also as a leader in organizational activities given to the promotion of the interests of gay and

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1 *National Org. for Women, Essex County Chapter v. Little League Baseball, Inc.*, 127 *N.J. Super.* 522 (App. Div.), *aff'd*, 67 *N.J.* 320 (1974).

lesbian students. He wants to continue his scouting career in a leadership capacity as a volunteer scoutmaster or assistant scoutmaster.

Concerned that accepting an avowed homosexual as a scoutmaster would signify endorsement of such a lifestyle in contradiction to their declared policies against extramarital sex and homosexual activity, the Boy Scouts went beyond refusing Dale a volunteer leadership post. They also revoked his Boy Scout membership.

These facts require us to address two separate issues, restriction of membership and restriction of leadership. As a "place" of public accommodation, the Boy Scouts should not have revoked Dale's membership. I must concur with the majority in that regard.

What of the second issue?

In January 1993, several years after revocation of Dale's membership, the Boy Scouts promulgated a Position Statement providing, in pertinent part:

> The Boy Scouts of America does not ask prospective members about their sexual preference, nor do we check on the sexual orientation of boys who are already Scouts. The reality is that Scouting serves children who have no knowledge of, or interest in, sexual preference. We allow youth to live as children and enjoy Scouting and its diversity without immersing them in the politics of the day.
>
> Membership in Scouting is open to all youth who meet basic requirements for membership and who agree to live by the applicable oath and law.
>
> * * * *
>
> The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization.

> We do not believe that homosexuals provide a role model consistent with these expectations.
>
> Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.

The present members of the Boy Scouts number approximately five million. We are told that as many as ninety million boys and men have enjoyed membership in the Boy Scouts since 1910. Surely the Boy Scouts are aware that, statistically, a number of these must have been gay. There obviously has been no anti-gay witch hunt in the Boy Scout movement.

The defendants' consistent theme is evident; scouting condemns homosexual practice as morally unacceptable, and so acts negatively with respect to its open avowal because it is inconsistent with one of the expressed moral policies of the organization.

The 1972 Scoutmaster's Handbook emphasized a scout leader's duty as a role model, and advised:

> You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons . . . . What you are speaks louder than what you say. This ranges from simple things like wearing the uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.

If their perception of the immorality of homosexuality is in fact an important part of the Boy Scouts' institutional message to young Scouts, what Jim Dale openly professes and exemplifies clearly flies in the face of that view. When we force the Boy Scouts to permit him to serve as a volunteer leader, we force them equally to

endorse his symbolic, if not openly articulated, message. I believe that this violates the right of expressive association guaranteed by the First Amendment of the United States Constitution. Even when a membership association provides public benefits to which this State may insure equal access under the LAD, such compelled access to membership does not carry with it a right to "trespass on the organization's message itself." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 *U.S.* 557, 580, 115 *S.Ct.* 2338, 2351, 132 *L.Ed.*2d 487, 508 (1995); *New York State Club Ass'n, Inc. v. City of New York*, 487 *U.S.* 1, 108 *S.Ct.* 2225, 101 *L.Ed.*2d 1 (1988). We may not compel the Boy Scouts to alter a message which they wish to convey by including messages more acceptable to others. *Hurley, supra*, 515 *U.S.* at 581, 115 *S.Ct.* at 2351, 132 *L.Ed.*2d at 508. This principle is not changed merely because the altered message is implicitly, but no less strongly, conveyed by example rather than by verbal articulation or by signs.

As applied to Dale's status as scoutmaster, I differ with the majority's reliance upon *Roberts v. United States Jaycees*, 468 *U.S.* 609, 104 *S.Ct.* 3244, 82 *L.Ed.*2d 462 (1984). There, only admission to Jaycee membership was the issue. Of course, the Boy Scouts were not organized for the primary purpose of advancing an anti-gay agenda. However, nothing in *Roberts* prevents an organization from advocating its view that a gay lifestyle is immoral and undesirable without requiring it to provide a platform for competing advocacy, express or implicit. Indeed, as *Hurley* demonstrates, the First Amendment guarantees the Boy Scouts that right of unfettered advocacy.

To the extent the majority opinion questions the fundamental nature of the Boy Scouts' profession of an organi-

zational view on homosexuality, there are two equally dispositive responses. First, it is not for this court to tell the Boy Scouts what to believe or what to profess. That is an internal matter. Their consistent litigation stand in cases like this, and the representations of their governing officials are enough for me. There has been no contravening intervention by opposing Boy Scout groups, although other, non-affiliated, *amici curiae* are abundantly represented in this appeal.

Secondly, when limited to the First Amendment issue of the expressive effect of elevating Dale to an adult leadership role (as distinct from his admission to or retention of Boy Scout membership), whether or not the Boy Scouts' stand on homosexuality is fundamental to that organization's creation is entirely irrelevant.

Based upon the above views, I respectfully dissent from the majority opinion to the extent it would compel the Boy Scouts to accept plaintiff James Dale as assistant scoutmaster or to any Scout leadership position. I concur with the majority result, to the extent that it would require plaintiff to be restored to membership.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY

Docket No. MON-C-330-92
Civil Action

JAMES DALE,

Plaintiff,

v.

THE BOY SCOUTS OF AMERICA an
THE MONMOUTH COUNCIL BOY SCOUTS OF AMERICA,

Defendants.

Decided: November 3, 1995

FINDINGS OF FACT AND OPINION

McGANN, JR., J.S.C.

This matter came before the court on cross-motions for Summary Judgment. The many certifications supplied by the parties, while voluminous and informative, present no substantial issues of material fact. The briefs submitted by both sides have likewise been fulsome, nonetheless, but clearly and competently delineate and argue the issues. Accordingly, summary judgment is apt.

THE FACTUAL BACKGROUND

Plaintiff, James R. Dale (born August 2, 1970 as James R. Dick) was a youth member in the Scouting movement continually from age eight until age 18. He began his scouting career as a Cub Scout and, as a Boy Scout, proceeded through the seven badge levels of advancement from Tenderfoot to Eagle Scout.[1] He was thoroughly immersed in scouting during his formative years and compiled a most commendable scout record.

His leadership ability during those years was recognized by his adult scoutmasters and his peers. He was appointed Assistant Patrol Leader in his troop in 1982; Patrol Leader, in 1983; Bugler from 1984 through 1988; and Junior Assistant Scoutmaster from 1985 through 1988.

He received the Arrow of Light Award for his work on behalf of the environment and the World Conservation Award based on his concern for protection of wildlife. In the years from 1984 through 1988 he held various offices in the Order of the Arrow—a national brotherhood of honor campers of Boy Scouts of America (hereinafter referred to as BSA).[2] He was, at various times, Banquet Chairman, Vigil Honor Chairman, Camping Promotions Chairman and Ceremonies Chairman of the Order. The

[1] Those levels are Tenderfoot, Second Class, First Class, Star, Life and Eagle. To advance from one badge level to the next a certain number of merit badges must be earned. Those badges cover a wide range of specified activities and subjects. Each step involves learning, testing, reviewing and, finally, recognition of achievement. In order to become an Eagle Scout, the boy must earn a total of 30 Merit badges.

[2] The purposes of the Order of the Arrow are to recognize those Scout campers who best exemplify the Scout Oath or Promise and the Scout Law in their daily lives, to develop and maintain traditions and spirit; to promote Scout camping, and to crystalize the Scout habit of helpfulness into a life purpose of leadership in cheerful service to others.

last-mentioned office involved the induction of new members into the Lodge, the Ordeal, and the Brotherhood and challenging them to live up to the Scout Oath and the Scout Law. He was very active in recruiting new Boy Scout youth members.

Over the years, James Dick attended various BSA leadership training programs including Brownsea Junior Leader Training, Order of the Arrow National Leadership Conference, and the annual leadership retreat for the Order of the Arrow, Na-Tsi-Hi Lodge No. 71.

All of these activities brought him to the attention of the Monmouth Council. Because of his exemplary record and public speaking ability he was asked to speak on behalf of Scouting at various functions and fund-raising events. In 1987 he was the featured youth speaker at the annual Joshua Huddy Distinguished Citizenship Award Dinner of the Monmouth Council.

Shortly after receiving his Eagle Badge in July of 1998, James Dick turned 18; his status as a Boy Scout automatically terminated as provided in the By-Laws of BSA. Thereafter, he was invited to apply for adult membership in BSA as an Assistant Scoutmaster. He did so in early 1989; was accepted and given a commission as an Assistant Scoutmaster by the BSA on recommendation of the Monmouth Council and assigned to Troop 73 Matawan, New Jersey, sponsored by the Matawan First United Methodist Church. That was the troop of which he had been a member during all of his scouting career.

In September 1988, James Dick (now using the name James Dale)[3] enrolled in Cook College of Rutgers Uni-

[3] A judgment granting the name change was entered on October 21, 1988 based on a complaint filed August 5, 1988.

versity. By that time he had acknowledged to himself, to his friends and to his family that he was homosexual.[4] On campus he became co-president (with a female) of the Rutgers University Lesbian and Gay Alliance.

In July 1990 an on-campus seminar sponsored by the Alliance drew newspaper coverage. The Newark Star-Ledger ran an article on July 8, 1990 captioned "Seminar addresses needs of homosexual teens." In an accompanying photograph, Dale's picture appeared with that of the featured speaker and the co-president of the Alliance. He was identified as co-president of the Lesbian and Gay Alliance in both the photograph and text.

That article came to the attention of the Executive of the Monmouth Council, BSA—Mr. James W. Kay. He sent the following letter dated July 19, 1990 to Dale:

> Dear Mr. Dale:
>
> After careful review, we have decided that your registration with the Boy Scouts of America should be revoked. We are therefore compelled to request that you sever any relations that you may have with the Boy Scouts of America.[5]
>
> You should understand that BSA membership registration is a privilege and is not automatically granted to everyone who applies. We reserve the right to refuse registration whenever there is a concern that an individual may not meet the high standards of

[4] He had not, however, told that to his Troop Committee Chairman who sponsored him for adult membership. Had he done so, he would not have been sponsored nor commissioned as an adult member by BSA.

[5] Dale was not stripped of any awards he had previously earned as a Boy Scout. He remains on the records of BSA as a former Boy Scout who attained the high rank of Eagle Scout.

> membership which the BSA seeks to provide for American youth.
>
> If you wish to have this decision reviewed by a BSA regional review committee, please write to the Regional Director within 60 days of the date of this letter, explaining your version of the facts supporting your claim that your registration as a BSA member should be reinstated. The procedures for a review of this decision are attached.

Dale wrote asking the reason for that action. In his reply of August 10, 1990, Kay stated "The grounds for this membership revocation are the standards for leadership established by the Boy Scouts of America which specifically forbid membership to homosexuals." Despite the repeated requests by Dale and later by his counsel, for a copy of those "standards" none was ever supplied. A reply to Dale's counsel from the national counsel of BSA dated December 21, 1990 states BSA's position as follows:

> "As your client is apparently an avowed [6] homosexual and the Boy Scouts of America does not admit avowed homosexuals to membership in the organization, no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting."

Dale appealed that decision through the various procedural avenues accorded by the structure of BSA, to no avail.

It is quite clear that, although a framework of "procedural due process" is available within the structure of

[6] The context of the correspondence makes it apparent that the use of the modifier "avowed" was intended to describe BSA's understanding that Dale was a sexually active homosexual and it was so understood by Dale and his counsel when they read the letter.

BSA, no serious hearing was ever accorded to Dale on the merits of whether an actively homosexual Assistant Scoutmaster could be or should be compatible with the goals of scouting—as Dale was prepared to argue had the opportunity been presented to him. In other words, the governing powers of BSA had made their own irrevocable decision which they would not change but for the compulsion of a court order. This action then followed.

It is stipulated that Dale is homosexual not only by inclination and preference but that he is a sexually active homosexual.

Dale takes the position, sincerely, that his Boy Scout training instilled in him the belief that "honesty is the best policy" including, among other matters, his sexual orientation. He was never aware, he states, of any written policy in any of the many publications of BSA that "avowed" homosexuals are not permitted in the BSA. He made no inquiries. Affirmatively he states that he is aware of other homosexuals active in scouting against whom no adverse action has been taken because they have not "gone public" with their sexual orientation as did he. He can perceive no per se conflict between the ideals and goals of BSA and his homosexual orientation, "avowed" or not.

We are left then with the fact that the defendants did discriminate (in the broad sense) against plaintiff because of his homosexual "affectional or sexual orientation". Is, then, Dale entitled to an order restoring him to adult membership in BSA and to his former position based on 1) the New Jersey Law against Discrimination (hereinafter NJLAD) or 2) common law policy considerations, or 3) equitable estoppel? Should he, in addition, be awarded compensatory and punitive money damages, counsel fees and costs?

Plaintiff's Complaint seeks relief on the following specified grounds; to wit, that

I. Defendants violated the NJLAD, N.J.S.A. 10:5-1 to 19, and specifically the rights accorded by N.J.S.A. 10:5-12(f) in that, as a "place of public accommodation," BSA discriminated against plaintiff by withholding or denying him "the accommodations, advantages, facilities and privileges" of BSA—as a place of public accommodation—on the basis of his "affectional or sexual orientation".

II. Defendants violated N.J.S.A. 10:5-12(a) in that, as employers, they "discharged" Dale, "as an employee", because of his "affectional or sexual orientation".

III. Defendants violated N.J.S.A. 10:5-12(l) in that BSA "refused to do business" with plaintiff based on his "affectional or sexual orientation".

IV. Defendants' actions in expelling plaintiff from membership in BSA on the basis of his affectional or sexual orientation violated the public policy of New Jersey as codified in the NJLAD.

V. Defendants' intentional revocation of plaintiff's membership in BSA without according him procedural due process violated New Jersey common law governing membership organizations; caused him emotional distress for which he is entitled to compensatory and punitive damages.

VI. Defendants should be estopped from revoking plaintiff's membership in BSA because they never informed plaintiff of their policy against admitting or retaining homosexual boys and men as members and thereby led him into a commitment of time and effort to an organization which he would have voluntarily left years before, had he known.

THE NATURE OF SCOUTING IN THE UNITED STATES

A. THE HISTORY OF SCOUTING

The Boy Scout movement was founded in England in 1907 by Lieutenant General, Sir Robert S. Baden-Powell. His book "Scouting for Boys" published in 1908 furnished the basis for all that scouting became, and it remains so to the present day. In 1910, with the assistance of his sister, Baden-Powell founded the Girl Guides (now Girl Scouts). Both movements spread rapidly throughout the civilized world. By 1920 the First International Scout Jamboree was held and continues to be held on a quadrennial basis.

Since Baden-Powell was a military leader, the organization for boys which he conceived and created has many military attributes. Members wear uniforms with insignia and badges; there is a chain of command; organizational units are called Posts, Troops and Patrols; there is achievable upward movement within the ranks based on merit.

Fundamental to becoming a boy scout was, and continues to be, the promise of the boy that on his honor, he will do his best to do his duty to God and his country; to help other people at all times and to obey the Scout Law. That oath—expressing a chivalrous code of behavior easily understood by a young lad—is taken by each scout candidate in a solemn fashion.

In every country of the world where Boy Scouting is present, the same basic pattern outlined by Baden-Powell is followed, with but small variations as national traditions and culture may require. The world-wide activities of scouting are overseen by the Boy Scouts International bureau established in 1920. Except for necessary professional and administrative personnel, Boy Scouting from

top to bottom is conducted by adult volunteers. They receive no compensation or material reward of any kind.[7]

B. THE STRUCTURE OF BOY SCOUTS OF AMERICA

Boy Scouts of America was first incorporated in 1910 as a not-for-profit corporation in the District of Columbia. Support for the aims and principles of scouting was so strong, nationwide, that on June 16, 1916 a new corporate charter was issued to Boy Scouts of America by Act of Congress.

In the Report of The House Committee on the Judiciary in support of the Act, Congress stated:

> The Boy Scout movement is . . . intended to supplement and enlarge established modern educational facilities in activities in the great and healthful out of doors where may be the better developed physical strength and endurance, self-reliance, and the powers of initiative and resourcefulness, all for the purpose of establishing through the boys of today the very highest type of American citizenship.
>
> It tends to conserve the moral, intellectual, and physical life of the coming generation, and in its immediate results does much to reduce the problem of juvenile delinquency in the cities . . . The importance and magnitude of its work is such as to entitle it to recognition and its work and insignia to protection by Federal incorporation.
>
> The Scout scheme is based upon the methods involved in educating the boy. It is a scheme of placing the boy on honor. In addition to requiring him

[7] The Monmouth Council, for example, has approximately 2,950 adult volunteer leaders and employs 4 scouting paid professionals.

to live up to a standard or code of laws which insure development of character along proper lines, it requires him to study in order to pass certain tests of qualification. The passing of these various tests is recognized by the award of appropriate badges or medals and insignia.

If any boy can secure these badges without meeting the required tests, the badges will soon be meaningless and one of the leading features of the Scout program will be lost. Likewise, with the uniform which designates a Scout. At the present time this is protected by the use of insignia—a seal woven or stamped into the cloth. All of these various badges and insignia are at present protected by the patent laws, but under the patent laws such protection is available for a limited period only. The passing by Congress of this bill will, it is believed, provide the organization with proper protection for its distinctive insignia, the integrity of which is essential to the maintenance of the movement, and protect it from those who are seeking to profit by the good repute and high standing and popularity of the Scout movement by imitating it in name alone.

The corporate charter of BSA grants the following powers:

> Section 2. That the name of this corporation shall be "Boy Scouts of America," and by that name it shall have perpetual succession, with power to sue and be sued in courts of law and equity within the jurisdiction of the United States; to hold such real and personal estate as shall be necessary for corporate purposes, and to receive real and personal property by gift, devise, or bequest; to adopt a seal . . . to make and adopt bylaws, rules, and regulations not

> inconsistent with the law of the United States of America, or any State thereof, and generally to do all such acts and things . . . as may be necessary to carry into effect the provisions of this Act and promote the purposes of said corporation.
>
> Section 3. That the purpose of this corporation shall be to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scout craft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now in common use by Boy Scouts.
>
> Section 4. That said corporation may acquire, by way of gift, all the assets of the existing national organization of Boy Scouts, a corporation under the laws of the District of Columbia, and defray and provide for any debts or liabilities to the discharge of which said assets shall be applicable; but said corporation shall have no power to issue certificates of stock or to declare or pay dividends, its object and purposes being solely of a benevolent character and not for pecuniary profit to its members.

In Section 5 the charter provides that "the governing body of the said Boy Scouts of America shall consist of an executive board composed of citizens of the United States. The number, qualifications, and terms of office of members of the executive board shall be prescribed by the by-laws . . ."

The By Laws of BSA establish its national office in Irving, Dallas County, Texas. The Purpose of BSA (Article I, Section 2) is stated as follows:

> Section 2: The purpose of the Corporation is as set forth in the original certificate of incorporation under

the laws of the District of Columbia, dated February 8, 1910, and restated in the Act of Incorporation enacted by the Congress of the United States of America on June 15, 1916, as follows: "The purpose of this Corporation shall be to promote, through organization and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scout craft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now a common use by Boy Scouts." In achieving this purpose, emphasis shall be placed upon its educational program and the oaths, promises, and codes of the Scouting program for character development, citizenship training, mental and physical fitness.

As created by the By-Laws and Rules and Regulations which flesh them out, BSA is structured—proceeding from top to bottom—in the following manner:

I The National Council

II Regional Committees

III Area Committees

IV Local Councils

V Local Units (Packs, Troops, Varsity Teams or Posts)

I. *THE NATIONAL COUNCIL.* The National Council is comprised of the following members:

a) all members of its Executive Board;

b) members of the Regional Executive Committee;

c) Local Council Representatives (president and council commissioner plus an additional member for every 5,000 youth members);

d) members at large elected by the National Council for 1 year terms;

e) Honorary (non-voting) members as elected by the National Council for 1 year terms.

It meets annually at the call of its Executive Board for the reception of reports of various officers and committees and to elect members both at large and honorary as well as to transact such business as presented by the Executive Board.

Its officers include a President, Executive Vice-President, one or more Vice Presidents, Treasurer and Assistant Treasurers, the National Commissioner (who is the chief morale officer and who represents BSA in national affairs); the International Commissioner (who represents BSA in international affairs) and the Chief Scout Executive who is designated as "the chief executive officer of the Corporation and shall have general direction of the administrative work of the corporation". He is required to prepare an annual report of BSA to transmit it to Congress and to present it to the annual meeting of the National Council.

The Executive Board is the governing body of BSA. Members (not to exceed 64) are elected for 1 year terms at the annual meeting of the National Council. Regional presidents are ex-officio members of the Board. The chairman of the Advisory Council (to the Executive Board) and chairman of the Board of Regents of the National Eagle Scout Association, are likewise ex-officio members. Up to five registered Youth Members from around the nation may be appointed by the President with approval of the Board to a one year term. Regular meetings of the Board occur three times each year.

The Executive Committee of the Board consists of the President of the Board, the executive vice president, the

vice presidents, Regional presidents, the international commissioner, the national commissioner, the treasurer, the assistant treasurers, the Chairman of the support committee of the Executive Board, Chairman of the Advisory Council, the Chief Scout Executive and the immediate past-President.

It meets at the call of the President and may exercise all the powers of the Executive Board during the intervals between Board meetings.

Various Standing Committees of the Board are provided for, to wit: Support, Nominating, Audit, Finance and Contract Review.

An Advisory Council to the Board also exists. It is large in number consisting of the National Council together with "United States citizens who, because of experience, have a particular expertise that would benefit the national movement." Those members have no specified term. They are elected by the Board. The chairman of the Advisory Council is appointed by the President of the Board and serves a term of 1 year. One annual meeting of the Advisory Council is mandatory. It advises "on matters of major national concern."

All of the foregoing are volunteers except for the National Commissioner, International Commissioner and Chief Scout Executive.

II *REGIONAL COMMITTEES.* For ease in administration the Executive Board is empowered by the By Laws to divide up the United States into various regions. Each region is subject to governance of the Regional Committee (composed of members of the National Council residing in the region plus youth members as appointed by the regional president). Each region must implement national BSA policy and program. The Regional Committee must meet once a year.

A Regional Board exercises the authority and responsibility of the Regional Committee whenever the Regional Committee is not in session. Its membership consists of the Regional Executive Committee, the regional vice-presidents plus not more than 50 members at large elected annually by the Regional Committee. The Regional Board may also have up to five youth members with 1 year terms appointed by the regional president. The Board must meet annually to plan events and activities for the region and to train members of the various standing committees. All of its members are volunteers.

The Regional Executive Committee conducts the affairs of Scouting in the region on a day to day basis in conformity with regional committee and board policy. It consists of the regional president and vice-president, area presidents, chairmen of the regional standing committees and the regional director. The last named person serves as secretary of the Regional Committee, the Regional Board, the executive committee of the Board and the Standing Committees.

III *AREA COMMITTEES.* The various regions are then geographically subdivided into areas governed by an Area Committee. Each area committee includes its executive committee (composed of the president, area vice-president(s) and various committee chairmen of standing committees), the regional council president and National Council members residing in the area. They, too, are all volunteers.

IV *LOCAL COUNCILS.* The smallest administrative structure within BSA is the Local Council. The defendant, Monmouth Council Boy Scouts of America, is a local council. Local Councils are subject to the governance of the Area Committee. They are "chartered" by BSA. On application and approval by the Executive Board a

new charter will issue for a period of not more than one year ending on June 30. The charter may thereafter be renewed annually provided the council has met all responsibilities required of it by the By-Laws and Rules and Regulations during the prior year. Each Council must, therefore, report annually on its operations for the preceding year. The charter may be terminated by BSA if "it deems such action advisable in the interests of Scouting." It is recommended that, when chartered, the Local Council incorporate under state law as a non-profit corporation. Most Local Councils (including Monmouth Council) do so.

Monmouth Council is one of 93 councils grouped together in the Northeast Regional Council of BSA. Local Councils report to it on finances, scouting membership, numbers of scouts attending camps and on their review of charter renewal applications for the Troops and Packs. The Regional Council in turn reports to the National Council, BSA. The National Council, which approves all charters and renewals as well as the appointment of adult members, publishes all training materials and handbooks for members and leaders.

Local Councils are responsible: 1) to insure that each Local Unit (i.e. a Boy Scout Troop or Cub Pack) within its territorial area carries out the general principles of advancement in Scouting; 2) to insure the integrity of the merit badge requirements for advancement in scouting; 3) to make Scout training available to the Local Units and community groups using the Scouting program; 4) to provide adequate leadership and leadership training for the Local Units; 5) to insure that standards in Scout policies, badges and insignia are protected; and 6) to insure that adequate financing exists for the support of the Local Units.

Membership of the Local Council (minimum age 21) is made up of one representative from each of the chartered local units within its jurisdiction, together with representatives at large from various business, civil, educational, labor, social and religious interests in the community. A minimum membership of 100 adults is required. Each year the members elect 25 to 50 of their number to serve as the local council executive board which is the governing body responsible for the council's operations and assets. Officers consist of a president, one or more vice-presidents and a treasurer. The executive board may also (and usually does) elect a commissioner and a Council Executive (a paid employee).

Monmouth Council is one of 14 Local Councils in New Jersey. It oversees 80 Boy Scout Troops and 101 Cub Packs (comprising some 2,038 Boy Scouts, 5,738 Cub Scouts and 2,950 adult members) chartered to various religious, fraternal, civic and educational organizations. 35 of the 80 Boy Scout Troops are chartered to churches and church-related organizations.

Monmouth Council also provides the camping and program resources to advance the goals of Scouting. It maintains campsites at Forestburg Scout Reservation in Sullivan County, New York, and Quail Hill Scout Camp in Manalapan Township, New Jersey. It assists the Local Units to recruit new members and to raise money to support the Local Unit activities. For example, it holds an annual Bowl-A-Thon, a Golf Tournament and the Joshua Huddy Awards Dinner as fund raisers. It also coordinates the annual Troop Popcorn sale.

V. *LOCAL UNITS.* Local Units are designated as Packs (Cub Scouts), Troops (Scouts), Teams (Varsity Scouts) and Posts (Explorers). Packs are organized in smaller groups of 3 to 8 boys designated as Dens; Troops,

in Patrols; Teams, in Squads. The leadership structure and makeup of each are spelled out in the Rules and Regulations. Cub Scouts, Boy Scouts and Varsity Teams are for boys. Exploring is for young men and young women. A volunteer adult member—Scoutmaster—heads the Troop (Pack, etc). He is assisted by other volunteer adult members—assistant Scoutmasters—who attend, guide and instruct at the meetings of the Patrols (Dens, Teams). Patrols meet twice a month, separately, and then join together, twice a month, with the other Patrols at Troop meetings.

A Local Unit is directly chartered to the sponsoring group by the Executive Board of BSA based on a favorable recommendation from the Local Council. Once a Charter is granted, it is subject to revocation by the Executive Board in the exercise of its sole judgment. In most instances, charters are issued to existing organizations (church, civic, etc.). In some instances a charter may issue to a unit of interested and qualified citizens formed specifically for that purpose. In either case (existing organization or community unit) the applicant is obliged "to provide adequate facilities, supervision and leadership for a period of at least one year and to make an effort to provide youth members with an opportunity for a quality program experience as set forth in the official literature of the BSA."

Each local unit must be under the supervision of a unit committee consisting of three or more qualified adults (at least 21 years old) selected by the chartered organization. For each Pack, Troop, Varsity Scout team or Explorer Post there must be one adult who registers and serves as the unit leader. That person must be approved by and registered with the Local Council.

Active adult leadership is required for each pack, troop, varsity scout team and explorer post. Using the Scout

Troop as an example (the requirements are similar for each) the leadership consists of the three members of the unit committee plus a Scoutmaster and the assistant Scoutmaster(s).[8] Collectively they are known as the unit Scouters. All must be recommended by the Local Council and then approved, commissioned and registered as adult members by BSA. All must subscribe to the Declaration of Religious Principle set forth in the By-Laws (below at p. 31) and the Scout Oath and Law (below at pp. 29-30). Commissions of Scoutmasters and assistant scoutmasters are issued on an annual basis.

The Local Council, for ease in servicing the local units, may subdivide its area jurisdiction into geographical Districts into which local units are grouped. The District provides its Troops with a volunteer Commissioner who trains, consults and advises the members of the Troop committees and other adult leaders. District Committees are formed to help with training of leaders and to coordinate District-wide events such as a Klondike Derby, Annual Spring and Fall Camporees and the biennial Council Scout Show. They also maintain regular contact with the sponsoring organizations of the Scout Troops.

C. *MEMBERSHIP*

All persons with an active role in scouting are designated as either "Scouters" or "Youth Members". "Scouters" are registered adult members of BSA. A "Youth Member" is "one who, with the approval of a parent or guardian, if necessary, becomes a member of a unit; obligates himself or herself to attend the meetings regularly; fulfills a member's obligation to the unit; subscribes to the Scout Oath. . . ; and participates in an appropriate program based on the member's age as promulgated from time to time by the BSA."

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[8] Assistant Scoutmasters may be commissioned at 18 years of age.

D. *ADULT LEADERSHIP (Scouters)*

Adult Leadership is treated in Article VIII of the By-Laws. Section 1 is pertinent. It reads:

> Leadership Qualifications.
>
> No person shall be approved as a leader unless, in the judgment of the Corporation, that person possesses the moral, educational, and emotional qualities deemed necessary for leadership and satisfies such other leadership qualifications as it may from time to time require.

The Rules and Regulations set forth those requirements in detail.

Article VIII, Section 2, Clause 1 states:

> Individuals serving in any official relationship with the BSA shall subscribe to the statement of religious principle, as prescribed in the By-Laws, and the Scout Oath and Law. They shall . . . be citizens of the United States.
>
> * * * *

Section 3 of Article VIII provides:

> Clause 1. All individuals in unit leadership positions . . . shall be issued commissions by the BSA.
>
> * * * *
>
> Clause 2. All individuals selected to serve as commissioners . . . shall be recommended by the Scout executive and approved by the council executive board. They shall be issued commissions by the Boy Scouts of America **on an annual basis.**
>
> Clause 3. Commissioned officials must be at least 21 years of age with the exception of those individuals

> at least 18 years of age who may be commissioned as assistant unit leaders. . .
>
> * * * *
>
> Clause 11. Unit Leadership. All recommendations to serve as . . . assistant unit leader . . . shall originate with the unit committee, the chartered organization . . . The head of the chartered organization or the chartered organization representative must approve the registration of the leader on the appropriate form. The local council must also approve the registration.
>
> Adult leadership positions shall be filled by persons 21 years of age or older, except the following, which may be filled by persons 18 years or older; . . . assistant Scoutmaster. . .

Dale became commissioned assistant Scoutmaster seven months after reaching age 18.

All Scoutmasters and Assistant Scoutmasters receive a copy of the Mission Statement and "The Scoutmaster Handbook". The Mission Statement recites that:

> *It is the mission of Boy Scouts* to serve others by helping *to instill values in young people* and, in other ways, *to prepare them to make ethical choices* over their lifetime in achieving their full potential. *The values we strive to instill are based on those found in the Scout Oath and Law:*
>
> *Scout Oath*
>
> On my honor, I will do my best
> To do my duty to God and my country and
> To obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong,
> mentally awake, and morally straight.

Scout Law

A Scout is:

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent

The handbook is a how-to-do manual. The sense of what BSA envisages for scoutmasters is conveyed by the message from the Chief Scout Executive which serves as a prologue to the 1990 (current) edition of the handbook. It reads as follows:

> As an adult leader in Scouting, you have a great opportunity to help boys discover their potential. Through a vigorous program of outdoor activities, your Scouts will learn to care for themselves in any kind of weather, set their own significant goals and reach for them, and gain in strength and confidence. One of the greatest joys of being a Scoutmaster or assistant Scoutmaster is watching boys develop into the kind of men our country needs—active citizens committed to the principles of the Scout Oath and Law, leaders who can fulfill important responsibilities in their communities and the nation.
>
> This handbook is designed to help you succeed. The chapters take you through a typical troop meeting and identify the people who will help you do your job. They tell you how to train the junior leaders who will run the troop with your help, using the patrol method. Your handbook also takes you through the program planning process, gives you a ready guide to uniforms and insignia, and explains the resources that are available to you.

> You have an important job, but you are not alone. Besides the parents of your Scouts, some of the best people resources are your Scouting professionals and volunteer commissioner staff. These dedicated people and those at your local council service center are prepared to help you make the Scouting adventure become a reality in the lives of the boys in your troop.
>
> In the years ahead, there's no telling how many men will look back on their happy, productive days as Boy Scouts and recall their Scoutmaster with a large measure of warmth and gratitude. This will be your ultimate reward in Scouting.

As the handbook points out in Chapter 6, there are three Aims of Scouting.

Aim I—To build character

Aim II—To foster citizenship

Aim III—To develop fitness.

That third aim recognizes four kinds of fitness, physical, mental, emotional, and moral. Each is discussed in detail. That dealing with "moral fitness"—as a scouting aim—bears on this case. The handbook for scoutmasters states:

> Moral Fitness: Morality, says the dictionary, concerns the "principles of right and wrong" in our behavior, and "what is sanctioned by our conscience or ethical judgment." Scouting has recognized the importance of moral fitness from the start: A Scout who took the Scout Oath in 1910, for instance, promised to do his best to keep himself "morally straight." A Scout who takes the Oath today promises the same.

In any consideration of moral fitness, a key word has to be "courage." A boy's courage to do what his head and his heart tell him is right. And the courage to refuse to do what his heart and his head say is wrong. Moral fitness, like emotional fitness, will clearly present opportunities for wise guidance by an alert Scoutmaster.

There is much more to be said about Scouting's aims in a dynamic and changing world, in particular the problems to be faced by a Scout generation approaching the turn of our century. How can Scouting help this generation prepare for the ethical judgments they will have to make, and develop the courage they will need to make them?

We explore this more deeply in chapter 10, "Understanding Youth."

In Chapter 10—Understanding Boys—the BSA concept of "moral fitness" is treated in more detail and as related to age groups of 11 to 13 and 14 and older. Thus under the heading—Sex Curiosity—the following suggestions are made:

> Because boys of Scouting age are naturally curious about sex, you may find sexually explicit magazines being circulated during a camp-out, overhear sex talk among the boys, or discover or hear about incidents of sexual experimentation among troop members. Unacceptable publications should be removed from the scene, and those who brought them told that you don't want them around, and why.
>
> Incidents of sexual experimentation call for a private and thorough investigation, and frank discussion with those involved. Such problems should be discussed with the Scout's parents and the troop committee. You might suggest counseling by the Scout's religious leader or by a professional. However, every effort should be made to keep the matter confidential.

Under the heading "Helping Adolescents With Problems", the subheading "Health Risks" states the following:

> Teenagers are more sexually active than ever, yet many do not use any form of contraception. The result is more than 1.1 million pregnancies per year. Roughly half of these pregnancies are terminated by miscarriage or abortion. The trend is for girls who give birth to keep their babies rather than give them up for adoption. For boys, this increasingly means 18-21 years of financial responsibility for their child. Another result of increased teenage sexual activity is a corresponding increase in sexually transmitted diseases among teenagers. Particularly worrisome is the potential among sexually active teenagers for contracting the deadly AIDS virus, which may not result in symptoms for 5-7 years.

* * * *

As Scoutmaster, you will have many opportunities to help Scouts develop healthy lifestyles, avoid health risks, and adjust to any health problems or handicaps they may have. The importance of nutrition, exercise, and safety should be emphasized in all troop activities. Scouting activities should be designed to help boys develop the healthy self-concept, self-esteem, and self-respect needed to make wise decisions and to assume responsibility for themselves in their personal lives.

Being involved in an active troop may help boys avoid temptations which might otherwise jeopardize their health and well being. Guest speakers can provide information on developing a healthy lifestyle,

avoiding accidents, and making decisions regarding substance use. If Scouts ask for information regarding substance use or sexual activity, answer honestly and factually, but stay within your realm of expertise and comfort. If a Scout has serious concerns that you cannot answer, refer him to his family, religious leader, doctor, or other professional. If you become aware that a Scout is involved in substance use or abuse or is sexually active, you will need to involve the Scout's family or direct him to competent professionals.

Lastly, in discussing the subject of "Child Abuse" these comments are made to the Scoutmaster:

Sexual abuse may be inflicted for a number of reasons. There are individuals who have sexual fantasies about children. Such individuals are referred to as pedophiles. All child molesters are not pedophiles; children are sexually molested for other reasons. The molestation may be an inappropriate exercise of power over the child, or the molester may be sexually indiscriminate and take advantage of adults as well as children. While it is true that most child molesters are male, there is a growing awareness of sexual abuse of boys by women.

* * * *

The BSA has developed materials for use in the Scouting program that provide essential information to members and their families. A detachable booklet in the front of The Boy Scout Handbook, "How to Protect Your Children from Child Abuse and Drug Abuse: A Parent's Guide, provides information to help families to increase self-protection skills. *A Time to Tell* is a video produced by the BSA for showing at troop meetings that addresses the problem of sexual abuse of boys 11 to 14 years old. *Boys' Life and Scouting* magazines have regular features providing up-to-date information concerning the youth protection program of the BSA.

A critical element of the youth protection program is the training of Scouting's volunteer leaders. "Youth Protection Begins with You" is the theme of this training session. In less than 2 hours, volunteer leaders receive information preparing them to conduct Scouting activities in accord with your protection guidelines.

Because of the critical roles of the Scoutmaster and assistant Scoutmaster, the selection of people to fill these roles is the most important function of the Troop Committee, the group of adult volunteers that serves as governing board of the Troop. The position of Scoutmaster or assistant Scoutmaster is limited to those who meet a host of formal and informal criteria. The Troop Committee seeking a Scoutmaster looks not only at the candidate's age, sex, religious beliefs, education, emotional health and moral values but also at the candidate's maturity, judgment, leadership qualities, ability to work with boys, ability to win the confidence of parents, ability and willingness to devote the necessary time, relevant knowledge and experience, and a number of other factors. The *Troop Committee Guidebook* lists "high moral standards" as the most important characteristic to have in a Scoutmaster or assistant Scoutmaster. Again, they are commissioned on an annual basis and must be re-commissioned each year.

E. *YOUTH MEMBERSHIP*

Article VII of the **By Laws** treats of Youth Membership in the following fashion:

> Section 1. Youth membership in Boy Scouts of America is open to all who meet the membership requirements. Cub Scouting, Boy Scouting, and Varsity Scouting are for boys. Exploring is for young men and young women.

The basic BSA program is that of Cub Scouts and Boy Scouts for boys from 8 to 18. The Scout Oath and Scout Law are the foundation of the program.

Clause I of Article VII of the **Rules and Regulations** enlarges on what is generally required of a scout be considered an "active youth member" of BSA. Thus

> An active youth member is one who, with the approval of a parent or guardian if necessary, becomes a member of a unit; obligates himself. . . to attend the meetings regularly; fulfills a member's obligation to the unit; subscribes to the Scout Oath . . . and participates in an appropriate program based on a member's age, as promulgated from time to time by the Boy Scouts of America.

In addition—in Article IX, Clause 3 of the **Rules and Regulations**—each scout must know and subscribe to the Scout Oath or Promise and the Scout Law, which are:

The Scout Oath or Promise

On my honor I will do my best
To do my duty to God and my country and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong, mentally awake, and morally straight.

The Scout Law

A Scout is:

Trustworthy. A Scout tells the truth. He keeps his promises. Honesty is part of his code of conduct. People can depend on him.

Loyal. A Scout is true to his family, Scout leaders, friends, school and nation.

Helpful. A Scout is concerned about other people. He does things willingly for others without pay or reward.

Friendly. A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs other than his own.

Courteous. A Scout is polite to everyone regardless of age or position. He knows good manners make it easier for people to get along together.

Kind. A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not hurt or kill harmless things without reason.

Obedient. A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.

Cheerful. A Scout looks for the bright side of things. He cheerfully does tasks that come his way. He tries to make others happy.

Thrifty. A Scout works to pay his way and to help others. He saves for unforeseen needs. He protects

and conserves natural resources. He carefully uses time and property.

Brave. A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at or threaten him.

Clean. A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean.

Reverent. A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.

All of the foregoing requirements for Adult Leadership and Youth Membership are completely consonant with the **Declaration of Religious Principle** contained in Article IX Section 1 of the corporate **By-Laws,** which states:

Clause 1. The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout Oath or Promise the member declares, "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law." The recognition of God as the ruling and leading power in the universe and the grateful acknowledgement of His favors and blessings are necessary to the best type of citizenship and are wholesome precepts in the education of the growing members. No matter what the religious faith of the members may be, this fundamental need of good citizenship should be kept before them. The Boy Scouts of America, therefore, recognizes the religious element in the training of the member, but it is absolutely nonsectarian in its attitude toward the religious

training. Its policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life.

Activities.

Clause 2. The activities of the members of the Boy Scouts of America shall be carried on under conditions which show respect to the convictions of others in matters of custom and religion, as required by the twelfth point of the Scout Law, reading, "Reverent. A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others."

Freedom.

Clause 3. In no case where a unit is connected with a church or other distinctively religious organization shall members of other denominations or faith be required, because of their membership in the unit, to take part in or observe a religious ceremony distinctly unique to that organization or church.

Leaders.

Clause 4. Only persons willing to subscribe to these declarations of principles shall be entitled to certificates of leadership in carrying out the Scouting program.

Clause 5. Other major policies are set forth in article IX of the Rules and Regulations.

Program Objectives (Article X, Section 1) are:

The program shall be one designed to achieve objectives in character development, citizenship training, and mental and physical fitness.

> In its several phases the program shall be adapted to the groups into which youth members are divided and shall be as set forth from time to time in these By-laws and in the Rules and Regulations of the Corporation.
>
> In all activities, emphasis shall be placed upon practice in daily life of the principles of the Tiger Cub Promise, the Cub Scout Promise, The Scout Oath or Promise, and the Explorer Code. In association with suitable adult leadership, members registered in Scouting will be guided to develop traits of character which are expressed in self-reliance, consideration of and help to others, personal courage, and above all in lives of useful citizenship.

The "bible" for all Scouts is The Boy Scout Handbook. As to what is required and what it means to be a Boy Scout it remains essentially unchanged since the First Edition published in 1910. The current edition is the 10th (Fourth Printing). Since 1910 a total of 34,860,000 Handbooks have been printed.

The applicant for membership in BSA is told that he must complete the following requirements to become a Boy Scout.

> At your first troop meeting, your Scoutmaster will explain the following joining requirements of the Boy Scouts of America:
>
> Submit a completed Boy Scout application and health history signed by your parent or guardian.
>
> Repeat the Pledge of Allegiance (page 468).
>
> Demonstrate the Scout salute, sign, and handclasp (page 468).

> Show how to tie the square knot (also known as the joining knot) (pages 132-133, 141).
>
> Understand and agree to live by the Scout Oath (pages 549-551), the Scout Law (pages 553-561), the Scout motto (page 562), the Scout slogan (page 563), and the Outdoor Code (pages 55-59).
>
> Describe the Scout badge (page 565).
>
> With your parent or guardian, complete the exercises in the pamphlet **How to Protect Your Children from Child Abuse and Drug Abuse.**[9]
>
> Participate in a Scoutmaster conference (pages 589-590).
>
> When you have completed these, welcome! You are a Scout! Your Scoutmaster will give you a certificate of membership, and you can proudly wear the Boy Scout badge and uniform. You may also subscribe to **Boy's Life,** a monthly magazine that is full of exciting articles for and about Scouts.

In Chapter 22 of the Handbook which addresses Personal Development there is the sub-heading "Good Judgment." The scout is told (passim):

> Good judgment is the ability to make wise decisions even under difficult conditions. You don't need great knowledge in order to use good judgment. You just have to do your best with what you already know.
>
> * * * *
>
> Part of good judgment is choosing friends. You spend a lot of time with the people you enjoy. You learn from them, have fun with them, and want them to like you.
>
> Hang on to friends who have attitudes and values you admire. Seek out those with healthy interests.

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[9] A recently added requirement.

Share adventures with people who want to make the most of themselves.

However, don't limit your opportunity to meet someone new just because he or she is not exactly like your other friends. Differences of race, culture, and language can be the basis of many close bonds. Some people are shy, so it may be up to you to open the door to friendship. Visit with them at school. Invite them to join in with Scouting events, ball games, and neighborhood activities. You will be surprised how eagerly others respond to your offers of friendship.

* * * *

The language you and your friends use is a clue to how you think about the world. Swear words, dirty jokes, and crude talk often are used as weapons to hurt other people. Clean language is a mark of intelligence, kindness, and respect for other people.

Once in a while, you may discover that some of the people you know are using tobacco, alcohol, or illegal drugs. They may pressure you to use them, too. However, you know that real friends would not want you to do things that could harm your health or cloud your mind. If smoking, drinking, or drugs are a part of your circle of friends, you may need to find new friends who are more interested in making the most of their lives. Don't worry, they are out there. Look around and you will find them.

An entire subsection is devoted to Sexual Responsibility. In itself it is a declaration of policy by BSA and is set forth in its entirety.

As you grow into manhood, your friendships will change. People around you are also changing. Girls you know are becoming young women. They are

growing both physically and emotionally. Your relationships with them will become closer and more meaningful to you and to them.

You are maturing sexually, too. As a young man, you are capable of becoming a father. That is a profound responsibility with powerful consequences in your life and the lives of others. It is a responsibility that requires your very best judgment.

Sex is not the most important or most grown-up part of a relationship. Having sex is never a test of maturity. True manliness comes from accepting the responsibility for your actions toward others and yourself in the following ways:

Your responsibility to women. Whenever you like someone, you want the best for that person. A healthy relationship is supportive and equal. You owe it to the women in your life to keep their best interests in mind. You can have a terrific time together enjoying life and growing emotionally. However, the difficulties created by a pregnancy can be enormous. Don't burden yourself and someone you care for with a child neither of you is ready to bear.

Your responsibility to children. When you are fully grown and have become secure in yourself and in your relationship with another person, the two of you may decide to marry and have a child. That is a wonderful choice full of challenges and rewards. By waiting until you are thoroughly prepared to be parents, you can give your own child a close, loving family in which to grow.

Your responsibility to yourself. An understanding of wholesome sexual behavior can bring you lifelong happiness. Irresponsibility or ignorance, however, can cause a lifetime of regret. AIDS and venereal

diseases spread by sexual contact may undermine your health and that of others. Having a baby before you are ready may drastically limit your future chances for education, occupations, and travel.

You owe it to yourself to enter adulthood without burdens. You owe it to yourself to enrich your life by learning what is right. Your religious leaders can give you moral guidance. Your parents or guardian or a sex education teacher should give you the facts about sex that you must know.

Learn by asking, remember? If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster. They have experienced much of life, and they are interested in what is best for you. Let them know your concerns.

James Dale used the Boy Scout Handbook for years. He was familiar with the Declaration of Religious Principle and had subscribed to the Scout Oath and Promise and Scout Law. When he applied for adult membership as an assistant scoutmaster he stated that he would adhere to the principles and policies of Scouting including the Declaration of Religious Principle, the Scout Oath and Promise and the Scout Law. He read the Scoutmaster Handbook. The version which he used was the 1972 edition. The subject of "Sex Curiosity" was treated therein as follows:

> In the age span covered by the Scouting program, boys discover sex as one of the realities of living. They are naturally curious about it, and they may have limited opportunity to find out about it.
>
> It seems to be general belief that boys should learn of sex and family life at home, from their parents. While there are few objections to this principle, it is

not borne out in fact that this teaching actually occurs.

You must respect the right of parents to teach their sons about life. You must also recognize that many of them will not do this very well, and some won't do it at all. Some of their failings will come to light in your troop.

If you find magazines at practically any level of obscenity being circulated during a campout.

You may have boys asking you for information or advice about sexual matters.

You may overhear dirty stories or dirty talk, both informed and uninformed, in the troop.

You may discover or hear about incidents of sexual experimentation among troop members.

How should you handle such matters?

Rule number 1: You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area, and that you are probably not well qualified to do so.

Rule number 2: If Scouts come to you to ask questions or to seek advice, you would give it within your competence. A boy who appears to be asking about sexual intercourse, however, may really only be worried about his pimples, so it is well to find out just what information is needed.

Rule number 3: You should refer boys with sexual problems to persons better qualified than you tc handle them. If the boy has a spiritual leader or a doctor who can deal with them, he should go there. If such persons are not available, you may just have to do the best you can. But don't try to play a

highly professional role. And at the other extreme, avoid passing the buck.

And now how about some of the questions we raised?

Publications that you judge unacceptable should be removed from the scene, and those who brought them told that you don't want them around, and why.

Incidents of sexual experimentation that may occur in the troop could run from the innocent to the scandalous. They call for a private and thorough investigation, and frank discussion with those involved. *It is important to distinguish between youthful acts of innocence, and the practices of a confirmed homosexual who may be using his Scouting association to make contacts. A boy of 15 or so cannot be assumed to be acting out of innocence, and should be separated from the troop for the protection of younger boys.* (Emphasis supplied)

Thus, when Dale states that he did not know that BSA had a policy against commissioning a sexually active homosexual assistant scoutmaster he is not worthy of belief.

LEGAL ANALYSIS

It is abundantly clear from the proofs presented by BSA that from its inception Scouting has excluded from membership and adult leadership any person who openly declares himself a homosexual and that such policy has continued unchanged, to the present. Such policy applies, a fortiori, to one who engages in homosexual conduct. It is the firm position of BSA that such conduct is not "morally straight" under the Scout Oath nor is it "clean" under the Scout Law.

Homosexuality is defined in the American Heritage Dictionary of the English Language (1969) as "1. Sexual

desire for others of one's own sex. 2. Sexual activity with another of the same sex." That is an acceptable working definition for the purpose of this case. Plaintiff is a homosexual by inclination and by action. In its secondary meaning homosexuality becomes sodomy—i.e. "anal copulation of one male with another." *id.* "Buggery" is a vulgar equivalent of sodomy.

"Sodomy" is derived from the name of the biblical city, Sodom, which, with the nearby city of Gomorrah, was destroyed by fire and brimstone rained down by the Lord because of the sexual depravity (active homosexuality) of their male inhabitants. *Genesis 18:16 to 19:28* (King James Version.)

In the Judeo-Christian tradition the act of sodomy has always been considered a gravely serious moral wrong. That is likewise true of the Muslim and Hindu religions. The criminal laws of Western civilization and of our nation, and, until recent times, those of this state, imposed penal sanctions in addition to moral culpability. Such laws sprang from the power of government to protect "public morals" as well as public health, safety and welfare. Under those laws consensual sodomy was a crime attributable to both participants, whereas only the aggressor was at risk in a non-consensual situation.

From the founding of BSA in 1911 and until 1961, sodomy was a serious criminal offense in every state in the Union and in the District of Columbia. *Bowers v. Hardwick*, 478 U.S. 186, 193-4 (1986). In New Jersey, sodomy was a crime (and actively prosecuted) until repealed by the enactment of the New Jersey Criminal Code effective September 1, 1979. N.J.S.A. 2C:98-2.[10] Thus,

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[10] Non-consensual sodomy is still a criminal offense under the sexual assault statute (N.J.S.A. 2C:14-2) and punishable as a second degree crime.

the former statute (N.J.S.A. 2A:143-1) stated that "Sodomy, or the infamous crime against nature, committed with man or beast,[11] is a high misdemeanor, and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 20 years or both." If committed with a child under 16 years of age, sodomy was punishable by imprisonment for not more than 30 years. N.J.S.A. 2A:143-2. As of 1986, the U.S. Supreme Court found that 24 states continued to view sodomy as a criminal offense and it affirmed their right to do so. *Bowers*, 478 U.S. at 193-4.

To suggest that the BSA had no policy against active homosexuality is nonsense. It was an organization which from its inception had a God-acknowledged, moral foundation. It required its members, youth and adult, to take the Scout Oath that they would be "morally straight". It is unthinkable that in a society where there was universal governmental condemnation of the act of sodomy as a crime, that the BSA could or would tolerate active homosexuality if discovered in any of its members. In this State that is surely correct from 1910 to 1979. BSA did not change its moral stance thereafter simply because the criminal law changed.

The criminal law has changed. The moral law—as to the act of sodomy—has not. The numerous certifications submitted by various ministers, priests and rabbis attest to that. Individual religious persons may distinguish between the moral culpability of a psychological tendency (perhaps innate) or sexual attraction to a person of the same sex, (a state of mind) but all religions deem the act of sodomy a serious moral wrong. The act is something deliberate and intentional; the thought might not be. An analogy with adultery and fornication is apt. The

[11] This related offense is usually termed "beastiality."

thought may or may not be morally culpable; the acts were, until 1979, considered criminal by the State of New Jersey.

Human beings with homosexual tendencies or thoughts have existed since the beginning of the human race and undoubtedly will continue to exist until its end. Dale argues that he is aware of others in BSA with such tendencies. He may well be correct. BSA is a vast organization. But when the tendency turns to action, the bible story of Sodom, the common law penal laws, the laws of New Jersey up to 1979 and universally held religious positions, condemn that act. Today in New Jersey the moral law as espoused by the major religions continues to declare the act of sodomy to be a serious wrong. Government no longer does.

BSA is a moral organization. Recognition of that basic reality explains the sponsorship of Boy Scout troops by all of the major religions. They believe, as the certifications demonstrate, that the BSA is compatible with and supportive of the moral principles which they espouse. That is why so many troops throughout the country, in New Jersey and in the Monmouth Council, are sponsored by churches and invited to meet in church facilities.

According to its mission and purpose, BSA has determined that an assistant scoutmaster who is an active sodomist is simply incompatible with scouting and is not "morally straight". Does the NJLAD require a fundamental, court-imposed, change in its policies? The short answer is No.

Dale argues that he was legally damaged by the revocation of his commission as an adult volunteer assistant scout master by virtue of the July 19, 1990 letter. Under BSA By-Laws all commissions are issued on an annual basis. Dale's would have expired on December 31, 1990

unless renewed for 1991. It is clear that BSA would not have renewed it.

There were no legally remediable adverse consequences to him from his termination. He had outgrown being a Boy Scout when he turned 18. BSA has not taken away any of the awards and honors bestowed on him as a boy scout. Until the day he dies he can proudly claim that he was an Eagle Scout. He was, for a short time, an unpaid volunteer whose services were terminated. By virtue of that termination he lost neither economic benefits, nor socially valuable status. The work of scoutmasters and assistant scoutmasters brings no measurable public recognition. Recompense is found in the gratitude of boys and parents for a job well done. These, as is true of most volunteers in our society, are truly "unsung heroes". Neither BSA nor Monmouth Council made any public announcement of his termination or the reason for it. If there is, presently, any public interest, it arises from this law suit. Dale has lost nothing of compensable value.

Clearly, if Dale had engaged in criminal activity such as using or dealing in controlled dangerous substances; if he were a rapist or murderer or pederast there could be no basis to claim a violation of NJLAD in revoking his commission as an assistant scoutmaster. To do less would fail to keep faith with the avowed purposes of Scouting and with the parents who entrust their boys between 8 and 18 to BSA and the principles it espouses. It would also defy common sense. Men who do those criminal and immoral acts cannot be held out as role models. BSA knows that. Active homosexuality, as noted, is no longer a crime. BSA and the major religions of the civilized world all deem it immoral. Should NJLAD be read to compel BSA to accept that form of immorality when it is perfectly clear that NJLAD could not protect

from adverse treatment, one whose immoral activity violates the criminal law as well?

Dale wishes to pursue his own life-style. He has a constitutional right to do so, now that the act is no longer criminal. But he cannot compel BSA to continue his volunteer adult leadership status when he is not in compliance with the Scout Oath, the Scout Law and the Statement of Religious Principle.

It is worthy of note that Dale's termination as an adult volunteer assistant scoutmaster does not rise to the level of an "expulsion" of a member of a professional or social service organization. In the latter class of cases members usually pay dues and membership brings with it recognized professional status or economic benefits. In such organizations expulsion of a member is legally proper, but only after the organization accords the affected person fundamental due process. *Sibley v. Carteret Club of New Jersey*, 40 N.J.L. 295 (Sup. Ct. 1878); *Higgins v. American Society of Clinical Pathologists*, 51 N.J. 181 (1968); *Zelenka v. B.P.O.E. of the U.S.*, 129 N.J. Super. 379 (App. Div. 1974), *Cert. denied*, 66 N.J. 317 (1974); *Calabrese v Policemen's Benevolent Ass'n, Local No. 76*, 157 N.J. Super. 139 (Law Div. 1978).; *James v. Camden County Council No. 10*, 188 N.J. Super. 251 (Ch. Div. 1982); *Rutledge v. Gulian (Masons)*, 93 N.J. 113 (1983).

As pointed out in *Loigman v. Trombadore*, 228 N.J. Super. 437, 449-50 (App. Div. 1988):

> Deference has always been afforded to the internal decision making process of private associations. These associations must have considerable latitude in rulemaking in order to accomplish their objectives and generally, their private law is binding on those who wish to remain members. *See Higgins v. American Soc. of Clinical Pathologists*, 51 N.J. 191-202 (1968). *See also, Calabrese v. Policemen's Benev-*

olent Ass'n Local #76, 157 N.J. Super. 139, 146-147 (Law Div. 1978).

* * * *

There can be no question but that a non-profit corporation is authorized to adopt or amend the bylaws for the administration and regulation of the affairs of the corporation. N.J.S.A. 15A:2-10 and 15A:3-1A(11); *See Moorestown Mgmt. v. Moorestown Book Shop, et als*, 104 N.J. Super. 250, 260 (Ch. Div. 1969). Further, the constitution and by-laws of a voluntary association become a part of the contract entered into by a member who joins the association. *Leeds v. Harrison*, 7 N.J. Super. 558, 570 (Ch. Div. 1950); *accord Delmarmo Associates v. N.J. Eng'g & Supply Co.*, 177 N.J. Super. 15, 17 (App. Div. 1980). "[I]t is well established that a voluntary association may, without direction or interference by the courts, draw up for its government and adopt rules, regulations and by-laws which will be controlling as to all questions of . . . doctrine or internal policy." 6 Am Jur 2d, *Associations and Clubs*, § 5 at 433 (footnote omitted).

Generally, judicial intervention into the affairs of a non-profit association is justifiable "only when the complaining parties have suffered an invasion of their civil rights, of persons or of property." *Leeds v. Harrison*, 9 N.J. at 215; 6 Am Jur 2d, *supra*, § 28 at 453-454. Non-profit corporate associations such as the Association are given the utmost latitude in their regulation and management of intra-corporate affairs. *Leon v. Chrysler Motor Corporation*, 358 F.Supp. 877, 855 (D.N.J.) *aff'd*, o.b. 474 F.2d 1340 (3rd Cir. 1973). "The general rule is that there is no legal remedy for exclusion of . . . an individual from admission to a voluntary association no matter how arbitrary or unjust the exclusion." *Trautwein v. Harbourt*, 40 N.J. Super. 247, 268 (App. Div. 1956).

Here, the BSA and Monmouth Council "terminated" rather than "excluded" Dale from adult membership. It was done peremptorily. He sought a "due process" hearing and was denied. It is clear that all of the hearings which might have been accorded would not have changed the result. Procedural niceties are not at issue here.

As a matter of law the public policy of New Jersey which Dale claims to have been violated is that established by the NJLAD; it is not some prior common law policy. *Erickson v. Marsh & McLennon Co.*, 117 N.J. 539, 561-2 (1990); *Shanner v. Horizon Bancorp.*, 116 N.J. 433, 453 (1989).

Therefore, absent a public policy as established under the NJLAD, plaintiff has no cause for action by the court.

The NJLAD is contained in N.J.S.A. 10:5-1 through 42. Not all sections are implicated by the issues raised in this case. Those which are, are set forth as follows.[12]

10:5-2. Police power, enactment deemed exercise of.

The enactment hereof shall be deemed an exercise of the police power of the State for the protection of the public safety, health and morals and to promote the general welfare and in fulfillment of the provisions of the Constitution of this State guaranteeing civil rights.

10:5-3. Finding and declaration of legislature.

The Legislature finds and declares that practices of discrimination against any of its inhabitants, because

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[12] For clarity, particular language in the various sections deemed not pertinent to the issues are elided by . . . Bold type does not appear in the statutes but are used here to emphasize language deemed pertinent.

of race, creed, color, national origin, ancestry, age, sex, **affectional or sexual orientation,** . . . are matters of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State. . .

The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the race, creed, color, national origin, ancestry, age, sex, **affectional or sexual orientation,** . . . in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured.

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. **Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.**

10:5-4. Obtaining employment, accommodations and privileges without discrimination; civil right.

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, . . . without discrimination because of race, creed, color, national origin, ancestry, age, marital status, **affectional or sexual orientation,** familial status, or sex, **subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.**

10:5-5. Definitions

* * * *

1. "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, . . . any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or devices of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections or where any beverages of any kind are retailed for consumption on the premises, any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theater, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dis-

pensary, clinic or hospital, any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. **Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution,** and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed . . .

* * * *

v. "Public facility" means any place of public accommodation and any street, highway, sidewalk, walkway, **public building, and any other place or structure to which the general public is regularly, normally or customarily permitted or invited.**

* * * *

hh. "Affectional or sexual orientation" means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.

ii. "Heterosexuality" means affectional, emotional or physical attraction or behavior which is primarily directed towards persons of the opposite gender.

jj. "Homosexuality" means affectional, emotional or physical attraction or behavior which is primarily directed towards persons of the same gender.

* * * *

10:5-12. Unlawful employment practice or unlawful discrimination.

It shall be an unlawful employment practice, or, as the case may be, and unlawful discrimination.

(f) For any owner, lessee, proprietor, **manager, superintendent, agent** or employee **of any place of public accommodation, directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof,** or to discriminate against any person in the furnishing thereof, or directly or indirectly to publish, circulate, issue, display, post or mail any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, or privileges of any such place will be refused, withheld from, or denied to any person on account of . . . **affectional or sexual orientation,** . . . or that the patronage or custom thereat of any person of any particular . . . affectional or sexual orientation is unwelcome, objectionable or not acceptable, desired or solicited. . .

(a) For an employer, because of the . . . affectional or sexual orientation . . . of any individual, . . . to refuse to hire or employ or to bar or to discharge . . . from employment such individual or to discriminate against such individual . . . provided further that **it shall not be an unlawful employment practice for a club exclusively social or fraternal to use club membership as a uniform qualification for employment, or for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of** clergy, religious teachers or **other employees engaged in the religious activities of the association or organization, or in following**

the tenets of its religion in establishing and utilizing criteria for employment of an employee; . . .

(1) For any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the. . .

I. PLAINTIFF IS ENTITLED TO NO RELIEF UNDER N.J.S.A. 10:5-12(f)

BSA is not a "place of accommodation" under N.J.S.A. 10:5-12(f) and as defined in N.J.S.A. 10:5-5(1). The lengthy list set forth in the definition is a list of *places*—not one of organizations. A physical place to which one may point is clearly intended. *See, Sellers v. Phillips's Barber Shop*, 46 N.J. 340 (1966); *Kiwanis International v. Ridgewood Kiwanis Club*, 806 F.2d 468, 471 (3rd Cir. 1986), *cert. denied*, 483 U.S. 1050 (1987).

N.J.S.A. 10:5-5(1) provides a lengthy list of establishments and facilities which solicit customers or patrons as places "of public accommodation." The doctrine of *ejusdem generis* requires that in deciding whether a non-enumerated place or facility should be included in the general term "place of public accommodation" a court should find that it is "similar in nature to those enumerated". *See BOC Group v. Lummus Crest*, 251 N.J. Super. 271, 277-280 (Law Div. 1990), which considered what was includable in the definition of "merchandise" under the Consumer Fraud Act. In *Frazier v. Robin Dee Day Camp*, 44 N.J. 480 (1965), the court refused to rule that the list of "places of public accommodation" under the statute was all-inclusive, but concluded that "the listed places . . . are merely illustrative of the accommodations the Legislature intended to be within the scope of the statute. Other accommodations, *similar in nature to those*

enumerated, were also intended to be covered." (Emphasis supplied.) *Id.* at 486.

Boy Scouts of America is not a place; it is an entity which embraces and projects through its organization certain moral concepts and values. It neither owns or controls a "place" from which Dale has been excluded. The same is true of the Monmouth Council.

A Boy Scout troop bears no similarity to the enumerated places of public accommodation. It consists of a small group of boys and their adult leaders who meet together in various places, viz. their regular meeting hall, in tents during summer camp or at other scout gatherings on scout-owned properties. None of those activities or places are open to the public. The benefits to the boys spring not from the "facility" but from their interaction, training and experiences as a group. Those goals and objectives are totally different from "places" to which the public is invited. *Seabourn v. Coronado Area Council, Boy Scouts of America*, 891 P.2d 385 (Kan. 1995). Boy Scouts of America was held not to be a place of public accommodation under federal law in *Welsh v. Boy Scouts of America*, 787 F.Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir. 1993).

Dale is no longer assistant scoutmaster of Troop 73 Matawan. Troop 73 meets in a hall provided by Matawan First United Methodist Church—its chartered sponsoring organization. That hall is, of course, a "place" under the statute. Is that "place" one of "public accommodation"? It is not. It is private property which Troop 73 uses by virtue of invitation and sufferance.

Dale would seem to suggest that wherever Boy Scout troops may meet, throughout the nation, that "place" is one of public accommodation because the "public" (read age-eligible boys) have a standing invitation to attend.

The only ones invited to be boy scouts are those who are willing to take the Scout Oath or Promise and who agree to be bound by the Scout Law. To be an adult leader of scouting one must agree to be bound not only by the Scout Oath or Promise but also by the Declaration of Religious Principles. Neither is an invitation to the public to participate in the affairs or scouting.

BSA is entitled to structure its organization in a fashion it deems appropriate. It is a private organization which has done so. Membership is limited. It is not "public" in the sense of N.J.S.A. 10:5-12(f); it is not a "place" within the legislative intent. Plaintiff is entitled to no relief under that section.

However, plaintiff seeks an "expansive" interpretation of "place of public accommodation" and points to the holding in *National Organization for Women v. Little League Baseball*, 127 N.J. Super. 522 (App. Div. 1974). That case held that Little League could not continue to discriminate against females as participants. The matter involved an appeal from the order of the Division of Civil Rights ordering Little League to admit girls to participation in the same manner as boys. The appellate Court relied heavily on medical testimony opining that in the age bracket in question (8 to 12 years) girls' athletic and physical ability was the equivalent of that of boys. It held that "[l]ittle League is a public accommodation because the invitation is open to children in the community at large, with no restriction (other than sex) whatever." *id.* at 531. It then stated that "the 'place' of public accommodation in the case of Little League is obviously the ball field at which tryouts are arranged, instructions given, practices held and games played." *id.*

In apparent recognition that under the rules and regulations of Little League, the "public" was not invited to

participate since only able boys between the ages of 8 and 12 were eligible), the court found added support for accommodation finding in stating that "[i]t (i.e. Little League) is public in the added sense that local government bodies characteristically make the playing areas available to the local leagues, ordinarily without charge." *id.* Query, if the playing areas were on church-related property would Little League then become a place of private accommodation?

Little League and Boy Scouts are similar in that both are not-for-profit and both are organized on a national level. In New Jersey, at least, Little League is open to both genders of age-qualified children. Scouting maintains separate organizations for the genders.

The differences are many. Scouting is a sustained program of moral character development for boys. Each activity (of the broad spectrum of activities) is designed to provide opportunities to practice and reinforce the values of the Scout Oath and Law. The focus in Little League is primarily on the development of ability in the sport of baseball in a competitive setting. In connection with that, good sportsmanship and fair play are stressed. The relationship among the troop members and adult leaders of Scouting is continuous on a year-round basis. It is personal and social. There is no public attendance. Little League provides an association of children and adults for the length of the baseball season and solely for that purpose. It thrives on public (i.e. family members and friends) attendance. Little League coaches serve as teachers of baseball skills and are role models for good sportsmanship, fairness and fatherly patience. Scoutmasters are teachers and role models of "what a man should be like" in all aspects of male adulthood. Lastly, the invitation of Little League is open to all age-eligible persons who want

to play baseball. That of Scouting is limited to those who subscribe to the Scout Oath and Law.

If a "place" meets the definition of "public accommodation" and discriminates against members of the invited public based on "affectional or sexual orientation" it runs afoul of the statute. BSA is neither a "place" nor is there an invitation to the public at large to enter, participate or make use of an "accommodation".

The defendants argue that they qualify under the exclusion contained in the definition of "a place of public accommodation" in N.J.S.A. 10:5-5(1) and therefore that they are not bound by NJLAD. The exclusion is in this language:

> Nothing contained therein shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything contained herein apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education or upbringing of a child under his control is hereby affirmed; . . .

Three exclusions are provided:

> 1) an "institution . . . . which is in its nature distinctly private",
>
> 2) an "educational facility operated . . . by a bona fide religious or sectarian institution,
>
> 3) the right of a . . . parent or one in loco parentis to direct the education or upbringing of a child. . .

The defendants assert that they are excluded in all three categories. They are correct as to the first and wrong as to the other two. BSA is not an "educational facility" as contemplated by the legislature. In the broad sense it

does educate, but not in a facility. Education takes place in the troop wherever and whenever the troop meets. Nor is BSA "a bona fide religious or sectarian institution" within the plain import of those words as, for example, would be the Southern Baptist, Presbyterian, Black Muslim, Evangelical Lutheran, Orthodox Jewish or Roman Catholic churches, synagogues and temples. That is not to say that BSA does not espouse religious principles acceptable to all of its religious sponsors—for it does. As will be seen in the discussion of Freedom of Expressive Association, below, it is quasi-religious in its nature (*See,* The Nature of Scouting, above). However, it does not qualify for the exclusion.

BSA argues that parents entrust their boys to the training and leaders commissioned by BSA and as a result BSA stands "in loco parentis to direct the education or upbringing of a child." That view stems from too broad a reading of the exclusion. "In loco parentis", in context, does not apply to a private organization but rather to a person such as a guardian or foster parent, or even a state agency, having the legal right to direct education or upbringing.

However, also as set forth above in explicating the *nature* of BSA, it is an institution which is distinctly private not public. It has membership requirements; its members wear distinctive uniforms and insignia; it has distinctive traditions and ceremonies; it articulates values and goals. These characteristics are bona fide; have existed since 1911 and are not feigned as a disguised form of discrimination. *Kiwanis International,* 806 F.2d at 476; *Welsh v. BSA* 993, F.2d 1267 (7th Cir. 1993); *Clover Hill Swimming Club v. Goldsboro,* 47 N.J. 25, 34 (1966). I find in, this exclusion, a legislative recognition of the freedom of expressive association discussed below and that BSA is protected by it.

II. PLAINTIFF IS ENTITLED TO NO RELIEF UNDER N.J.S.A. 10:5-12(A)

The cited statute precludes discrimination in employment. Dale was a volunteer, not an employee. He received no remuneration or benefits. He did not work for BSA. His efforts were devoted to the boys in the troop. BSA issued his "commission" which gave him the authoritative position of assistant scoutmaster. It did so on the recommendation of the unit committee and Monmouth Council—neither of which would have done so had they been aware that he was a sexually active homosexual. *Graves v. Women's Professional Rodeo Organization*, 907 F.2d 71, 73 (8th Cir. 1990).

N.J.S.A. 10:5-12(a) must be read in conjunction with the legislative purpose expressed in N.J.S.A. 10:5-3, that is, to prevent "personal hardships" such as "economic loss; time loss. . . . or other irreparable harm resulting from the strain of employment controversies" for which there are "legal remedies including compensatory and punitive damages".

The invidious discrimination against an individual precluded by N.J.S.A. 10:5-12(a) is that which affects "compensation or . . . terms, conditions or privileges". None of that applies to Dale.

Plaintiff has no cause for action under the statute.

III. PLAINTIFF IS ENTITLED TO NO RELIEF UNDER N.J.S.A. 10:5-12(l).

The cited statute precludes discrimination based on a refusal to do business with any other person on the basis of, inter alia, "affectional or sexual orientation." BSA was not doing business with Dale. It simply commissioned him as a volunteer adult assistant scoutmaster. There was no

contractual relationship—no quid pro quo. There was a unilateral authorization by BSA that allowed Dale, as a volunteer, to act as adult mentor for a specified time period to a patrol of scouts assigned to him for guidance and tutelage—nothing more. *Curran v. Mount Diablo Council of the Boy Scouts*, 29 Cal. App. 4th 192, 29 Cal. Rptr. 580 (1994) *rev. granted* 31 Cal. Rptr. 126 (1994); *Seabourn v. Coronado Area Council*, 891 P.2d at 403.

Plaintiff has no cause for action under that statute.

Therefore, for the foregoing reasons all relief sought by plaintiff is denied.

IV. THE DEFENSE OF FREEDOM OF EXPRESSIVE ASSOCIATION

In *Roberts v. United States Jaycees*, 468 U.S. 607, 82 L.Ed. 2d 462, 104 Sup. Ct. 3244 (1984) Justice Brennan developed the concept of First Amendment protection of a group's right to freedom of expressive association in the following fashion (beginning at 104 Sup. Ct. 3252) (citations omitted):

> An individual's freedom to speak, to worship and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were also guaranteed.
>
> * * * *
>
> According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.
>
> * * * *
>
> Consequently, we have long understood as implicit in the right to engage in activities protected by the

First Amendment a corresponding right to associate with others in pursuit of a wide variety of political social, economic, educational, religious, and cultural ends.

* * * *

Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. Among other things, government may . . . Try to interfere with the internal organization or affairs of the group.

* * * *

There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore, plainly presupposes a freedom not to associate.

* * * *

The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

In her concurring opinion, Justice O'Connor, refined the concept in the following fashion (p. 3258 Sup. Ct.):

> . . . an association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. Protection of the message itself is judged by the same standards as protection of speech by an individual. Protection of the association's right to define its membership derives from the recognition that the information of an expressive association is the creation of a voice, and the selection of members is the definition of that voice. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." (citations omitted)

And at (p. 3259 Sup. Ct.):

> In my view, an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominantly of the type protected by the First Amendment. It is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard. An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the market-place of ideas.

Determining whether an association's activity is predominantly protected expression will often be difficult, if only because a broad range of activities can be expressive. It is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service.

* * * *

> Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvment. (The footnote reference for this is the Girl Scout and Boy Scout Handbooks).

The court was unanimous in holding that the State of Minnesota through its legislative power as interpreted by its Supreme Court could vitiate a by-law of the Jayees excluding women from voting membership based on a finding that the Jaycees was essentially a commercial association.

A similar result was reached in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 95 L.Ed. 2d 474, 107 S. Ct. 1940 (1987). Both the California appellate court and the Supreme Court were of the opinion that the California law against discrimination based on gender, vitiated Rotary's by-law limiting membership to men and that, based on its essential business-related nature, Rotary had no freedom of expressive association right to be constitutionally protected in that regard. The State's "compelling interest in eliminating discrimination against women" (a goal not related to the suppression of ideas) prevailed.

In the language of Justice O'Connor in the *Jaycees* case, Rotary, too, fell into the category of a "predominantly commercial association".

In *New York State Club Association v. City of New York*, 487 U.S. 1, 101 L.Ed. 2d 1, 108 Sup. Ct. 2225 (1988) the focus was somewhat different. The New York City Human Rights Law had an anti-discriminatory provision containing language which parallels that of N.J.S.A. 10:5-12(f). As originally enacted, it provided an ex-

emption for "any institution, club, or place of accommodation which proves that it is in its nature distinctly private". Thereafter, that exemption was amended to affirmatively extend anti-discriminatory coverage to any "institution, club or place of accommodation (that) has more than four hundred members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business." It is further provided that any such club "shall not be considered in its nature distinctly private". The plaintiff, consortium of private clubs, challenged the amendment as violative, on its face, of First and Fourteenth amendment rights of "private" clubs.

Relying on its *Rotary* and *Jaycees* opinions the Court rejected the facial First Amendment challenge. It left open the possibility that an individual club might litigate the question on an "as applied" basis.

The facial Fourtenth Amendment challenge was based on an equal protection argument stemming from the exemption of clubs "distinctly private" in nature. For similar reasons that argument was given rather summary disposition.

That case has no precedential value for this case save for the concurring opinion of Justices O'Connor and Kennedy as well as that of Justice Scalia which were sensitive to the First Amendment rights of expressive association held by other organizations. For the purposes of this case we are left, then, with the guidance provided by *Roberts* quoted above.

No discussion of appellate court sensitivity to the rights of certain organizations to protected freedom of expressive asssociation would be complete, here, without reference of *Leeds v. Harrision*, 9 N.J. 202 (1952).

The defendants in that case were the board of directors of the Young Women's Christian Association (YWCA) of Atlantic City, a corporation organized in 1915 as an "association not for pecuniary profit."[13] The certificate of incorporation states the purpose as "the improvement of the spiritual, intellectual, social and physical condition of young women." It originally provided for a governing body of five trustees. At the time the litigation commenced it appears that the number of trustees had increased and that the trustees had provided in the By-Laws for a board of directors and officers.[14] A board of directors was authorized by N.J.S.A. 16:19-3. It could consist of 8 or more. Those directors together with the president of the association then constituted the board of trustees.

The constitution, duly adopted, stated the purpose as the association of "young women in personal loyalty to Jesus Christ as Savior and Lord; to promote growth in Christian character and service through physical, social, mental, and spiritual training and to become a social force for the extension of the Kingdom of God."

The By-Laws divided membership into "Active" and "Associate" categories. Only active members could hold office and vote. "Active" was defined as "those who subscribe to and will support the purpose and who are members of Protestant Evangelical churches." "Associate" members are those "who wish to identify themselves in interest and service for the Association."

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13 Although incorporated under the predecessor of N.J.S.A. 15:1-1 et seq., as the court noted in opinion, the legislature had clothed YWCA with all of the benefits and privileges accorded by the corporations and Associations, Religious Act, N.J.S.A. 16:19-1 et seq.

14 Part of the relief sought by plaintiffs was abolition of the board of directors and reduction of the number of trustees to five as provided in the original certificate of incorporation.

The constitution and by-laws also required that a confession of the religious faith and beliefs be a condition of membership. Although affiliated at one time with the national federation of YWCAs, the defendant, in 1949, had disaffiliated itself precisely because the federation had departed from the principles and beliefs which it had once shared in common with defendant.

The court had no difficulty in understanding the reference to "Protestant Evangelical churches."

> Evangelical faith signifies full acceptance of the Gospel. The standards of doctrine of Protestant evangelicalism are embodied in the Apostles' Creed and Gospels. We have been referred to the dictionary for the terms of classification and the definitive characteristics and differences. "Evangel" means the message of news of the Christian dispensation and the redemption of mankind through Christ as revelation of the grace of God; hence, one of the four Gospels. "Evangelicalism" signifies belief in the Divinity of Christ and conformance to the spirit of the Gospel and the teachings of the New Testament—a school among the Protestants which holds that the essence of the Gospel consists mainly in its doctrines of man's sinful condition and need of salvation, the revelation of God's grace in Christ, the necessity of spiritual renovation, and participation in the experience of redemption through faith. See "evangel" and "evangelical" in Webster's New International Dictionary, 2d ed. Evangelical belief includes acceptance of the mystery of the Holy Trinity; hence, it differs fundamentally from the Unitarian theology which rejects the Trinity and holds that God exists only in one person, and also sustains the right of private judgment in theological matters. Thus, a by-law conditioning membership upon adherence to

> the articles of Christian faith expressed in the Apostles' Creed and the doctrines of the four Gospels would be in keeping with the essential object of the society. The very name assumed by the Association and the declaration of purpose made in the corporate charter plainly import an alliance of believers in the Trinity and the Divinity and teachings of Christ to serve the spiritual, temporal and social welfare of womankind. "Spiritual" has reference to the soul and the Divine Will and sacred things. It follows that the provision of the constitution limiting the voting membership to professing believers in the Christian faith, doctrine, worship and discipline comprehended in and practiced by evangelical Protestantism does not involve a radical and unauthorized deviation from the corporate charter of the defendant society.

The court found such requirement for membership to be within the legislative corporate grant.

The plaintiffs were 12 women non-members. They sought a mandate from the court to direct the association to accept them into membership free of any condition or requirement that they "be members of any particular Christian church or religious sect" or that they "subscribe to any statement of faith or dogma" and also to compel abolition of the board of directors and reduction of the board of trustees to the original number of five set forth in the corporate charter; to revise the constitution and by-laws accordingly and thereafter conduct a new election for trustees for which the distinction in active and associate membership would no longer exist.[15]

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15 The association had denied active membership but had tendered associate membership to plaintiffs. That had been refused.

It is of interest to note that at the time that litigation commenced, the NJLAD had been enacted L.1945 c. 169 and had taken effect on April 16, 1945. One of the prohibited grounds of discrimination was that based on "creed". However, that possible avenue of relief was not explored by the plaintiffs in the *Leeds* case.

The court upheld the defendant Y.W.C.A.'s constitution and by-laws and dismissed the complaint. In so doing it first distinguished between religious societies and quasi-religious societies (p. 214).

> While Young Men's and Young Women's Christian Associations are not formed for public religious worship and exercise no ecclesiastical control over their members, *in New Jersey such societies are deemed impressed with a "religious use" and therefore quasi-religious in the view of the law.* The Legislature recognizes a kinship and identity between religious societies in the strict sense and associations of the particular class. There is sufficient similarity in spiritual conception for a common classification. (Emphasis supplied)

And (at p. 215-6)

> There is an essential and readily discernible difference between a voluntary association of persons grounded in common religious principles and beliefs for charitable and benevolent purposes and the corporation formed to govern the society's temporalities; and judicial interposition may not be had to work a basic alteration of the bond of association in disregard of the rights of those who hold membership on the faith of common adherence to the fundamental creed and polity. *III Stokes' Church and State in the United States*, p. 376. Questions of re-

ligious faith and doctrine are left to the society itself. This policy of the civil jurisdiction is founded in the constitutional freedom of religion and liberty of conscience. Generally, judicial intervention is justifiable only where the complaining parties have suffered an invasion of their civil rights, of person or of property . . . (citing cases). Such religious and quasi-religious societies are the same footing as other voluntary associations for benevolent purposes: all "who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it." *Watson v. Jones*, 13 *Wall.* 679, 729, 20 L.Ed. 666 (1872). Such "religious societies are regarded by the civil authority as other voluntary associations, the individual members and separate bodies of which will be held to be bound by the laws, usages, customs, and principles which are accepted among them, upon the assumption that in becoming parts of such organisms they assented to be bound by those laws, usages, and customs, as so many stipulations of a contract between." *First Presbyterian Church of Louisville v. Wilson*, 14 *Bush* 252 (*Ky. Ct. Apps.* 1878).

> The society's constitution is essentially conventional in character. The compact derives from the common consent of the parties, and is limited accordingly. It is a corollary that where, as here, there has been long acquiescence in a by-law prescribing qualifications of members, and the association is united in the principles and beliefs thereby laid down as the standard of membership, it is ordinarily not ground for judicial intervention that the by-law has unduly narrowed the field of action prescribed by the charter.

And further, (pp. 216-17)

> There is no reason in law or in equity why this fundamental limitation on the character and object of the society declared at the outset by its constitution and laws should now be overthrown for want merely of a specification in the charter of the qualifications of members. *A subversion of the principle uniting the membership for common action is beyond the judicial province. The common bond which underlies the compact is secure against judicial interference.* Such has been the motivating and cohesive force of this society from the beginning. And until now this fundamental tenet of the alliance has been free from challenge. *Religious and quasi-religious societies may adopt a constitution and laws for the regulation of their affairs, if conformable and subordinate to the charter and not repugnant to the law of the land*; and they are binding upon the membership until modified or repealed in due course . . . And *by their very nature, the right of membership is not a justiciable question.* (Emphasis supplied.)

Leeds v. Harrison spoke before *Roberts v. United States Jaycees.* It does not use in so many words the First Amendment right of "freedom of expressive association" yet the values expresed in *Roberts* echo the state court's rationale of judicial abstention from interference in the internal governance of the affairs of a quasi-religious organization to force a change in its requirements for membership. Had *Roberts* been in existence it would have been cited in support of the result. See the dictum in *Hurley v. Irish American Gay, Lesbian and Bisexual Group, etc.*, 115 U.S. 2338, 132 L.Ed.2d 487 (1995), in which the Court stated that: "a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." 132 *L.Ed.* 2d at 496.

Further, in *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25, 34 (1966) the Court recognized that if a private club did "owe its existence to the associational preferences of its members" it would be exempt from NJLAD.

Youth membership in scouting is restricted to boys between 11 and 18. To become a member, each must submit a completed Boy Scout application and health history signed by his parents; each must repeat the Pledge of Allegiance; demonstrate the Scout salute, the Scout sign and handclasp and how to tie a square knot. Each, with his parents, must complete a child protection program; participate in a Scoutmaster conference and pay the national dues. Each must understand and agree to live by the Scout Oath, Law, motto, slogan and Outdoor Code.

Similarly, Adult Leadership is not open to the public. One must be a male citizen over the age of 21 (except, for assistant scoutmasters, over 18). He must possess the moral, educational and emotional qualities deemed necessary by BSA for leadership before he will be commissioned. He must be recommended by the Scout Executive and approved by the Local Council executive board. He must subscribe to the Statement of Religious Principle, the Scout Oath and the Scout Law.

Each troop meeting begins with the recitation of the Scout Oath and Law. On a regular basis there then follows a group discussion of various parts of the Oath and Law stimulated by the Scoutmaster or troop leader. Before the close of each meeting, it is the usual practice that the Scoutmaster offer the boys a moral lesson, known as the Scoutmaster's Minute.

At each level of advancement, the individual boy describes to his Scoutmaster or review board of adult leaders how he is living his life in accordance with the Scout Oath and Law.

Since its inception Scouting has sincerely and unswervingly held to the view that an "avowed", sexually-active homosexual is engaging in immoral behavior which violates the Scout Oath (in which the person promises to be "morally straight") and the Scout Law (whereby the person promises to keep himself "clean"). The exclusion or termination of an adult leader who openly advocates consensual homosexuality is no less rational than excluding one who advocates any other type of behavior (such as promiscuous heterosexual activity) which BSA holds to be morally wrong. The consequences of restoring Dale to a position of adult leadership would be devastating to the essential nature of scouting.

CONCLUSION

The Boy Scout movement is world-wide. Its founder, Baden-Powell, made its basic purpose the molding of the character of growing boys in such a fashion that at age 18 they could move into an adult world armed with strong moral principals for their own good and for the good of those around them. That noble ideal (which our society needs so desperately today) requires of them, as boys, a belief in God (the benevolent and loving Creator) and, through the Scout Oath, the Scout Law and the Scout Handbook an adherence to the Ten Commandments and the Golden Rule.

In the language of *Leeds v. Harrison*, BSA is a quasi-religious organization. As distinguished from *Leeds* it is a non-sectarian quasi-religious organization. It is not irreligious or religiously indifferent. It has religious beliefs which it upholds as intrinsic to its purpose. Adult leaders are critical to its mission. The By-Laws and Regulations

require careful selection and an affirmation commitment by the application to the Scout Oath, Scout Law and Statement of Religious Principal. They also provide for one year commissions to limit any harm which an inappropriate appointment could cause. The presence of a publicly avowed active homosexual as an adult leader of boy scouts is absolutely antithetical to the purpose of Scouting.

BSA and Monmouth Council are both organizations which have First Amendment freedom of expressive association rights preventing government from forcing them to accept Dale as an adult leader-member.

Accordingly, plaintiff's motion for Summary Judgment is denied. Judgment for no cause for action based on the cross-motion for summary judgment is granted.

Mr. Brown will submit the appropriate form of Judgment in accordance with R.4:42-1.

APPENDIX D

STATUTORY PROVISIONS

10:5-4. Obtaining employment, accommodations and privileges without discrimination; civil right

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

10:5-5. Definitions

As used in this act, unless a different meaning clearly appears from the context:

* * * *

l. "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in

the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; and public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or postsecondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation, in the admission of students.

* * * *

hh. "Affectional or sexual orientation" means male or female, heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.

* * * *

No. 98-699

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a *Writ of Certiorari* to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

Thomas J. Moloney
Allyson W. Haynes
Seth A. Stuhl
Kierith A. Jones
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Lewis H. Robertson
231 Maple Avenue
P.O. Box Y
Red Bank, New Jersey 17701
(732) 842-6660

Evan Wolfson
(Counsel of Record)
David Buckel
Jon W. Davidson
Beatrice Dohrn
Ruth Harlow
Lambda Legal Defense and Educational Fund, Inc.
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585

Attorneys for Respondent

QUESTION PRESENTED

Whether a large unselective membership organization can invoke the First Amendment to defeat application of an anti-discrimination law and expel a long-standing exemplary member, when none of the purposes, messages, or values that bring its members together are substantially altered or burdened by application of that law.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

STATEMENT OF THE CASE..... 1

Boy Scouts of America 1

James Dale 4

The Revocation of James Dale's Membership.... 5

The Superior Court of New Jersey, Chancery Division 6

The Superior Court of New Jersey, Appellate Division..... 6

The Supreme Court of New Jersey 6

REASONS FOR DENYING THE WRIT..... 9

Summary of Argument..... 9

I. BSA's Petition Rests On A False Premise: Scouting's Members Do Not Share Any View Or Expressive Purpose Concerning Sexual Orientation Or Related Matters..... 9

A. The Documentary Record And Scouting's Activities Show No Such View Or Purpose..... 10

PAGE

1. Those Materials, Activities, And Stated Purposes That Are Known To Scouting's Members Either Are Silent About Sexual Orientation And Related Themes, Or Actually Refute The Petition's Claim Of A Shared Anti-Gay View Or Purpose..... 11

2. The "Position Statements" Prepared By BSA To Defend Its Discrimination, Like The "Policy" Itself, Are Inconsistent And Are Not Shown To Or Known By BSA Members..... 14

B. The Diversity Of Boy Scouts' Sponsors And Members Also Supports The Finding Below 15

II. The Decision In This Case Does Not Conflict With Other Lower Court Decisions..... 17

III. There Is No Doctrinal Confusion In This Court's Expressive Association Jurisprudence, And The Lower Courts Have Had No Problem Applying This Court's Precedents 19

A. The Expressive Association Precedents Of This Court Are Clear And Settled... 19

PAGE

B. *Hurley* Is A Speech Case Rather Than An Expressive Association Case, And Fits Comfortably And Clearly Alongside The *Roberts* Trilogy 20

C. The Lower Courts Have Had No Difficulty Applying This Court's First Amendment Precedents 22

D. The Supreme Court Of New Jersey Properly Applied This Court's Precedents 23

1. The Court Properly Found That Enforcement Of The LAD Against BSA's Discriminatory Policy Did Not Violate The Freedom Of Expressive Association 23

2. BSA's Contentions Regarding Intimate Association And Speech Were Properly Rejected 27

CONCLUSION 30

TABLE OF AUTHORITIES

Statutes and Rules PAGE

36 U.S.C. § 22 (West 1983) 13

36 U.S.C. § 23 (West 1983) 1

Sup. Ct. R. 10 ..... 10, 17, 19

Cases

Allen v. McCurry, 449 U.S. 90 (1980) 18

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) ..... *passim*

Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996) 29

City of Cleveland v. Nation of Islam, 922 F. Supp. 56 (N.D. Ohio 1995) 23

Curran v. Mount Diablo Council of the Boy Scouts of Am., 952 P.2d 218 (Cal. 1998) 17

EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996) 29

Elks Lodges 19 & 2021 v. Alcohol Beverages Control, 905 P.2d 1189 (Utah 1995) 22

Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) 29

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) ..... *passim*

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) ..... *passim*

PAGE

Quinnipiac Council, Boy Scouts of Am., Inc. v. Commission on Human Rights and Opportunities, 528 A.2d 352 (Conn. 1987) 17

Randall v. Orange County Council, Boy Scouts of Am., 952 P.2d 261 (Cal. 1998) 17

Roberts v. United States Jaycees, 468 U.S. 609 (1984) .....*passim*

Schwenk v. Boy Scouts of Am., 551 P.2d 465 (Or. 1976) 17

Seabourn v. Coronado Area Council, Boy Scouts of Am., 891 P.2d 385 (Kan. 1995)..... 17

Sistrunk v. City of Strongsville, 99 F.3d 194 (6th Cir. 1996) 23

Stone v. Powell, 428 U.S. 465 (1976)..... 18

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) 29

Troster v. Pennsylvania State Dep't of Corrections, 65 F.3d 1086 (3d Cir. 1995)..... 23

Welsh v. Boy Scouts of Am., 742 F. Supp. 1413 (N.D. Ill. 1990), *subsequent decision on other grounds*, 787 F. Supp. 1511 (N.D. Ill. 1992) 15

Welsh v. Boy Scouts of Am., 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993)..... 17

Other Authorities

Brief Of The Boy Scouts Of America As Amicus Curiae In Support Of Appellants Rotary International, *et al.* (December 18, 1986) 28

STATEMENT OF THE CASE

Boy Scouts of America

Boy Scouts of America ("Boy Scouts" or "BSA") was chartered by Congress in 1916 under Title 36 of the United States Code, "Patriotic Societies and Observances," to "promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues. . . ." 36 U.S.C. § 23 (West 1983). The Charter requires BSA to make a yearly report to Congress of its "proceedings." A.1162.[1] BSA's close and unique relationship with the federal government also extends to the President, the military, the astronaut corps, and other departments and agencies. 27a-28a.

State and local governments, too, are key participants in, and formal sponsors of, Scouting, and give BSA substantial contributions and special privileges.[2] A.1049-A.1152; A.1592; 27a-28a. "In New Jersey, for example, public schools and school-affiliated groups sponsor close to 500 scouting units, comprising approximately one-fifth of the chartering organizations in the State. Other governmental entities, such as law enforcement agencies, fire departments, city governments, and the military, sponsor approximately 250 scouting units in New Jersey." 4a. The same is true nationally. 29a. As the New Jersey Supreme Court noted, "New Jersey governmental entities are of course bound by the LAD. Their sponsorship of, or conferring of special benefits on, an orga-

---

[1] Consistent with the Petition's references to the record, numbers preceded by "A." refer to pages in the record before the New Jersey Supreme Court, and numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition.

[2] BSA "charters" public and private religious and secular entities to "sponsor" Scouting troops and activities. It reviews and renews all sponsors' charters annually. 3a-5a.

nization that practices discrimination would be prohibited." 29a.[3]

BSA's bylaws provide that "[b]oth membership in Scouting and advancement and achievement of leadership in Scouting units are open to all boys without regard to race or ethnic background, and advancement and achievement of leadership in Scouting is based entirely upon individual [achieve]ment." A.1174. BSA tells the public:

> Our federal charter sets forth our obligation to serve boys. *Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy*. The National Council and Executive Board have always taken the position that Scouting should be made available for *all boys* who meet entrance age requirements.

A.1027 (emphasis supplied). The courts below found that BSA mounts aggressive, ongoing, and sweeping national and local recruitment campaigns, 3a; 24a-30a; 131a, and observed:

> Boy Scouts has been firmly committed to a diverse and "representative" membership. It recognizes that the skills it teaches its members are needed "in all economic, cultural, and ethnic groups." . . . Its objective is to see to it "that all eligible youth have the opportunity to affiliate with the Boy Scouts of America." . . . Boy Scouts

[3] BSA attempts to downplay the significance of its entanglement with public institutions, arguing (without record support) that school and public sponsorship is "dwindling," and that "[t]his case does not involve the question whether public bodies can or should sponsor Boy Scout Troops." Pet. 8-9, n.4. However, the continued extensive involvement of public schools and other government entities in Scout sponsorship (which BSA continues to seek) *is* relevant, not least because it belies BSA's central premise that BSA members come together to express a message requiring discrimination. Obviously public entities, particularly in a state like New Jersey with its LAD, do not and cannot come together to support or implement any such purpose. 29a. Permitting BSA to discriminate in violation of the LAD could have a significant impact on the continued participation of schools and other public sponsors in Scouting.

> does not seek to limit membership to individuals of a particular religious faith or moral persuasion. . . . The result of this "all-inclusive" membership policy is the admission of four million boys and over one million adults.

59a (citations omitted). Since its inception in 1910, BSA has had over 90 million members. A.1323.

All Boy Scouts adult members are automatically "leaders," and BSA admits that the terms "member" and "leader" are "interchangeable" for the million-plus adults at all levels. 10a-11a.[4] James Kay, "the highest ranking employee in Monmouth Council and the official who first made the decision to terminate [James] Dale," stated in his deposition that:

> he was not aware of any previous rejection by BSA's National Council of an adult application for membership in Monmouth Council. Kay was likewise unaware of any membership rejection in the previous council with which he was affiliated for eight and one-half years.

78a-79a.

Alongside the publicly sponsored Scout units are many units sponsored by religious bodies, and Scouting's rules and message are explicitly pluralistic. "BSA categorically states: 'religious instruction is the responsibility of the home and church.' " 9a. BSA bylaws declare Scouting to be "absolutely non-sectarian," A.1176, and BSA informs adults of this core policy on every adult membership application (in stark contrast to the absence of any communication to members, applicants, or parents regarding sexual orientation).

[4] Petitioner Monmouth Council, which is one of fourteen local Boy Scouts councils chartered to carry on Scouting activities in New Jersey, had 3000 adult volunteer "leaders" and four paid Scouting professionals in 1991. Of the 3000 volunteers, some 340 were assistant Scoutmasters. 5a.

Boy Scouts' stated position on issues of sexuality is that " 'boys should learn about sex and family life from their parents, consistent with their spiritual beliefs.' " 9a. BSA's diverse public and private, religious and secular members and sponsors come together for a program of activities and moral values such as inclusion, community service, and honesty—not to promote anti-gay ideology or any other views about sexuality.[5]

James Dale

At the time of his expulsion from Scouting at the age of twenty, James Dale had spent more than half of his life as a member of the Boy Scouts, and had won virtually every award available to a Scout. For Dale, as for so many American men and boys, Scouting was a central part of growing up and becoming a citizen. In addition to teaching him about camping and the outdoors, Scouting provided Dale with a sense of civic responsibility, fostered his self-confidence, and gave him the opportunity to have fun and form friendships with other boys in his community. A.1907-A.1909. As he participated in camping trips, fundraising events, summer Scout camp, and national activities, as well as regular troop meetings, Dale successfully advanced through various Scout leadership positions, including Bugler, Assistant Patrol Leader, Patrol Leader, and ultimately Junior Assistant Scoutmaster. A.3287-A.3294.

BSA recognized Dale's outstanding commitment and accomplishments. A.61-A.62. It selected him as a featured youth speaker, A.1912, and admitted him to the Order of the Arrow established by BSA to "recognize those Scout campers who best exemplify the Scout Oath and Law in their daily lives." A.1006. BSA elevated Dale to the status of Vigil

[5] Boy Scouts' own representatives admitted under oath that it is not an explicit aim of the organization to teach about or discourage homosexuality. A.4395; A. 4405 (depositions of BSA officials Charles Ball and James Kay).

Honor, the highest mark of distinction within the Order. A.928. And it awarded him the Eagle Scout Badge, the highest rank in Scouting, attained by only two percent of all Scouts. A.1909. Finally, when Dale became an adult member at the age of eighteen, BSA invited him to become Assistant Scoutmaster of Troop 73. A.1913. Throughout, as the New Jersey Supreme Court found, James Dale consistently exemplified, "accept[ed,] and endors[ed] Boy Scouts' moral principles." 57a-58a.

The Revocation Of James Dale's Membership

While an undergraduate student at Rutgers University, James Dale first acknowledged to himself that he is gay. A.1921-A.1922. On July 8, 1990, a local newspaper, the *Newark Star-Ledger*, ran an article entitled "Seminar addresses needs of homosexual teens," which discussed the psychological and health needs of lesbian and gay teenagers, including the harms caused by discrimination and isolation. The article and accompanying picture mentioned Dale as a participant, as a Rutgers student, and as co-president of the campus lesbian and gay student group, but did not in any way refer to his membership in Scouting. A.1947. The 19-year-old was quoted not "as a gay activist," Boy Scouts' Petition for Writ of Certiorari ("Pet."), at 6, but as a student looking for community and support. A.1946. This news story, however, provided BSA with a piece of information that it would act upon—Dale's sexual orientation.

Days after the article, Monmouth Council sent Dale a letter summarily revoking his membership and instructing him to "sever any relations [he] may have with the Boy Scouts of America." A.1947. Stunned, Dale wrote back asking the reason. A.1949. By letter dated August 10, 1990, BSA responded that it "specifically forbid[s] membership to homosexuals." A.1950.[6]

[6] BSA denied Dale's request for a hearing before the National Council Review Committee because "[Boy Scouts] does not admit

On July 29, 1992, James Dale brought suit against BSA for its violation of the New Jersey Law Against Discrimination ("LAD").

The Superior Court of New Jersey, Chancery Division

On the parties' cross-motions, the Superior Court of New Jersey, Chancery Division, granted summary judgment for BSA and dismissed Dale's complaint. The court held that Scouting did not constitute a "place of public accommodation" under the LAD. 204a. In *dicta*, the court found that the right of expressive association shielded BSA's expulsion of Dale from the LAD. 224a. Neither an intimate association nor free speech defense was raised before, or addressed by, the court.

The Superior Court of New Jersey, Appellate Division

On March 2, 1998, the Superior Court of New Jersey, Appellate Division, reversed. Noting BSA's size and non-selectivity, the court found BSA to be a public accommodation under New Jersey law. 119a. Accepting *arguendo* BSA's claim that its goals and activities are expressive, the court found that because no message or purpose bringing the members together was in fact burdened, application of the LAD would not "impair the BSA's ability to express its fundamental tenets and to carry out its social, educational and civic activities." 136a. The court rejected BSA's intimate association defense, raised there for the first time. A free speech defense was not argued before, or addressed by, the court.

The Supreme Court of New Jersey

The Supreme Court of New Jersey unanimously affirmed.

First, the court found that as a matter of New Jersey law, BSA is a place of public accommodation for two reasons: (1)

avowed homosexuals to membership in the organization so no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting." A.1952.

BSA holds itself out as open to "all boys," 35a, "engages in broad public solicitation through various media," 25a, and "reaches out to the public in a myriad of ways designed to increase and sustain a broad membership base," 26a; and (2) BSA is singularly entangled in, and privileged by, special relationships it seeks with "federal and state governmental bodies and with other recognized public accommodations," 27a, including "Boy Scouts' connection to public schools and school-affiliated groups [which] constitutes its single most beneficial governmental relationship." 29a.

Second, the court found that BSA does not fall within the LAD's exceptions for organizations that are "distinctly private," provide a religious educational facility, or act *in loco parentis*. Noting BSA's non-selective invitation to "all boys," 35a, the court stated:

> We acknowledge that Boy Scouts' membership application requires members to comply with the Scout Oath and Law. We do not find, however, that the Oath and Law operate as genuine selectivity criteria. To the contrary, the record discloses few instances in which the Oath and Law have been used to exclude a prospective member; in practice, they present no real impediment to joining Boy Scouts . . . .
>
> Most important, *it is clear that Boy Scouts does not limit its membership to individuals who belong to a particular religion or subscribe to a specific set of moral beliefs*. . . .

37a-38a (emphasis supplied).

Third, the court rejected BSA's asserted First Amendment defense based on the rights of expressive and intimate association. The court scrupulously applied the framework set forth by this Court in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State*

Club Association v. City of New York, 487 U.S. 1 (1988). It concluded that application of the LAD does not violate the freedom of expressive association "because the statute does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views." 52a. The court explained that:

> The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality.

52a. The court found further that "[i]t is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society." 62a. Therefore, even if the application of the LAD to petitioners had resulted in some slight infringement upon Boy Scouts' right of expressive association, that infringement would be justified as serving New Jersey's compelling interest in eradicating discrimination under the LAD. 63a-64a.

Finally, the court found that *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), did not compel a different result. *Hurley*, a speech case about a parade, does not alter this Court's careful and well-settled framework for analyzing expressive association defenses asserted by membership organizations. Under that framework, with thorough fact-finding, the New Jersey Supreme Court unanimously held that BSA failed to show any violation of the First Amendment.

REASONS FOR DENYING THE WRIT

Summary of Argument

This case does not warrant review by this Court. As Petitioners concede, Pet. 26-27, there is no conflict among the state courts or the federal circuits. This Court's jurisprudence for evaluating expressive or intimate association claims is clear and well-established, and has been applied consistently and without confusion by the lower courts. The court below properly followed that framework here.

As the New Jersey Supreme Court unanimously concluded, BSA's argument rests on a false premise; the record contains no evidence to support BSA's contention that preventing it from discriminating against its gay members would in any way alter or burden the messages, purposes, and values that bring Scouting's diverse members together. Based on an exhaustive examination of the extensive record in this case, the court found that the application of the LAD does not change the ability of the members of Scouting to continue to express the actual shared purposes and values that bring them together in BSA. Thus, enforcement of the state civil rights law creates no true First Amendment problem and presents no new federal question.

I.

BSA's Petition Rests On A False Premise: Scouting's Members Do Not Share Any View Or Expressive Purpose Concerning Sexual Orientation Or Related Matters

BSA's effort to conjure up a First Amendment issue warranting this Court's re-examination hinges on its attempt to relitigate the state appellate courts' *factual* finding that BSA failed to demonstrate an anti-gay or related expressive purpose of its members that would be burdened by application of

the LAD.[7] BSA's entire petition rests on the pivotal false premise that its members associate for such an anti-gay or related purpose.

The record fully supports the New Jersey Supreme Court's unanimous finding that the LAD does not burden any actual expressive purpose of Scouting's members. Those members do not come together in Scouting around a shared "moral code" or viewpoint regarding gay people, heterosexuality, homosexuality, or sexuality. Stripped of its mischaracterizations and repeated indifference to the facts, the Petition presents no novel federal question regarding a membership organization's associational rights.

A. The Documentary Record And Scouting's Activities Show No Such View Or Purpose

The court below followed this Court's well-settled jurisprudence that the right of expressive association does not protect an organization's ability to discriminate in furtherance of every view that any of its members or leaders happen to espouse, but "only those views *that brought them together*." *Roberts*, 468 U.S. at 623 (emphasis supplied). *See also Rotary*, 481 U.S. at 548-49; *New York State Club Ass'n*, 487 U.S. at 13; *Hurley*, 515 U.S. at 580-81 (reaffirming that for purposes of an expressive association analysis courts must examine whether an excluded person's "*manifest views* [are] at odds with a position *taken* by the [organization's] *existing members*") (emphasis supplied). The findings of the New Jersey Supreme Court and the voluminous record below refute

[7] This Court's rules provide that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule." Sup. Ct. R. 10. Although it would have this Court disregard the factual findings below, the Petition points to no evidence in the record that renders the factual findings of the court below "erroneous." Further, the court below properly stated and properly applied the well-settled governing rule.

BSA's central misleading suggestion that an anti-gay "moral code" or any related viewpoint or message is part of what brings the members together in Scouting.

The court below, and the intermediate appellate court as well, found that BSA failed to make the predicate showing of a true message or purpose burdened by the civil rights law. The courts drew this conclusion based on the record regarding: (1) Scouting's stated purposes, activities, and own materials; and (2) the diversity of Scout members and sponsors and their views. BSA's invitation to relitigate the entire factual record is inappropriate for certiorari, and unnecessary in light of the thorough opinions below based on the enormous record of evidence. Thus, what follows here are only brief summaries of how the evidence supports the courts' key finding under this Court's established doctrinal framework.

1. Those Materials, Activities, And Stated Purposes That Are Known To Scouting's Members Either Are Silent About Sexual Orientation And Related Themes, Or Actually Refute The Petition's Claim Of A Shared Anti-Gay View Or Purpose

BSA has created a plethora of recruiting and informational materials that were put into evidence below, yet was unable to produce even a single document disseminated or generally made available to members or prospective members containing the anti-gay "moral code" it seeks to litigate anew as its members' ostensible expressive purpose.

For example, the Scout Oath, Law, Motto, and Slogan do not mention gay people or sexuality. A.2542-A.2549. Nowhere in the Scout Handbook's extensive explanations of Scouting principles is there reference to gay people or their alleged "immorality." A.2247-A.2600. Indeed, in the years of litigation below, BSA has centered its defense on the argument that this supposedly central moral tenet should be inferred from the requirements that Scouts be "clean" and

"morally straight."[8] However, as the court below found, these terms are not defined anywhere in Scouting materials in a way that is burdened or altered by gay people's continued participation:

> The words "morally straight" and "clean" do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral. We doubt that young boys would ascribe any meaning to these terms other than a commitment to be good.
>
> Boy Scouts also argues that the immorality of homosexuality can be implied from the moral principles expressed by the Scout Oath and Law. Yet, Boy Scouts teaches that "moral fitness" is an individual choice and defers the ultimate definition to its members . . . .

55a. Neither can the anti-gay "moral code" asserted by the Petition be gleaned from the *implicit* teachings of Scouting, which emphatically and repeatedly emphasize values of tolerance, inclusion, and respect for self, for the law, and for others.[9]

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[8] Ironically, it is BSA's discrimination against James Dale that in fact violates the Scout Oath and Law. BSA's own definition of "morally straight" in the Scout Handbook instructs members: "To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open." A.2543.

[9] Just as Boy Scouts' stated core purposes and "manifest views," *Hurley*, 515 U.S. at 580-81, have nothing to do with discrimination or sexuality, neither do its actual activities of camping, sports, outdoors skills, community service, and the like. While Scouting reinforces important pluralistic and general values, as the Scout Handbook states, "most boys join Boy Scouting for one reason—to have fun in the outdoors." A.991; *see also* 53a. BSA describes the meanings behind the words in the Scout Oath and Law in the Scout Handbook, A.2542-A.2549, telling boys, for example, that "[a] Scout is a friend to all. He seeks to understand others. He respects those with ideas and customs that are different from his own." A.2545. BSA's explanations also stress the importance of obeying the laws of the nation, and require Scouts to "respect and defend the rights of all people." A.2543. BSA's Congressional Charter provides

Boy Scouts' own materials affirmatively state that conveyance of any message regarding gay people, heterosexuality, homosexuality, or sexuality in general is neither a primary nor even an incidental goal of Scouting. *See* A.4409. Rule number one of the Scoutmaster Handbook's section on "Sex Curiosity" states: "You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area, and that you are probably not well qualified to do this." A.3589.[10] Even the BSA post-litigation "position statement" on homosexuality (one of a handful drafted by public relations consultants but never shown to members) states:

> [t]he reality is that Scouting serves children who have no knowledge of, or interest in, sexual preference. We allow youth to live as children and enjoy Scouting and its diversity without immersing them in the politics of the day.

A.4409.

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that BSA's bylaws and rules shall not be "inconsistent with the law of the United States of America or any state thereof." 36 U.S.C. § 22 (West 1983).

[10] The Petition asserts that "[t]he Scoutmaster's role includes communication of the organization's teachings on sexual morality," Pet. 4, and selectively quotes from the Scout Handbook. The full passage referenced by BSA reads: "If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster." A.2532. As the court below found, 9a, the record is replete with additional materials telling Scoutmasters that discussion about sex and sexuality (gay or non-gay) is not for the program and is best left to others in the boy's life, A.4343. Scouting executives advise that sexual orientation and sexuality in general are *not* Scouting issues. A.4346.

2. The "Position Statements" Prepared By BSA To Defend Its Discrimination, Like The "Policy" Itself, Are Inconsistent And Are Not Shown To Or Known By BSA Members

The Petition's key premise—that BSA has a "moral code" impaired by gay members—is further refuted by the fact that even the "policy" itself (supposedly embodying core shared values) is in fact muddled, inconsistent, and kept secret from its members and volunteers. As of the time BSA revoked Dale's membership, no incarnation of a "policy" of excluding gay participants had ever been circulated among youth or adult members, applicants, or "leaders," A.3289; A.3297, or even made available upon request. A.4334. Prior to publicity surrounding this and other litigation, the discriminatory "policy" was not known to Scouting's members—or even to the Professional Scouters, Board Members, and Youth Leaders responsible for communicating the purposes and aims of Scouting to others within the organization. 141a-142a; *see also* A.1625-A.1905 (affidavits of over a hundred BSA members testifying that they were unaware of any anti-gay policy—let alone purpose—of Boy Scouts).

While BSA officials, with the help of an outside media consulting firm, have developed a smattering of internal "position statements" regarding gay people, as the New Jersey Supreme Court noted in reviewing the record, "[t]he self-serving nature of these [position statements] is apparent." 54a.[11] These litigation documents do not establish that the members of Scouting have come together for the purpose of expressing the

[11] In testimony, BSA conceded that these "position statements" are "drawn up not to communicate within our organization but to help others outside of the [S]couting family to understand better the values and standards of the organization." A.4433. In these statements, which are simply litigation stances and do not reflect a shared view of the members (and are not themselves distributed to the members or even Scouting's volunteer "leaders"), 140a-142a, BSA's various iterations of the discriminatory "policy" are internally inconsistent. A.3247; A.3245.

view—either to the world at large or to one another—that gay people are "immoral" (or any such position), as the Petition would have this Court believe.[12]

B. The Diversity Of Boy Scouts' Sponsors And Members Also Supports The Finding Below

As the court below found, the diversity of Boy Scouts' sponsors and members further demonstrates that they do not come together around a "specific expressive purpose," *New York State Club Ass'n*, 487 U.S. at 13, that excludes continued gay participation. 56a. Boy Scouts' sponsors include public schools, police and fire departments, the military, secular chartered sponsors, and "[a] large and diverse group of religions that subscribe to many different and sometimes contradictory beliefs." 9a. The religious entities, including Methodists, Mormons, Jews, Catholics, Muslims, Episcopalians, and others, hold widely divergent views on sexual morality, as opposed to the one view propounded in the Petition. Under Scouting's pluralism, the religious participants are free to disagree on matters not related to Scouting such as

[12] Furthermore, there is a difference between a practice or "policy" pursued by an organization or employer, and an actual "specific expressive purpose," *New York State Club Ass'n*, 487 U.S. at 13, which triggers First Amendment protection. Otherwise the mere fact that a policy of discrimination was in place among groups like Jaycees or Rotary would end the entire inquiry. Certainly, a written but undistributed policy is not enough to transform discriminatory actions into a true expressive purpose of the organization's members:

> [F]ew would claim that the YMCA would be entitled to exclude blacks if the YMCA had a written policy that one of its purposes was to instill good morals in its members and that belief in white superiority was necessary to fulfill that purpose, even though expression of white concerns was not a major part of the YMCA's activities.

Welsh v. Boy Scouts of Am., 742 F. Supp. 1413, 1432 n.28 (N.D. Ill. 1990), *subsequent decision on other grounds*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993).

sexual, religious, or political views. Meanwhile, the public entities—particularly in a state like New Jersey, with its legislated commitment to end discrimination—clearly do not and could not sponsor units or engage in Scouting in order to express the discriminatory views of the Petition. 29a.

Scouting's broad outreach and recruitment seeking "all boys," A.1174, underscore that the courts below were correct: the members of Scouting do not all share the same sexual morality or conception of the terms "morally straight" or "moral fitness," nor do they come together for expression regarding that which divides them. 56a. The existence of these diverse views among the members and sponsors (including public entities) is not simply incidental or a mere "internal disagreement." Pet. 25. It is dispositive proof that the members of this organization do not associate for any shared message requiring exclusion of gay members.

Finally, the Petition's claim that the exclusionary policy is necessary to promote moral or other "views" is most powerfully and directly contradicted by the fact that BSA accepts and retains *non-gay* youth and adult members and sponsors regardless of their views on BSA's anti-gay policy. It permits them to express their contradictory moral or other views on sexuality or sexual orientation, and even to express their opposition to the anti-gay policy once they learn of it.[13] 56a. By contrast, Dale was expelled not for expressing any viewpoint, but because he was discovered to be gay. 59a; 67a.

[13] Individuals and entities within Scouting who have expressed contrary views without expulsion or sanction include current and former members of the Executive Board of BSA, A.4378-A.4379; A.4020-A.4022; A.4461-A.4490; BSA Local Councils, A.3982-A.3984; A.4009-A.4014; Scout Troops, A.3973-A.3974; A.3977; Chartered Organizations, A.3885; A.3893-A.3895; A.3911; A.3958-A.3959; A.3805-A.3806; A.3781; A.3972; professional and volunteer Scouters; A.1970; A.4022; A.1979; A.4335; A.4341; A.4379; A.1625-A.1905; A.4027-A.4328; and Scouts and their parents, A.1970; A.1979; A.3973; A.3975; A.4020; A.4335; A.4342; A.4379-A.4380; A.1625-A.1905; A.4027-A.4328.

There is no new legal issue here, no incursion on expression, no "First Amendment principles . . . manifestly endangered by the decision below." Pet. 13. There is only an effort to defend discrimination that has been properly reviewed by the courts below under the standards laid out by this Court.

II.

The Decision In This Case Does Not Conflict With Other Lower Court Decisions

This is not a case where a "state court of last resort [has] decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Sup. Ct. R. 10. BSA concedes that there is no explicit conflict among the decisions of lower courts, and "in all likelihood one will never arise." Pet. 27. Nor is there the phantom "conflict in principle" that BSA concocts. *Id.* None of the decisions relied upon in the Petition even reach the First Amendment issue that BSA asserts this Court should again review, let alone reach it in a way that conflicts with the decision in this case.[14]

The cases cited in the Petition involved differing BSA membership and employment policies, including BSA's discrimination based on sex, sexual orientation, and religion. These cases all turned on statutory interpretation questions involving different state or federal laws, not the LAD (on

[14] *See Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993) (applying Title II of the federal Civil Rights Act); *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218 (Cal. 1998) (state law); *Randall v. Orange County Council, Boy Scouts of Am.*, 952 P.2d 261 (Cal. 1998) (state law); *Quinnipiac Council, Boy Scouts of Am., Inc. v. Commission on Human Rights and Opportunities*, 528 A.2d 352 (Conn. 1987) (state law); *Seabourn v. Coronado Area Council, Boy Scouts of Am.*, 891 P.2d 385 (Kan. 1995) (state law); *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465 (Or. 1976) (state law).

which the New Jersey Supreme Court has the last word). There is no common federal question at all among the cluster of cases from which BSA tries to extract the requisite important conflict.

BSA argues that this Court should intervene where there is concededly no conflict because, it speculates, lower court judges in the several states will all disingenuously disregard the language of their respective state statutes in order to avoid any First Amendment ruling. Pet. 26-28. Because of the judicial evasion they prophesy, BSA seeks a special opportunity to relitigate before this Court the facts of this case.

Courts of course seek to interpret statutes so as to avoid constitutional conflict, but not to the point of rewriting them; this Court should not presume that judges will take inappropriate and evasive action as BSA predicts. *See Allen v. McCurry*, 449 U.S. 90, 105 (1980) (rejecting "general distrust of the state courts to render correct decisions on constitutional issues"); *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (rejecting "basic mistrust of state courts as fair and competent forums for the adjudication of federal constitutional rights" as legitimate ground for granting federal habeas corpus relief). Rather, the more appropriate course is to allow the lower courts to do their job handling the application of statutes and legal principles to cases such as this, until a real and important question or conflict in federal law develops.[15]

[15] Petitioners themselves point out that other challenges to BSA's various discriminatory policies are pending in the lower courts. Pet. 28. Likewise, other youth or adult membership organizations seeking to discriminate have faced enforcement of civil rights laws in the past, and may face such enforcement in the future. It is entirely possible that under different facts, a court may yet find a public accommodations law applicable, but unconstitutional. When and if that happens at the state supreme court or federal court of appeals level, a conflict might arise that would warrant this Court's intervention, but until then, certiorari is not appropriate.

III.

There Is No Doctrinal Confusion In This Court's Expressive Association Jurisprudence, And The Lower Courts Have Had No Problem Applying This Court's Precedents

Just as there is no conflict among the lower courts, there is no conflict here between the decision below and the "relevant decisions of this Court." Sup. Ct. Rule 10. This Court's past rulings fit together coherently and effectively to protect genuine First Amendment interests while at the same time allowing government to pursue compelling anti-discrimination objectives. Because there is no confusion either in the doctrine or among lower courts, and because there is no truth to the Petition's assertion that *Hurley* created a conflict or that First Amendment principles are more generally threatened, review by this Court is unnecessary.

A. The Expressive Association Precedents Of This Court Are Clear And Settled

In the *Roberts* trilogy, this Court established the definitive framework for analyzing an alleged conflict between a nondiscrimination statute and the freedom of expressive association asserted by an organization in its membership policies. *See Roberts*, 468 U.S. at 622-29; *Rotary*, 481 U.S. at 548-49; *New York State Club Ass'n*, 487 U.S. at 13. Under that framework, an organization asserting an expressive association defense must first as a necessary predicate show "*specific* expressive purposes" or actual "views that the club's members wish to promote," which bring the members together in expressive association. *New York State Club Ass'n*, 487 U.S. at 13 (emphasis supplied). Second, the organization must show that application of the statute would impose "serious burdens," *Roberts*, 468 U.S. at 626, on shared "basic goals," *Rotary*, 481 U.S. at 548, such that the continued participation

or admission of a member under an antidiscrimination law would require the other members to "abandon or alter" their expressive activities. *Rotary*, 481 U.S. at 548; *see also New York State Club Ass'n*, 487 U.S. at 13. Finally, even if these predicates for invoking the defense are met, some infringement of expression could be justified in light of the compelling interest in enforcing antidiscrimination laws. *Roberts*, 468 U.S. at 623; *see also Rotary*, 481 U.S. at 549. The *Roberts* framework is clear, and preserves important constitutional and social values.

B. *Hurley* Is A Speech Case Rather Than An Expressive Association Case, And Fits Comfortably And Clearly Alongside The *Roberts* Trilogy

Seeking to create a conflict where there is none, BSA asks this Court to interpret *Hurley* so as to eviscerate the *Roberts* test. However, *Hurley*, which evaluated the application of a public accommodations statute to a contingent seeking to march in a parade, does not disturb the Court's jurisprudence governing expressive association claims about large community organizations' membership policies.

In *Hurley*, this Court based its finding that the statute violated the freedom of speech on a parade's distinctive status as a "form of expression" in and of itself—a finding supported by a thorough history of parades and an analysis of parades as symbolic speech akin to saluting a flag, wearing an armband, hoisting a flag, or displaying a swastika. *See Hurley v. Irish Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 568-69 (1995) (citations omitted). *Hurley* concerned application of a civil rights law to a pure speech act (a parade), and to an attempt to change the message of that speech (a contingent with a banner seeking entry into the parade). Thus, the bulk of the *Hurley* opinion necessarily applied a pure speech approach; the facts of the case took it out of the *Roberts* trilogy analysis.

Hurley did not purport to displace this Court's expressive association jurisprudence on exclusionary membership decisions. In fact, *Hurley* briefly considers whether the outcome of the case would differ under expressive association analysis, rather than pure speech analysis. 515 U.S. at 580-81. There, Justice Souter, writing for the unanimous Court, explicitly preserved both the structure and the strength of the *Roberts* framework, holding that banner-carrying marchers in a parade could "be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose *manifest views* were at odds with a *position taken by the club's existing members*." *Id.* (emphasis supplied). With this emphasis again on the actual views—rather than mere identity—of individuals, and the focus again on actual core views of the *members*, *Hurley* reaffirms the *Roberts* approach.

First, *Hurley* reaffirms the significance of a showing that the excluding organization be objecting to the actual expression or *views* allegedly infringing its expressive association rights, rather than discriminating against individuals because of their identity or shorthand characteristics. *See id.* at 572 (The parade organizers "*disclaim any intent to exclude homosexuals as such*, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.") (emphasis supplied).

Second, *Hurley* notes that the basis for exclusion must be that such individual's views are "manifest," not presumed. *See id.* at 581. *Hurley*'s analysis rejects the insinuation that the mere status or identity characteristics of an individual can be the basis of exclusion in defiance of a civil rights law. *See id.* at 572. When it does perform an expressive association analysis, *Hurley* keeps the focus on the expressive association equivalent of the message, rather than the marchers. The *Hurley* statement—that to justify excluding a member, an orga-

nization must show that the member's "manifest views" are at odds with the organization's members' true message—preserves *Roberts*' requirement that a would-be discriminator show actual views as the basis for exclusion, rather than "unsupported [status-based] generalizations," *Roberts*, 468 U.S. at 628, and not be permitted to rely on "*shorthand measures* in place of . . . more legitimate criteria for determining membership." *New York State Club Ass'n*, 487 U.S. at 13 (emphasis supplied).

Third, *Hurley* fully preserves the *Roberts* requirement that in order for an organization to invoke the right of expressive association to defeat a civil rights law, it must show that the targeted individual's "manifest views" conflict with a particular "position *taken* by the club's existing *members*" that is infringed upon. *See Hurley*, 515 U.S. at 581 (emphasis supplied). *See also id.* at 580 (noting necessity of "positions *espoused* by the general club memberships" and "organization's message itself" as predicates for invoking right to defeat statute) (emphasis supplied). Thus in the expressive association context, the *Hurley* Court explicitly and unanimously reaffirmed the requirement of a particular message. It did not wipe out the *Roberts* framework, as BSA's argument would, in favor of allowing a pretextual invocation of the First Amendment to thwart the state's non-discrimination goal without a showing of an actual purpose or message that is burdened.

C. The Lower Courts Have Had No Difficulty Applying This Court's First Amendment Precedents

Lower courts have consistently recognized both the different doctrinal applicability and the underlying compatibility of *Hurley* and *Roberts*. Without confusion or difficulty, they have continued to apply *Roberts* to expressive association cases, *see, e.g., Elks Lodges 19 & 2021 v. Alcohol Beverage Control*, 905 P.2d 1189, 1196-1207 (Utah 1995), while

applying *Hurley* to "pure speech" cases.[16] The courts are easily reconciling the cases. Their expressive associational analysis, like that of the New Jersey Supreme Court, has followed this Court's well-settled framework. This consistent doctrinal clarity among lower courts in their interpretation of relevant First Amendment case law likewise affirms that there is no problem here warranting this Court's intercession.

D. The Supreme Court Of New Jersey Properly Applied This Court's Precedents

The New Jersey Supreme Court performed the rigorous analysis required by the *Roberts* trilogy for BSA's expressive association defense, applied the correct governing principles to BSA's intimate association argument, and furthermore assessed a freedom of speech claim under *Hurley* despite BSA's failure to raise it earlier in the litigation. The court found that the application of the LAD in this case would not burden or alter any actual purpose, message, or activity of the Boy Scouts, or otherwise violate the First Amendment. This analysis is fully consistent with this Court's precedents and with the record in this case, and need not be reviewed here.

1. The Court Properly Found That Enforcement Of The LAD Against BSA's Discriminatory Policy Did Not Violate The Freedom Of Expressive Association

As discussed above, contrary to the BSA's false premise in its Petition and its ongoing effort to relitigate the facts, the

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16 *See, e.g., Sistrunk v. City of Strongsville*, 99 F.3d 194, 198-99 (6th Cir. 1996) (applying *Hurley* to the wearing of a button during a political rally); *Troster v. Pennsylvania State Department of Corrections*, 65 F.3d 1086, 1089-90 (3d Cir. 1995) (discussing *Hurley* in the context of the wearing of a flag patch on a uniform); *City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 58-59 (N.D. Ohio 1995) (applying *Hurley* in the context of a lecture).

New Jersey appellate courts found that the Boy Scouts' right to expressive association is not infringed because Scouting's members do not come together around an anti-gay or related expressive purpose. 56a. Under the *Roberts* framework, this finding, fully supported by the facts in this case as found by both the Appellate Division and unanimous New Jersey Supreme Court, *see supra*, at 10-17, is sufficient, as a threshold matter, to dispense with the Boy Scouts' expressive association defense. *See Roberts*, 468 U.S. at 626-27 (requiring that actual "views" must exist and be burdened for the right to be invoked); *New York State Club Ass'n*, 487 U.S. at 13 (noting the necessity of "views that the club's members wish to promote" and "specific expressive purposes" that would be seriously burdened by application of a non-discrimination statute).

Furthermore, the court correctly found that even if the application of the LAD had implicated some expressive purpose of Boy Scouts, there was no evidence that James Dale's inclusion in Scouting would require Scouting members to " 'abandon or alter' " their expressive activities or message, *New York State Club Ass'n*, 487 U.S. at 13 (citing *Rotary*, 481 U.S. at 548), or that Dale's membership in Scouting would impose "*serious burdens*," *Roberts*, 468 U.S. at 626 (emphasis supplied), or "affect in [a] *significant way*," *Rotary*, 481 U.S. at 548 (emphasis supplied), the ability of Scouting's members to express those views. *See New York State Club Ass'n*, 48 U.S. at 19 (O'Connor, J., concurring) (a group should be protected if its "expressive purposes would be *substantially undermined* if they were unable to confine their membership.") (emphasis supplied). 51a-52a. BSA failed to meet this test because: (1) BSA does not have an actual expressive position or purpose with which Dale's continued membership would interfere, 52a, and (2) James Dale has no "manifest view" contrary to the purposes that bring Scouting's members together, and has shown no failure to follow the rules on the same terms as his fellow members. 57a; 65a-66a.

Dale was not expelled from Scouting for anything he did or said to convey "any message inconsistent with Boy Scouts' policies." 65a-66a. This is not a case involving "a person who, by word and deed, disagrees with the organization's moral code," Pet. 15; the court below specifically found that he does not. 57a-58a. As the August 10 letter stated, Dale was expelled from BSA because he is gay.[17] 67a. The court below found that he was expelled pursuant to BSA's across-the-board policy of excluding gay members—not for what they say or do, but for who they are—even though non-gay members are permitted to remain, no matter what views or positions they take on "morality" or other matters. 56a.

Likewise, Dale was not expelled because of BSA's need to speak through its "leaders." Significantly, BSA's "leaders" (*i.e.*, all of its one-million-plus adult members), like its youth members, are free to express their moral views pro or con on the inclusion of gay members or gay people's moral fitness—so long as they are not gay. 66a-67a. This is because there is no core expressive purpose of anti-gay ideology in Scouting, and also because, contrary to the Petition and as the courts below found, BSA's policy in truth targets gay *people* (whether youth or adult members or "leaders"), not any *view* pro or con on homosexuality. 56a; 142a-144a. As his record showed, James Dale can lead like any other member, under the same rules and terms as others. BSA's attempt to distract this Court with a specious distinction regarding "leadership" is yet another effort to relitigate the facts, elide the

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[17] Contrary to the Petition, Dale was not expelled because of any "conduct" or misconduct, any "activism" or, indeed, any "views" he had manifested. 65a-67a. BSA's inability to identify any actual inconsistent manifest views is highlighted by the Petition's repeated reference to a single statement made by Dale *after* the commencement of this litigation (and long after the expulsion) deploring BSA's discrimination. Such opposition to discrimination has been expressed by many other (non-gay) members and affiliates with no resulting expulsion from the organization. 56a.

false premise of its argument, and hide its true discrimination.[18]

The court below also correctly found that BSA's suggestion that Dale's identity as a young gay man can serve as a proxy for expression is antithetical to this Court's decisions. *See* 56a-57a ("The United States Supreme Court has not hesitated to uphold the enforcement of a state's anti-discrimination statute against an expressive association claim based on assumptions in respect of status that are not a part of the group members' shared expressive purpose."). Treating a gay person's simple honesty and openness about his or her identity as inherently disqualifying "advocacy" that removes him or her from the protections of an anti-discrimination law—let alone inferring from such identity any particular "viewpoint"—typifies the "overbroad assumptions," "stereotypical notions," and "sexual stereotyping" condemned in *Roberts*, 468 U.S. at 625, 628, and the kind of "shorthand measure" forbidden by this Court in *New York State Club Ass'n*, 487 U.S. at 13. *See also Hurley*, 515 U.S. at 572 (noting that the organizers "disclaim any intent to exclude homosexuals as such" and only sought to prevent them from marching as a contingent under a banner). It cannot be that Jews, Catholics, Puerto Ricans, lesbians, and gay men, or others whose identity may initially go unnoticed, shed all protection—or can have viewpoints or positions ascribed to them and then used with impunity as the basis for discrimination—the moment they identify themselves.

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[18] BSA misrepresents this case as involving a "court's decision to require an organization to put [Dale] into a leadership position." Pet. 15. In fact, like all one-million-plus members over 18, James Dale was made a "leader" by the Boy Scouts; the decision below simply prevents BSA from expelling him from his long-time membership based on prejudice and pretext. Here, too, the Petition's effort to invoke *Hurley* to trump *Roberts* is misguided. Pet. 17, 22. Dale is no outsider seeking to enter the organization or change its message; he is a long-time member fully in accordance with the expression and purposes that bring him and the other members together. 65-66a.

Finally, following the *Roberts* trilogy, the court below correctly found that even if BSA had not failed to establish that boys and adults join Scouting in order to express a shared view regarding the morality of being gay, and had not failed to demonstrate that the admission of "avowed homosexuals" would impede its ability to express such alleged views, application of the LAD to BSA would still have been justified by New Jersey's compelling interest in eradicating discrimination in public accommodations. 64a. Infringements on the freedom to associate "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623; *see also Rotary*, 481 U.S. at 549.

The LAD meets each of these criteria. First, New Jersey adopted the LAD to serve a compelling state interest. *See Hurley*, 515 U.S. at 578 (prohibitions on sexual orientation discrimination serve compelling state interests); 62a ("It is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society."). Second, like the statutes at issue in *Roberts* and *Rotary*, the LAD is aimed at invidious discrimination—not viewpoints—and is thus unrelated to the suppression of ideas. *See Roberts*, 468 U.S. at 629; *Rotary*, 481 U.S. at 549. And third, the LAD is narrowly tailored to end discrimination in public accommodations and, as in the trilogy of cases before, there is no alternative for meeting that goal that is less restrictive of associational freedom. *See, e.g., Roberts*, 468 U.S. at 628-29.

2. BSA's Contentions Regarding Intimate Association And Speech Were Properly Rejected

The courts below also properly rejected BSA's intimate association defense. The court found that, like the Jaycees and Rotary, the "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing non-

members to attend meetings, establish that [the Boy Scouts] is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." 48a; *see also Roberts*, 468 U.S. at 631 ("Whatever the precise scope of [the right of intimate association, it does] not encompass associational rights of a 295,000-members organization whose activities are not 'private' in any meaningful sense of the term.") (O'Connor, J., concurring).[19]

Second, the court below considered *Hurley* and found that no "pure speech" would be infringed upon by James Dale's continued membership. The court noted that participation in the Boy Scouts is not itself a "pure speech act" or expression as were the parade or parade contingents in *Hurley*. 66a. This finding was correct—"Boy Scouting," *see* Pet. 22, is no more an act of "pure speech" like a parade than "Jayceeing" or "Rotarying" were.

Furthermore, the court found that in this context, BSA's leadership decisions are not "a form of 'pure speech' akin to a parade." 66a. BSA's selection of leaders, *i.e.* its promotion of youth members and welcoming of adult applicants virtually

19 Under the factors deemed relevant by this Court to assess an intimate association defense—"size, purpose, policies, selectivity [and] congeniality," *Roberts*, 468 U.S. at 620—BSA has much in common with the Rotary Club, which was found to have no such right. *See Rotary*, 481 U.S. at 546-47. BSA complains that the New Jersey Supreme Court analogized the facts of this case to those in *Rotary*, Pet. 19, yet in the amicus brief submitted by BSA in the *Rotary* case, BSA compared the two organizations and declared that Rotary and BSA engage in the "same types" of protected activity. Brief of the Boy Scouts of America As Amicus Curiae In Support of Appellants Rotary International, *et al.*, dated December 18, 1986, at 14. Most Boy Scouts troops are approximately the same size as or larger than many Rotary Club chapters, *see Rotary*, 481 U.S. at 546 (noting that the range of sizes of local Rotary Clubs begins at "fewer than 20"), share the basic Rotary Club goals of "humanitarian service, high ethical standards . . . , good will, and peace," *id.* at 548, and are far less selective than Rotary Clubs, which are "not open to the general public." *Id.* at 547.

non-selectively, 78a-79a, is not speech such as participation in a parade, *see Hurley*, 515 U.S. at 569, or wearing an arm band. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505-06 (1969).[20] Scouting's million-plus "leaders" are integral parts of the membership. Thus, the key overall is protection of the organization's (*i.e.*, the members') ability to express themselves—which is not impaired here. While "the Constitution looks beyond written or spoken words" as examples of pure speech, *Hurley*, 515 U.S. at 569, choosing a Scouting leader is no more an act of pure speech than choosing a fellow Scout. Although both acts may implicate expressive association concerns, they do not implicate the speech concerns addressed under the particular facts of *Hurley*. To hold otherwise would render the *Roberts* trilogy toothless and irrelevant.

This Court traditionally does not disturb the decision of a state's highest court when that court has properly and meticulously followed this Court's precedents. Because there is no confusion or conflict below; because this case warrants no special intervention given BSA's atypical government entanglement, special presence in the schools, and self-presentation

20 Quite notably, none of the cases cited in the Petition as evidence that leadership selection fits within the pure speech canon actually says any such thing; indeed, all but one are not even speech cases. *See* Pet. 15-16. Other than *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989), which involves a specialized framework regarding political parties, each of these cases involves employment, not association or speech. *See, e.g., Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996). Furthermore, most of these cases only invoke the First Amendment through application of the Free Exercise Clause. *See, e.g., EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996). These decisions simply do not address the irrelevant leadership selection argument for which BSA cites them.

as "open to all boys;"[21] and because the members of this organization do not have a core expressive purpose that is burdened by the civil rights law, this Court should decline to revisit the unanimous decision of the New Jersey Supreme Court and should deny BSA's petition for a writ of certiorari.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
November 24, 1999

Respectfully submitted,

Thomas J. Moloney
Allyson W. Haynes
Seth A. Stuhl
Kierith A. Jones
CLEARY, GOTTLIEB,
STEEN & HAMILTON
One Liberty Plaza
New York, N.Y. 10006
(212) 225-2000

Lewis H. Robertson
231 Maple Avenue
P.O. Box Y
Red Bank, New Jersey 17701
(732) 842-6660

Evan Wolfson
(Counsel of Record)
David Buckel
Jon W. Davidson
Beatrice Dohrn
Ruth Harlow
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585

Attorneys for Respondent

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[21] BSA is anything but a typical "private" organization whose defense of discriminatory membership policies might be argued to illustrate useful new principles. It is a poor vehicle to raise the rights and responsibilities of the countless genuinely private organizations and associations (expressive and otherwise) that, unlike BSA, are not chartered by the federal government, are not open to virtually anyone, are not entangled with the schools, and do not pursue purposes so wide-ranging, public, and generic that giving them a First Amendment right to discriminate in ways that the government never could would be tantamount to conferring such a right on nearly every imaginable group.

(14)

No. 99-699

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONERS

MICHAEL W. MCCONNELL
2301 S. Benchmark Circle
Salt Lake City, Utah 84109

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD
& REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

SANFORD D. BROWN
CERRATO, DAWES, COLLINS
SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

Attorneys for Petitioners

1488

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONERS	1
ARGUMENT	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Asbury Park Press, Incorporated v. City of Asbury Park, 23 N.J. 50, 127 A.2d 401 (1956) 4

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 2,6

Boy Scouts of America v. Teal, 374 F. Supp. 1276 (E.D. Pa. 1974) 3

Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980)..... 5

Gay Law Students Association v. Pacific Telephone & Telegraph Company, 24 Cal. 3d 458, 595 P.2d 592 (1979)..... 5

Hack v. President & Fellows of Yale College, 16 F. Supp. 2d 183 (D. Conn. 1998), *appeal pending*, No. 98-9136 (CA2)..... 9

Hall v. American National Red Cross, 86 F.3d 919 (CA9), *cert. denied*, 519 U.S. 1010 (1996) 9

Hsu v. Roslyn Union Free School District, 85 F.3d 839 (CA2 1996)..... 7

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Incorporated, 515 U.S. 557 (1995)..... *passim*

Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston, 418 Mass. 238, 636 N.E.2d 1293 (1994) 3

International Society for Krishna Consciousness, Incorporated v. Lee, 505 U.S. 672 (1992)..... 6

Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995) 9

TABLE OF AUTHORITIES—Continued

Page

New York State Club Association v. City of New York, 487 U.S. 1 (1988)..... 2,6,7

O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980). 4

Orr v. Orr, 440 U.S. 268 (1979)..... 1

Raley v. Ohio, 360 U.S. 423 (1959)..... 1

Roberts v. United States Jaycees, 468 U.S. 609 (1984).. 2,6,7

Rotwein v. General Accident Group, 103 N.J. Super. 406, 247 A.2d 370 (1968) 4

Texas v. Johnson, 491 U.S. 397 (1989) 6

Winkler v. Chicago Public Schools, No. 99C 2424 (N.D. Ill. filed Apr. 14, 1999)..... 9

Winkler v. City of Chicago, No. 97C 2475 (N.D. Ill filed Apr. 10, 1997) 9

PUBLICATIONS

David Cole & William N. Eskridge, Jr., *From Hand-holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L. Rev. 319 (1994)..... 5

Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update On the Fight Against 'Sodomy' Laws*, 21 Fordham Urb. L.J. 997 (1994) 5

The Advocate, Oct. 26, 1999 1

N.Y. Times Magazine, Aug. 22, 1999 1

N.Y. Times, Aug. 5, 1999..... 1

The Boston Globe, Aug. 5, 1999 1

TABLE OF AUTHORITIES—Continued

	Page
The Record, Aug. 5, 1999	1
United Press International, Apr. 30, 1981	3
United Press International, July 7, 1981	3

REPLY BRIEF FOR PETITIONERS

ARGUMENT

After trumpeting its importance for months in the national media,[1] respondent now declares this case a routine application of "clear and well-established" law, not warranting this Court's attention. Opp. 9. It is anything but. The decision to require Boy Scouts of America, perhaps this nation's premiere private youth organization, to appoint leaders who do not accept the organization's moral code is an unprecedented intrusion into the autonomy of private organizations, throwing aside constitutional principles of free speech and association. Respondent's bold assertion that the case raises no substantial First Amendment problem[2] only underscores the need for this Court's guidance.

1. Respondent's principal theme is that our petition rests on the "false premise" that Boy Scouts of America has a moral code that is inconsistent with affirmation of homosexual conduct. Opp. 11-17. Indeed, respondent goes

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1. *E.g.*, The Advocate, Oct. 26, 1999, at 30-36 (Cover picture and story about Dale); N.Y. Times Mag., Aug. 22, 1999, at 17 (Dale pictured and quoted: "I see this case as an important community thing."); N.Y. Times, Aug. 5, 1999, at A-1 (Dale and counsel pictured; counsel quoted as stating that the New Jersey Supreme Court's ruling is "a victory for Jim Dale and it's a victory for other gay men like him"); The Boston Globe, Aug. 5, 1999, at A1 (counsel quoted as stating that the New Jersey Supreme Court's decision was a "tremendously powerful decision" that will "further the national discussion about gay youth and the need to end discrimination"); The Record, Aug. 5, 1999, at A-1 (counsel quoted as stating that the New Jersey Supreme Court decision "sends a very powerful message").

2. Since the free speech and intimate association defenses were addressed on the merits in the opinion of the New Jersey Supreme Court, 44a-50a; 64a-67a, respondent's assertion that petitioners did not raise them in the lower courts, Opp. 6, 23, is without significance. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959).

so far as to tell Boy Scouts of America that its policy violates the Scout Oath and Law. *Id.* at 12 n.8. To this we have three responses. First, it is not the business of governments or of hostile litigants to decide what a private organization's message is. As this Court stated in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, "under the First Amendment, . . . a speaker has the autonomy to choose the content of his own message." 515 U.S. 557, 573 (1995). The Oath and Law belong to Scouting, and Scouting has the sole right to interpret them. *The very argument that the government may impose its own interpretation on an organization's moral message raises First Amendment issues of the highest order.* In the *Roberts* trilogy, this Court did not disregard or second-guess the groups' official statements about their ideological views. Rather, it accepted those groups' characterization of their views, and decided the cases on the ground that their stated views were not substantially related to their practice of excluding women. *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984); *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13-14 (1988).

Second, whether the "premise" exists or not is constitutionally irrelevant. Even if Scouting did not consider homosexual conduct immoral, it would still have the right not to select a leader whose moral agenda the organization chose not to endorse. That is the only way it can control its message. Even if Scouting had not wished to take a formal stance against homosexual conduct, it could not be forced to appoint leaders who openly advocate *in favor of* the morality of homosexual conduct, or whose public position may dilute or distract from the organization's chosen message. Scouting is entitled to shape its own message, and if it believes that an individual who seeks to be a uniformed

Scout leader will not represent that message, it is entitled to decline his offer to volunteer services.[3]

On this point, this case is indistinguishable from *Hurley*. There, too, the lower court held that the parade organizers lacked a "specific expressive purpose" that would be threatened by a gay contingent. 418 Mass. 238, 249, 636 N.E.2d 1293, 1299 (1994). This Court unanimously rejected the argument, which respondent repeats here, that "a narrow, succinctly articulable message" is required as a predicate for First Amendment protection. *Compare* Opp. 15 *with Hurley*, 515 U.S. at 569. Free speech rights are not confined to the strident, nor to single-issue organizations, nor to organizations in which all members are in agreement.

Third, the so-called "*factual* finding" by the appellate courts below, Opp. 9 (emphasis in original), was nothing of the sort. This case was decided on cross-motions for summary judgment. The trial court granted summary judgment *in favor of Scouting*, finding that "[s]ince its inception Scouting has sincerely and unswervingly held to the view that an 'avowed,' sexually-active homosexual is engaging in immoral behavior which violates the Scout Oath (in which the person promises to be 'morally straight') and the Scout Law (whereby the person promises to keep himself 'clean')." 223a. The Appellate Division simply substituted a factual assumption to the contrary by noting that "[t]he parties agree that there are no genuine issues of material

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3. The public record shows Scouting declining such services since at least 1981. *See* United Press Int'l, Apr. 30, 1981 (reporting exclusion of Timothy Curran following news article quoting his belief that attending a high school prom with a male date was a political statement) (A.3660-A.3661); United Press Int'l, July 7, 1981 (Scout representatives quoted as stating that Curran did "not set good moral standards to be emulated by younger Scouts.") (A.3658-A.3659). *See also Boy Scouts of America v. Teal*, 374 F. Supp. 1276, 1279 n.2 (E.D. Pa. 1974).

fact," 111a, and by failing to recognize that "[c]ross motions for summary judgment do not preclude the existence of issues of fact," *O'Keeffe v. Snyder*, 83 N.J. 478, 487, 416 A.2d 862, 866 (1980), and are not a forfeiture of the right to have the court consider whether genuine issues of fact exist. *See Asbury Park Press, Inc. v. City of Asbury Park*, 23 N.J. 50, 56, 127 A.2d 401, 404 (1956); *Rotwein v. General Accident Group*, 103 N.J. Super. 406, 424-25, 247 A.2d 370, 381 (1968). At least the parade organizers in *Hurley* had the benefit of a trial. On this record, it is unimaginable that the highest state court concluded that Scouting's repeated official statements do not create even a *disputed issue of material fact* regarding the organization's beliefs. No other court of last resort has reached the conclusion that Scouting's message is other than what it says it is.

2. Respondent also challenges our argument that appointing an avowed homosexual and gay rights activist would impair communication of Scouting's message. Opp. 25-26. Respondent Dale's public avowal of his sexual orientation, he contends, is nonexpressive. *See id.* at 26 ("[A] gay person's simple honesty and openness about his or her identity" cannot be treated as "'advocacy,'" and Scouting is engaged in discriminatory stereotyping when it "infer[s] from such identity any particular 'viewpoint.'"). To this we have two responses.

First, respondent simply ignores the facts of this case. While some potential leaders might keep their sexuality or their dissent to themselves, that cannot be said of respondent Dale, the only person before the Court in this case. Respondent, who has not been shy about appearances in the national media, asserts a right to be "open" and "honest" about his identity. Opp. 26. That is expressive.[4] Dale's

4. In other contexts, advocates for gay rights (including respondent's counsel of record) have argued that "coming out" as a homosexual is an act of expression that warrants First Amendment protection. David Cole & William N. Eskridge, Jr., *From Hand-holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L. Rev. 319, 325 (1994) ("An admission of sexual identity is expressive in the strictest sense of the word."); Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update On the Fight Against 'Sodomy' Laws*, 21 Fordham Urb. L.J. 997, 1049 n.100 (1994) ("there are . . . inherently political dimensions to being openly gay or lesbian"). *See Fricke v. Lynch*, 491 F. Supp. 381, 384-85 (D.R.I. 1980) (holding that gay student's seeking to attend high school prom with male escort has "expressive content" and constituted a "political" "message"); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 488, 595 P.2d 592, 610 (1979) ("[T]he struggle of the homosexual community for equal rights . . . must be recognized as a political activity . . . . [O]ne important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet'"). Indeed, the Appellate Division cited Dale's expression here as "the gay's exercise of his own First Amendment right to speak honestly about himself." 149a. It is disingenuous to suggest that "coming out" is expressive when the individual seeks First Amendment protection, but is nonexpressive when organizations with contrary views prefer not to be associated with the message.

homosexual activism came to the attention of the Monmouth Council when, as head of a gay rights organization at his university, he made a public speech on the "needs of lesbian and gay teenagers." Opp. 5. He has openly stated that his purpose in this litigation is "to point out to [Scouting] how bad and wrong this policy is." A.3366-A.3367; A.3548. Even in his brief before this Court, respondent Dale goes beyond simple self-identification and advocates the position that Scouting's message "in fact violates the Scout Oath and Law." Opp. 12 n.8.

Second, Dale's argument is contrary to this Court's holding in *Hurley*. The excluded contingent in *Hurley* did not seek to express any overt opinions on sexual morality, but simply to "bear witness" to their identity as gays and lesbians. 515 U.S. at 574. Proclamations of self-identity of

this sort *do* constitute the expression of ideas, and other private speakers are entitled not to be associated with them. *Id.* at 570.[5] In *Hurley*, this Court was at pains to show that a seemingly innocuous display by a contingent in a seemingly non-ideological parade of mixed messages had First Amendment significance.

Respondent asserts that "choosing a Scouting leader," unlike marching in a parade or wearing an arm-band, is not an "act of pure speech." Opp. 29. However, very little protected expression is "pure" speech. *See Texas v. Johnson*, 491 U.S. 397, 420 (1989) (flag burning is protected speech); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 (1992) (soliciting contributions is protected speech). Here, the organization's moral code is far more explicit than the parade theme in *Hurley*. Respondent cannot deny that the choice of a leader who is to act as a role model is important to an organization's ability to communicate to its members. And respondent Dale has admitted to his desire to communicate an opposite message. That is virtually an admission that the decision below creates a conflict with this Court's most closely-analogous precedent. If *Hurley* was rightly decided, this case follows *a fortiori*.

3. By the same token, respondent relies heavily on the *Roberts* trilogy without so much as acknowledging the differences from this case. *Roberts*, *Rotary*, and *New York State Club Ass'n* all involved organizations with a substantially

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5. Respondent's assertion that Scout leaders "are free to express their moral views pro or con on the inclusion of gay members or gay people's moral fitness — so long as they are not gay," Opp. 25, is simply false. It is undisputed in the record that Scouting units reserve the right to refuse leadership positions to any person whose service is deemed inconsistent with the organization's purposes. 38a; A.2976-A.2979. Indeed, a heterosexual affiant who supported Dale's summary judgment motion, A.4329-A.4336, was later dismissed as a Scouting leader for involving Scouting youth in his efforts to change Scouting policy barring openly homosexual leaders.

commercial purpose and effect and whose self-described philosophy was unrelated to their exclusionary practice. The Court made clear that if these factors were not present, the cases would have presented a different constitutional balance. As this Court explained in *Hurley*, the *Roberts* trilogy leaves "private club[s]" free to exclude members (let alone leaders) who do not accept the group's existing philosophy. 515 U.S. at 581; *see New York State Club Ass'n*, 487 U.S. at 13.

4. Once respondent's erroneous and legally irrelevant claims about the content of Boy Scouting's moral code and the expressiveness of respondent Dale's "honesty and openness" are put aside, his claim that this case presents no significant constitutional issue collapses. Respondent does not deny that Scouting is an expressive association. The court below conceded that "Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." 53a. Respondent does not claim that Scouting is a commercial venture, or that its activities have a primarily commercial value or content. *See Roberts*, 468 U.S. at 634-35 (O'Connor, J., concurring) (the key factor in determining protected status of expressive organizations is their noncommercial character); *New York State Club Ass'n*, 487 U.S. at 12 (emphasizing the commercial character of the associations). Respondent cannot seriously claim that the ability of an organization to choose its leaders does not affect its ability to communicate its message. *See Hsu v. Roslyn Union Free Sch. Dist.*, 85 F.3d 839, 872-73 (CA2 1996) (holding that Bible club in a public school under the Equal Access Act has the right to "discriminate" on the basis of religion in its choice of president and worship leader). Nor — despite respondent's repeated observation that Boy Scouting is open to "all boys," Opp. 2, 7, 16, 30, — can he make a serious argument that an organization's openness to potential members without regard

to race or ethnicity means that it forfeits the right to insist that members (and especially leaders) share its moral code.

5. Neither does respondent offer a response to our argument, Pet. 18-19, that the close personal relationships among Boy Scouts and Boy Scout leaders, the almost parental supervisory role of leaders on camping trips and other outings, the nonpublic character of most meetings and activities, and the moral and noncommercial purpose of the organization, entitle Boy Scout Troops to constitutional protection as intimate associations. Respondent's discussion of the intimate association issue, Opp. 27-28 & n.19, is utterly unresponsive. The state has no business telling groups of this sort — or the families involved in the Scouting movement — whom they must install in positions of leadership and influence.

6. In an initial paragraph of the opposition brief, respondent asserts that Scouting is subject to the same requirements as public schools or military bases which have agreed to sponsor Boy Scout Troops, Opp. 1-2 & n.3;[6] in the concluding paragraph of the opposition brief, respondent suggests that this case does not warrant review because Boy Scouts of America is "atypical" because of "government entanglement" and "special presence in the schools." Opp. 29-30. While such entities have sponsored Scouting — particularly in inner-city areas where family

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6. While religious organizations sponsor over 60 per cent of Scouting units, public schools sponsor slightly over 8 per cent and other government bodies such as military bases sponsor less than 5 per cent of Scouting units. The religious organizations which have filed briefs as *amici curiae* in support of petitioners sponsor about 75 per cent of all Scouting units sponsored by religious groups. Putting aside the Methodist social action group which has taken a different view from the Methodist group responsible for the Church's relationship with Scouting, the religious organizations which have filed a brief as *amici curiae* in support of respondent include only about 2 per cent of the religious sponsors of Scouting units.

and neighborhood support for boys is weak or, as in the military, where attempts are made to approximate civilian life — all sponsors agree to conduct the program in accordance with the policies of Boy Scouts of America. A.3158. In other lawsuits, advocacy groups have sued government entities to force their dissociation from Scouting because of Scouting values. *Winkler v. Chicago Public Schools*, No. 99C 2424 (N.D. Ill. filed Apr. 14, 1999) (brought as defendant class action); *Winkler v. City of Chicago*, No. 97C 2475 (N.D. Ill filed Apr. 10, 1997) (settlement entered Feb. 4, 1998).

Many private organizations have relationships of various sorts with governmental entities, without thereby forfeiting their constitutional rights. State action doctrine draws the line between genuinely private action, which is entitled to constitutional protection, and ostensibly private action that is so entangled with the state that it must be covered by governmental norms. At no point in this litigation has respondent contended, or the New Jersey courts held, that Boy Scouts of America is anything but a private actor.[7] Accordingly, it has First Amendment rights. If New Jersey wishes to withhold public sponsorship or other benefits to the organization on account of its policies, or if respondent wishes to bring an action against governmental entities claiming that their relationship with Scouting is illegal or unconstitutional, that would raise different issues; but the existence of public

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7. All corporations, even religious corporations, necessarily have government charters. Scouting's federal charter does not make it a state actor or negate its First Amendment rights. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (holding that a governmentally-created corporation is a public actor only if the government retains permanent authority to appoint a majority of its board of directors); *Hall v. American Nat'l Red Cross*, 86 F.3d 919, 921-22 (CA9), *cert. denied*, 519 U.S. 1010 (1996); *Hack v. President & Fellows of Yale College*, 16 F. Supp. 2d 183 (D. Conn. 1998), *appeal pending*, No. 98-9136 (CA2).

benefits does not entitle the government to invade a private organization's speech and associational rights.

7. Finally, even if respondent's interpretation of First Amendment principles were more plausible than we suppose, that does not detract from the importance of this case, or the need for *certiorari* review. The clash between public accommodation laws and the free speech and associational rights of private organizations has wide ramifications for our society. Few legal issues in recent years have aroused such widespread public attention or controversy. Whichever side is correct, this is a constitutional issue so important to the American way of life that resolution cannot be left to lower courts. This Court's guidance is urgently needed.

CONCLUSION

For these reasons and those stated in the petition, this Court should issue a *writ of certiorari* to review the judgment of the New Jersey Supreme Court in this case.

Respectfully submitted,

MICHAEL W. MCCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

SANFORD D. BROWN
CERRATO, DAVIES, COLLINS, SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

Attorneys for Petitioners

(3)

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Petitioners,

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JAMES DALE,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF OF LIBERTY COUNSEL AND LIBERTY ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Jerry Falwell, Jr.
Va. Bar No. 27396
THE LIBERTY ALLIANCE
P.O. Box 542
Forest, VA 24551

Mathew D. Staver
(Counsel of Record)
Florida Bar No. 0701092
Erik W. Stanley
Florida Bar No. 0183504
LIBERTY COUNSEL
1900 Summit Tower Blvd.
Suite 540
Orlando, Florida 32810
(407) 875-2100

2398

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I.

THIS COURT SHOULD GRANT CERTIORARI OF THE NEW JERSEY SUPREME COURT DECISION AS IT IS IN CONFLICT WITH THE PRECEDENTS OF THIS COURT 4

II.

THIS COURT SHOULD GRANT CERTIORARI TO ANSWER THE QUESTION OF GREAT PUBLIC IMPORTANCE WHETHER THE BOY SCOUTS OF AMERICA ARE GOVERNED BY PUBLIC ACCOMMODATION LAWS 11

A.

This Court Should Grant Certiorari To Resolve The Conflict Between The New Jersey Supreme Court Decision And The Seventh Circuit Court Of Appeals 12

B.

This Court Should Grant Certiorari To Resolve The Conflict Among The State Courts 14

CONCLUSION 19

TABLE OF AUTHORITIES

CASES: PAGE

Bd. of Directors of Rotary Int'l. v. Rotary Club of Duarte,
481 U.S. 537 (1987) 3, 5, 6

Curran v. Mount Diablo Council of the Boy Scouts of America,
952 P.2d 218 (Cal. 1998) 15, 16, 17

Dale v. Boy Scouts of America,
734 A.2d 1196 (N.J. 1999) 3, 4, 12, 13, 14, 16, 18

Daniel v. Paul,
395 U.S. 298 (1969) 5

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,
515 U.S. 557 (1995) 3, 5, 9, 10, 11

Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities,
528 A.2d 352 (Conn. 1987) 18

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 3, 6, 7, 8, 9, 10, 11, 18

Seabourn v. Coronado Area Council, Boy Scouts of America,
891 P.2d 385 (Kan. 1995) 18

Schwenck v. Boy Scouts of America,
551 P.2d 465 (Or. 1976) 18

Sullivan v. Little Hunting Park,
396 U.S. 229 (1969) 5

Tillman v. Wheaton-Haven Recreation Ass'n.,
410 U.S. 431 (1973) 5

United States Jaycees v. Iowa Civil Rights Comm'n.,
427 N.W.2d 450 (Iowa 1988) 17

United States Jaycees v. Massachusetts Comm'n. Against Discrimination,
463 N.E.2d 1151 (Mass. 1984) 18

United States Jaycees v. Richardet,
666 P.2d 1008 (Alaska 1983) 17

Welsh v. Boy Scouts of America,
993 F.2d 1267 (7th Cir.),
cert. denied, 510 U.S. 1012 (1993) 12, 13

CONSTITUTIONAL AND STATUTORY PROVISIONS

Mass. Gen. Laws § 272:98 (1992) 9

Minn. Stat. § 363.03, subd. 3 (1982) 6

INTEREST OF *AMICI*

LIBERTY COUNSEL

Liberty Counsel is a non-profit civil liberties education and legal defense organization.[1] Liberty Counsel's activities include educating the public regarding civil liberties and the role of law in the judicial process in preserving and implementing individual freedoms and the democratic process. As part of advancing its purpose, Liberty Counsel coordinates with local attorneys and members of the academic community to provide educational resources and opportunities to both the lay and legal communities, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amicus curiae* briefs on a variety of issues.

Liberty Counsel is particularly interested in protecting the First Amendment rights of freedom of speech and association. Liberty Counsel is interested in ensuring that non-profit organizations retain their right to freedom of association and freedom of expression without fear of compulsion by the government to adopt statements or beliefs to which they are opposed.

Attorney Erik W. Stanley is a staff attorney with Liberty Counsel and was also actively involved in the Boy Scouts of America as a young man, eventually earning the Eagle Scout award in 1990. As an Eagle Scout, Attorney

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent are attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Stanley has an interest in the preservation and vitality of the Boy Scouts of America, including the continuation of the Boy Scout's message of morality and values.

Liberty Counsel files this brief, in the belief that to allow the decision of the lower court to stand would be detrimental to the First Amendment Freedoms of Association and Expression. Attorney Mathew D. Staver has previously appeared before this Court and through this brief attempts to lend his assistance in the proper evaluation of the constitutional infringement and application of the constitutional analysis.

THE LIBERTY ALLIANCE

The Liberty Alliance is a non-profit education and lobbying organization founded in 1986. The Liberty Alliance's activities include educating the public and influencing public policy regarding the role of government in preserving and implementing religious freedoms and traditional family values in the United States of America.

As part of advancing its purpose, The Liberty Alliance provides educational resources to the general public, coordinates petition drives to express the opinions of citizens to lawmakers, coordinates regional educational seminars for religious and lay community leaders, and publishes articles and produces videos for distribution to the public.

The Liberty Alliance is participating with Liberty Counsel in the filing of this brief because it is particularly interested in protecting the constitutional rights of private non-profit organizations to express their beliefs and to associate freely with whomever they choose without governmental interference. Attorney Jerry L. Falwell, Jr. is General

Counsel to The Liberty Alliance.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court decision in *Dale v. Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999), is in conflict with the precedents of this Honorable Court. This Court's decisions in *Bd. of Directors of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), concluded that the anti-discrimination statutes at issue in those cases applied to prohibit the organizations involved from refusing admission to women. These two cases, however point to the fact that an organization may conduct expressive activities such that it may be understood to be speaking as a unified whole. Specifically, Justice O'Connor in *Roberts* stated that the Boy Scouts of America are different from organizations such as the Rotary Club or the Jaycees. This difference stems from the Boy Scouts of America's mission and purpose which entitles it to First Amendment Freedom of Association protection.

Further, this Court specifically held in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) that state public accommodations laws could not be applied to a parade organizer who refused access to a parade to a group whose message it did not agree with. This Court's holding rested on the characterization of a parade organizer as a composer, choosing the parade's message from among proposed individual participants. Because the organizer chose what message to include and what message to exclude, the organizer was a private speaker with First Amendment Freedom of Expression protection. In the same way, the Boy Scouts of America is an organization that speaks as a unified whole in order to promote its mission. As such, the Boy Scouts of America should be afforded First

Amendment protection to choose what message they wish to include and what messages they choose to exclude.

The New Jersey Supreme Court's decision also is implicitly in conflict with the Seventh Circuit Court of Appeals as well as the State Supreme Courts of California, Alaska, Iowa and Massachusetts over the issue of great public importance whether the Boy Scouts of America and other similarly situated organizations may constitutionally be subject to public accommodation laws. The New Jersey Supreme Court stands alone in answering that question in the affirmative. Such a decision subjects the Boy Scouts of America, a nationwide chartered organization, to differing interpretations depending on where the organization happens to conduct its activities.

This Court should grant certiorari to resolve the conflicts between the New Jersey Supreme Court and the precedents of this Honorable Court, the precedent of the Seventh Circuit Court of Appeals and the precedents of the State Supreme Courts of the states of California, Alaska, Iowa and Massachusetts.

ARGUMENT

I.

THIS COURT SHOULD GRANT CERTIORARI OF THE NEW JERSEY SUPREME COURT DECISION AS IT IS IN CONFLICT WITH THE PRECEDENTS OF THIS COURT.

The New Jersey Supreme Court decision in *Dale v.*

Boy Scouts of America, 734 A.2d 1196 (N.J. 1999) is in conflict with the precedents of this Honorable Court. The three main cases decided by this Honorable Court addressing whether a nonprofit organization may be considered a place of public accommodation are *Bd.of Directors of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537 (1987), *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).[2]

In *Rotary International*, this Court concluded that Rotary International and the Duarte Rotary Club was a "business establishment" within the meaning of the California Unruh Civil Rights Act and therefore required the clubs to admit women over the objections of Rotary International. In so applying the California statute, this Court rejected Rotary International's First Amendment defense. *Rotary Int'l.*, 481

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[2] In *Tillman v. Wheaton-Haven Recreation Ass'n.*, 410 U.S. 431 (1973), this Court held that a nonprofit recreational association that was open to all caucasian residents in a certain geographic area was not a private club exempt from federal public accommodation law because the association had "no plan or purpose of exclusiveness." *Id.* at 438. In *Daniel v. Paul*, 395 U.S. 298 (1969), this Court found that a recreational facility known as Lake Nixon was not a private club but was instead a business operated for profit with none of the attributes of self-government and membership-ownership traditionally associated with private clubs. This Court found that Lake Nixon was therefore not exempt from the Civil Rights Act of 1964. Finally, in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), this Court found that a community park could not properly be considered a private social club exempt from the Federal Civil Rights Act of 1964 because "it is open to every white person within the geographic area, there being no selective element other than race." *Id.* at 236. These cases do not directly address the issue presently before this Court.

U.S. at 549.

This Court's decision in *Rotary International* paralleled its prior decision in *Roberts*. Three years before *Rotary International*, this Court construed the Minnesota Human Rights Act to apply to the United States Jaycees. The Act in pertinent part states as follows:

> It is an unfair discriminatory practice:
>
> to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin or sex. Minn. Stat. § 363.03, subd. 3 (1982).

Roberts, 468 U.S. at 614-615.

The United States Jaycees had raised the First Amendment as a defense to the application of the Minnesota Human Rights Act. This Court found that personal affiliations that exemplify First Amendment freedom of association protection include the creation and sustenance of a family such as marriage, the raising and education of children, and cohabitation with one's relatives. *Id.* at 619. This Court then stated that "an association lacking these qualities -- such as a large business enterprise -- seems remote from the concerns giving rise to this constitutional protection." *Id.* at 620.

Factors relevant in determining whether the First Amendment freedom of association is violated include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.

The United States Jaycees was opposed to admitting women as full voting members, but this Court found that local chapters were "large and basically unselective groups." *Id.* at 621. The *Roberts* Court also found that "numerous non-members of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another, including many of the organization's various community programs, award ceremonies, and recruitment meetings." *Id.* This Court therefore concluded that the Minnesota Human Rights Act applied to the United States Jaycees and the First Amendment right to associate was no defense. *Id.* at 622-632.

However, Justice O'Connor wrote a concurring opinion that is directly on point to the Boy Scouts in this case. In her concurrence, Justice O'Connor observed the following:

> In my view, an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not predominately of the type protected by the First Amendment. It is only when the association is predominately engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard. An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas.

Id. at 635-636 (O'Connor, J., concurring).

Justice O'Connor's concurrence continued when she observed the following: **"Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."** *Id.* at 636 (emphasis added). Justice O'Connor then appended a footnote to the foregoing quote in which she stated the following:

> *See, e.g., Girl Scouts of the U.S.A., You Make the Difference* (1980); W. Hillcourt, The Official Boy Scout Handbook (1979); P. Fussell, The Boy Scout Handbook And Other Observations 7-8 (1982)("*The Official Boy Scout Handbook*, for all of its focus on Axmanship, Backpacking, Cooking, First Aid, Flowers, Hiking, Map and Compass, Semaphore, Trees, and Weather, is another book about goodness. No home, and certainly no government office, should be without a copy").

Roberts, 468 U.S. at 636 (O'Connor, J., concurring).

When Justice O'Connor referred to activities intended to develop "good morals, reverence, patriotism, and a desire for self-improvement", she was referring to Girl Scouts of the U.S.A. and Boy Scouts of America. There can be no doubt that she was referring to the Boy Scouts as she cites the Boy Scout's Handbook in her footnote. Thus, Justice O'Connor clearly saw a difference between the Boy Scouts organization and the United States Jaycees. In Justice O'Connor's view, public accommodation laws cannot be constitutionally applied

to the Boy Scouts of America. Unlike the United States Jaycees or the Rotary International, the Boy Scouts have a clear First Amendment freedom of association defense to such application of any public accommodation laws.

The BSA has not entered into the realm of commerce in any substantial degree. To the contrary, the Boy Scouts do teach "outdoor survival skills or participation in community service" which indeed are "expressive" activities "intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.* at 636.

This Court's protection of the expressive activities of organizations under the First Amendment continued in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In a unanimous decision, this Court held that a parade organizer could exclude a group from a parade simply because he disagreed with the message the group wished to convey. *Id.* at 581. This Court held that the public accommodations law of Massachusetts could not be applied to compel the parade organizer to include the Gay, Lesbian and Bisexual group in its parade. *Id.* *Hurley* is directly on point with the case at bar and should have controlled the outcome below.

The Massachusetts public accommodations law in pertinent part, states that it is prohibited to discriminate on the basis of:

> race, color, religious creed, national origin, sex, sexual orientation..., deafness, blindness or any physical or mental disability or ancestry in the admission of any person to, or treatment [in] any place of public accommodation, resort or amusement. Mass. Gen. Laws § 272:98

(1992)

Id. at 572.

The parade organizer raised the First Amendment as a defense to the application of the Public Accommodations Law. This Court found that a parade is an expressive activity and that the parade organizer is "[r]ather like a composer... select[ing] the expressive units from potential participants..." *Id.* at 574. The parade organizer had decided to exclude the Gay, Lesbian and Bisexual group from participation in the parade. This Court stated, with respect to that judgment:

> ...the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another... it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

Id. at 574-575.

This Court stated that a parade's message is "distilled from the individual presentations along the way, and each unit's expression is perceived by the spectators as part of the whole." *Id.* at 577. In this respect, a parade "does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience." *Id.* at 576.

In the same way, the BSA is an expressive organization

with a coherent message pieced together by the organization's leadership. The message of the BSA is the promotion of virtues and ethical choices in young people. *See* BSA Mission Statement. This message is transmitted through the Scout Oath as well as the Scout Law which each scouting member is required to memorize and be prepared to recite. As Justice O'Connor stated in *Roberts*, "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring).

The BSA is an organization promoting values and goals in young people. This message is borne out every day in the thousands of scouting meetings across the country by those in positions of authority in the individual scout troops. Like the parade organizer in *Hurley*, the BSA organizers select those individuals that will promote the message they wish to instill in young people. The use of the New Jersey Public Accommodations Law to compel the BSA to include a message they disapprove of is precisely the type of infringement on the Freedom of Expression this Court struck down as unconstitutional in *Hurley*. As this Court stated in *Hurley*, "Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others." *Hurley*, 515 U.S. at 581.

Clearly the decision of the New Jersey Supreme Court in *Dale* is in direct conflict with the underlying precedents of this Court. This Court should therefore grant certiorari to resolve the conflict.

II.

THIS COURT SHOULD GRANT CERTIORARI TO ANSWER THE QUESTION OF GREAT PUBLIC IMPORTANCE WHETHER THE BOY SCOUTS OF AMERICA ARE GOVERNED BY PUBLIC ACCOMMODATION LAWS.

This Court should grant certiorari to review the New Jersey Supreme Court decision in *Dale v. Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999) in order to answer the question of great public importance and to resolve the conflict that has arisen among both the state and federal courts as to whether the Boy Scouts of America or other similarly situated nonprofit associations may constitutionally be subjected to public accommodation laws. A conflict has arisen among both the state and federal courts which needs to be resolved by this Court. This issue is of great public importance as the decision in *Dale* affects not only the Boy Scouts but other similar nonprofit organizations.

A.

This Court Should Grant Certiorari To Resolve The Conflict Between The New Jersey Supreme Court Decision And The Seventh Circuit Court Of Appeals.

The New Jersey Supreme Court decision is in direct conflict with the Seventh Circuit Court of Appeals in answering the question of whether the Boy Scouts of America are governed by public accommodations laws. This is an issue of great public importance that needs to be decided by this Court. In *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir.), *cert denied*, 510 U.S. 1012 (1993), the

Seventh Circuit Court of Appeals held that the Boy Scouts is not a "place of public accommodation" under Title II of the Civil Rights Act of 1964 because "Congress when enacting § 2000a(b) never intended to include membership organizations that do not maintain a close connection to a structural facility within the meaning of 'place of public accommodation.'" *Id.* at 1269.

The New Jersey Supreme Court decision in *Dale* is in conflict with the Seventh Circuit Court of Appeals in *Welsh* over the issue of great public importance, namely, whether the Boy Scouts of America and other groups similarly situated are governed by Public Accommodations Laws.

The BSA is a national organization that is federally chartered. Because of the scope of the organization, the BSA is subject to differing interpretations depending on where in the country they are operating. These differing interpretations of whether the Public Accommodations Laws, such as Title II, apply to the BSA make it difficult for the BSA to operate as a unified and coherent organization. The conflict also makes it difficult for other similarly situated non-profit organizations to operate effectively. In this respect, the issue whether public accommodation laws apply to organizations such as the BSA is one of the utmost public importance. As the seventh Circuit stated in *Welsh*:

> When the government, in this instance through the courts, seeks to regulate the membership of an organization like the Boy Scouts in a way that scuttles its founding principles, we run the risk of undermining one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs.

Welsh, 993 F.2d at 1278.

This Court should grant certiorari to resolve the conflict between the New Jersey Supreme Court and the Seventh Circuit Court of Appeals.

B.

This Court Should Grant Certiorari To Resolve The Conflict Among The State Courts.

In *Dale*, the New Jersey Supreme Court addressed the question as to whether the Boy Scouts were subject to the New Jersey Law Against Discrimination. The state law in pertinent part states as follows:

> All persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, . . . without discrimination because of . . . affectional or sexual orientation.

Dale, 734 A.2d at 1207.

The New Jersey Supreme Court in *Dale* concluded that the Boy Scouts were governed by the New Jersey Law Against Discrimination and rejected the Boy Scouts' First Amendment defense. The Court based its ruling in part upon a finding that the Boy Scouts engaged in broad public solicitation. This case conflicts with other state Supreme Court rulings.

While there is not a direct conflict between the New Jersey Supreme Court case and other various state Supreme

Court cases with respect to a federal question, the First Amendment right to freedom of association was raised as a defense in each of the cases. The courts in each of the cases, however, did not decide the case on the basis of the First Amendment, deciding the cases instead on the construction of the various state public accommodations laws at issue. However, the First Amendment right to freedom of association was always at issue in each of the state Supreme Court cases, even if those cases did not address the First Amendment squarely. In this respect, the New Jersey Supreme Court case is in conflict with other state Supreme Court cases because the New Jersey decision necessitated that the court confront the First Amendment issue directly, whereas the other state Supreme Court decisions did not mandate such an analysis. Had the other state Supreme Courts decided the public accommodations law issue differently, they would have then been required to confront the First Amendment defense squarely.

In *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218 (Cal. 1998), the California Supreme Court addressed the question as to whether the Boy Scouts should be considered a public accommodation under the state law known as the Unruh Civil Rights Act. In *Curran*, a former Eagle Scout made application to become an assistant Scoutmaster. The application was rejected by the BSA after learning that the applicant publicly stated he was homosexual and publicly expressed his commitment to communicating to others his view as to the acceptability and morality of homosexuality. *Id.* at 219. The statute under consideration in *Curran* stated in pertinent part as follows:

> All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and

> privileges of inns, restaurants, hotels, eating houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens.

Id. at 229.

Even though the California Supreme Court noted that the Boy Scouts did engage in certain commercial transactions, the Court nevertheless concluded the following:

> [W]e do not believe that the circumstance that the Boy Scouts is generally nonselective in its admission policies, and affords membership to a large segment of the public, is itself sufficient to demonstrate that the organization reasonably can be characterized as the functional equivalent of a traditional place of public accommodation or amusement. The record establishes that the Boy Scouts is an organization whose primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose.

Id. at 236.

The California Supreme Court noted that "the Boy Scouts is an expressive social organization whose primary

function is the inculcation of values in its youth members, and whose small social group structure and activities are not comparable to those of a traditional place of public accommodation or amusement." *Id.* at 238. The Court then concluded that the Boy Scouts "is not a business establishment whose membership policies or decisions fall within the reach of the Act." *Id.* Since the Court in *Curran* found that the BSA did not constitute a business establishment within the public accommodation statute, it did not reach the First Amendment defense. The court, however, was clearly influenced by the First Amendment. *Id.* at 255-56 (Kenard, J., concurring). The New Jersey Supreme Court ruling in *Dale* is in direct conflict with the California Supreme Court ruling in *Curran*.

In *United States Jaycees v. Richardet*, 666 P.2d 1008, 1011 (Alaska 1983), the Alaska Supreme Court found that "the word 'place' . . . . would not encompass a service organization lacking a fixed geographical situs." Thus, since the Boy Scouts meet in various locations, under the Alaska Supreme Court decision, the Boy Scouts would not be considered a place of public accommodation. The Jaycees had raised the First Amendment as a defense, claiming that application of the public accommodation law to them would violate the organization's freedom of association, among other constitutional violations. *Id.* at 1010. The Alaska Supreme Court did not consider this defense, instead deciding the case on the basis of the construction of the Public Accommodation Law. The Alaska Supreme Court decision is therefore in direct conflict with the New Jersey Supreme Court decision.

Similarly, in *United States Jaycees v. Iowa Civil Rights Comm'n.*, 427 N.W.2d 450, 454 (Iowa 1988), the Iowa Supreme Court stated that the "United States Jaycees is not a 'place' within our definition of 'public accommodation'". The

Jaycees had originally raised the First Amendment right to freedom of association as a defense but amended their bylaws once this Court issued its decision in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Furthermore, in *United States Jaycees v. Massachusetts Comm'n Against Discrimination*, 463 N.E.2d 1151, 1156 (Mass. 1984), the Massachusetts Supreme Court found that the antidiscrimination law "does not apply to [a] membership organization, since such an organization does not fall within the commonly accepted definition of 'place.'" Similarly, the Jaycees raised the First Amendment right to freedom of association as a defense to the application of the Public Accommodations Law of Massachusetts. *Id.* at 1153. The court, however, did not address the First Amendment defense, preferring to decide the case on the basis of the construction of the Public Accommodations Law. The New Jersey Supreme Court ruling in *Dale* is therefore in conflict with the Iowa and Massachusetts Supreme Courts.

In addition to the foregoing, the New Jersey Supreme Court case also conflicts with the state supreme court decisions in Connecticut, Kansas, and Oregon. *See Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities*, 528 A.2d 352 (Conn. 1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 891 P.2d 385 (Kan. 1995); and *Schwenck v. Boy Scouts of America*, 551 P.2d 465 (Or. 1976).

This Court should grant certiorari to resolve the conflict among the state Supreme Courts.

CONCLUSION

This Court should grant certiorari to review the decision of the New Jersey Supreme Court as it is in conflict with the precedents of this Court. The New Jersey Supreme Court's decision is also in conflict with the Seventh Circuit Court of Appeals and is in conflict with the Supreme Courts of California, Alaska, Iowa, and Massachusetts. Further, the issue of whether the Boy Scouts of America is governed by the Public Accommodations Laws is a question of great public importance that should be decided by this Court. This Court should grant certiorari.

Respectfully submitted,

Jerry Falwell, Jr.
Va. Bar No. 27396
THE LIBERTY ALLIANCE
P.O. Box 542
Forest, VA 24551

Mathew D. Staver
(Counsel of Record)
Florida Bar No. 0701092
Erik W. Stanley
Florida Bar No. 0183504
LIBERTY COUNSEL
1900 Summit Tower Blvd.
Suite 540
Orlando, Florida 32810
(407) 875-2100

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In the

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA

Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF PACIFIC LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

JOHN H. FINDLEY
Counsel of Record
HAROLD E. JOHNSON
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932
Counsel for Amicus Curiae

3199

QUESTIONS PRESENTED

1. May an association dedicated to an expressive purpose be compelled to admit as a leader an individual with a manifest opposition to that purpose?

2. May a court dictate to a private expressive organization the details of that organization's expressive purpose?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. A WRIT OF CERTIORARI IS NECESSARY BECAUSE THE NEW JERSEY SUPREME COURT'S RULING ASSAULTS A FUNDAMENTAL FIRST AMENDMENT RIGHT: THE FREEDOM OF PRIVATE EXPRESSIVE ORGANIZATIONS TO DEFINE THEIR OWN BELIEFS AND THE MEMBERSHIP POLICIES DESIGNED TO PROMOTE THOSE BELIEFS 7

A. The First Amendment Protects a Freedom of Expressive Association That Allows a Private Organization Dedicated to Expressive Purposes to Condition Its Membership Policies So as to Promote Those Purposes 7

B. BSA Is an Expressive Organization Enjoying the Same First Amendment Protection Accorded the Parade Organizers in *Hurley* 8

TABLE OF CONTENTS—Continued

Page

C. The Boy Scouts' Right to Expressive Association Includes the Freedom to Define for Themselves the Content of Their Teaching, Free from Editing by the Courts 10

1. The New Jersey Court Would Impermissibly Force BSA into a Strident Advocacy of Its Tenets in Order to Win Them Judicial Recognition 11

2. A Court's Editing of an Expressive Organization's Ideology Is as Impermissible as Court Interpretation of a Religion's Doctrine 11

D. Denying the Boy Scouts the First Amendment Freedom to Determine Their Own Membership Would Carry Chilling Implications for Other Organizations With Expressive Purposes 12

II. IN ADDITION TO ITS STATUS AS A CONSTITUTIONAL MANDATE, FREEDOM OF EXPRESSIVE ASSOCIATION MERITS DEFERENCE BECAUSE OF ITS IMPORTANT PRACTICAL ROLE IN PROMOTING LIBERTY 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases

Arkansas Educational Television Commission v. Forbes, 523 U.S. 666 (1998) 1

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670 (1998) 3-4, 7-8, 10, 12-13

Dale v. Boy Scouts of America, No. MON-C-330-92 (Ch. Div. Nov. 3, 1995) 4-5

Dale v. Boy Scouts of America, 160 N.J. 562 (1999) 4-5, 9-12

Dale v. Boy Scouts of America, 308 N.J. Super. 516 (App. Div. 1998) 3, 5

Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, *reh'g denied* (Sept. 12, 1997) 1

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) 5-11

Keller v. State Bar, 496 U.S. 1 (1990) 1

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) 11

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995) 1

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 1

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 7

Widmar v. Vincent, 454 U.S. 263 (1981) 12

TABLE OF AUTHORITIES—Continued

Page

Rules of Court

Supreme Court Rule 37 1

Rule 37.6 1

Miscellaneous

Alexis de Tocqueville, Democracy in America (J.P. Macer and Max Lerner, eds., Harper & Row, 1966) 13-15

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.[1]

For more than two decades, Pacific Legal Foundation attorneys have been litigating in support of First Amendment rights. *See, e.g., Keller v. State Bar*, 496 U.S. 1 (1990). Pacific Legal Foundation has also participated as a friend of the court in many other First Amendment cases this Court has heard. *See Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998); *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, *reh'g denied* (Sept. 12, 1997); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995); and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). In addition, as a private, nonprofit organization whose mission statement expresses a guiding philosophical purpose (to undertake legal action on behalf of limited government, property rights, and individual rights), Pacific Legal Foundation has an institutional interest in the right of private expressive organizations to define their missions free from government interference.

INTRODUCTION

A writ of certiorari is called for because private expressive associations play a key role in the infrastructure of ordered liberty, and the decision below gravely assaults the independence and viability of such organizations. This case poses the important question of whether government may force a private association organized on a distinct philosophy to alter that philosophy in order to bring it into accord with a governmentally approved line of thinking. Do private

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[1] No party or party's counsel authored this brief in whole or in part and no person or entity other than the Amicus Curiae, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. *See* Rule 37.6.

associations with an expressive purpose enjoy the freedom to define for themselves what that purpose is? Can they embrace a defining principle to the point of excluding from membership people who do not share their convictions?

Or, alternatively, may lawmakers tell private expressive associations whom they may or may not admit as members or leaders, regardless of individual candidates' acceptance or rejection of the organization's precepts? And are courts free to superimpose on a private, expressive association a mission purpose, even if it is at odds with the organization's own definition of its purpose and convictions?

The First Amendment provides clear answers to these questions. It denies any power of lawmakers to force on a private expressive association membership policies that conflict with the association's defined purpose. The First Amendment also prohibits courts from making themselves the arbiters of private associations' philosophical tenets and imposing on such an organization an interpretation of its guiding philosophy inconsistent with the organization's own understanding of its mission. In this way, the First Amendment promotes freedom, social betterment, and cultural enrichment by fostering a multitude of private associations with diverse philosophical goals.

STATEMENT OF THE CASE

The Boy Scouts of America (BSA) is a nonprofit, private organization incorporated in 1910. As opposed to being a recreational facility open without distinction to any and all individuals irrespective of their beliefs and commitments, BSA has specified membership criteria--willingness to express a belief in God is fundamental, for instance. Participants meet regularly in small groups (often in private homes) that are designed to foster close relationships and trust. The BSA Mission Statement announces the organization's philosophy and purpose:

> It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential. The values we strive to instill are based on those found in the Scout Oath and Law:
>
> Scout Oath
>
> On my honor I will do my best, to do my duty to God and my country to obey the Scout Law; [t]o help other people at all times; [t]o keep myself physically strong, mentally awake, and morally straight.

Quoted in Dale v. Boy Scouts of America, 308 N.J. Super. 516, 524 (App. Div. 1998).

According to official BSA position statements, the duty to remain morally straight encompasses a commitment to refrain from sex outside of marriage. It also incorporates a view with respect to homosexuality, as set forth in a 1978 memorandum written by the national BSA:

> "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?
>
> A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership.
>
> Q. May an individual who openly declares himself to be a homosexual be a registered unit member?

> A. No. As the Boy Scouts of America is a private, membership organization, participation in the program is a privilege and not a right. We do not feel that membership of such individuals is in the best interests of Scouting."

Quoted in Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 735 n.7 (1998).

James Dale is a veteran New Jersey Boy Scout. About the time that he applied for adult membership and leadership status, he entered college, announced to friends and family that he was gay, and eventually became co-president of the Rutgers University Lesbian/Gay Alliance. In July, 1990, his open homosexual orientation and leadership in the Lesbian/Gay Alliance came to the attention of Scout leaders through a newspaper article in which he was interviewed in conjunction with a seminar he attended on issues relating to lesbian and gay teenagers. In the newspaper article--appearing in the *Newark Star-Ledger*--he was identified as co-president of the Rutgers Gay/Lesbian organization. Thereafter, the Monmouth Council of the BSA revoked Dale's BSA membership. A subsequent letter from the Council stated the grounds for his membership revocation: "[T]he standards for leadership established by the Boy Scouts of America . . . which specifically forbid membership to homosexuals." *Dale v. Boy Scouts of America*, 160 N.J. 562, 579 (1999). After receiving similar explanations from the assistant regional director of BSA's Northeast Region and BSA's national counsel, Dale declined to seek National Council review of the issue but, instead, brought a lawsuit challenging BSA's right to exclude him. The trial court rejected Dale's claim that New Jersey's Law Against Discrimination (LAD) applied to the Boy Scouts and prohibited them from barring someone from BSA leadership because of his sexual orientation. The court also found that the Boy Scouts' position with respect to active homosexuality was clear and BSA had a First Amendment right not to accept Dale as an adult leader. *Dale v.*

Boy Scouts of America, No. MON-C-330-92 (Ch. Div. Nov. 3, 1995), I at 71.

The Appellate Division reversed and remanded for further proceedings, holding that BSA is a "place of public accommodation" subject to LAD and, therefore, Dale could not be denied the opportunity to be a volunteer assistant Scoutmaster based solely on his announced sexual orientation. The court also found that BSA did not have a First Amendment right to restrict membership according to sexual orientation. *Dale v. Boy Scouts of America*, 308 N.J. Super. 516 (App. Div.).

The New Jersey Supreme Court upheld the Appellate Division's ruling that BSA is subject to the provisions of the LAD and that applying those provisions does not infringe the Boy Scouts' First Amendment rights. *Dale v. Boy Scouts of America*, 160 N.J. at 624.

BSA now seeks this Court's review of the New Jersey Supreme Court's decision, on the ground that it denies the Boy Scouts basic federal constitutional protections. This amicus brief supports the Boy Scouts' petition of this Court for a writ of certiorari to review the ruling of the New Jersey Supreme Court.

SUMMARY OF THE ARGUMENT

A writ of certiorari is crucial because the First Amendment freedom undermined by the New Jersey Supreme Court is so fundamental to American liberty. The freedom at issue is the right of a voluntary organization such as BSA to dedicate itself to expressive purposes, to condition its membership policies so as to promote those purposes, and to be free from government reinterpretation or second-guessing of the details or implications of those purposes. BSA is every bit as much an expressive enterprise as was the St. Patrick's Day Parade whose right to exclude a contingent of openly gay marchers was upheld by this Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557

(1995). Indeed, *Hurley* explicitly says that the right to restrict membership enjoyed by the parade organizers was akin to a private club's right to exclude an applicant who did not adhere to the club's defining principles. *Id.* at 580-81.

The New Jersey Supreme Court has pronounced that BSA's fundamental principles do not include opposition to homosexuality, regardless of what BSA officials claim. Besides being a dubious contention in the face of significant evidence to the contrary, that court's pronouncement represents an impermissible judicial infringement on the right of a private expressive organization to define its own mission and principles. The First Amendment shields speakers from such government attempts to dictate--or to proscribe or edit--the speakers' chosen messages.

Denying a private expressive organization the right to define and abide by its own mission is a formula for undermining America's marvelous profusion of private associations. The widespread tendency to associate for purposes of social uplift, instruction, or advocacy was cited by Tocqueville as an especially healthy aspect of American society--a bulwark of liberty, in fact. In contrast, Tocqueville noted, some other nations prohibited private associations from being established unless their doctrines received governmental preapproval. In the United States, any such effort to force a stifling uniformity of thought on expressive organizations is barred by the First Amendment. Regardless of how one feels about the particular BSA policy that is challenged by Mr. Dale, vindicating the Scouts' right to adhere to their own vision is crucial for the rights of all private expressive organizations, of all outlooks, and for the larger cause of liberty in general.

ARGUMENT

I

A WRIT OF CERTIORARI IS NECESSARY BECAUSE THE NEW JERSEY SUPREME COURT'S RULING ASSAULTS A FUNDAMENTAL FIRST AMENDMENT RIGHT: THE FREEDOM OF PRIVATE EXPRESSIVE ORGANIZATIONS TO DEFINE THEIR OWN BELIEFS AND THE MEMBERSHIP POLICIES DESIGNED TO PROMOTE THOSE BELIEFS

A. The First Amendment Protects a Freedom of Expressive Association That Allows a Private Organization Dedicated to Expressive Purposes to Condition Its Membership Policies So as to Promote Those Purposes

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, this Court unanimously held that Massachusetts could not require organizers of a St. Patrick's Day Parade to admit a group that aimed specifically to "celebrate its members' identity as openly gay, lesbian, and bisexual descendants of Irish immigrants." The parade constituted "expressive activity" even if it lacked any "narrow, succinctly articulable message." *Id.* at 569, 578. Hence, to compel parade organizers, under terms of the state antidiscrimination law or any other statute, to accept "an expressive contingent with its own message" would violate the organizers' First Amendment rights. *Id.* at 580-81. This right of an expressive organization to align its membership with its message would be hollow if honored only so long as the message and the membership restrictions do not trigger controversy. "'[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.'" *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), *cited in Curran v.*

Mount Diablo Council of the Boy Scouts, 17 Cal. 4th at 730 (Kennard, J., concurring).

Could state action to curtail an expressive association's membership restrictions be justified as promoting a larger goal --such as freeing society from unfounded biases? Not under the doctrine of the First Amendment. It shields the right of private expressive organizations to embrace positions regardless of their acceptability to popular sentiment. Government may not force such an organization to adopt contrary opinions--or membership policies reflecting contrary opinions--merely because an organization's views might be considered backward or unseemly by many or even most people.

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.

Hurley, 515 U.S. at 579. Even if one thinks the Boy Scouts are wrong in the policy at issue in this case, the Boy Scouts have a First Amendment right to be wrong.

B. BSA Is an Expressive Organization Enjoying the Same First Amendment Protection Accorded the Parade Organizers in *Hurley*

The *Hurley* Court found the annual St. Patrick's Day parade a protected expressive enterprise even though it lacked any "narrow, succinctly articulable message." It was enough that a "parade" generically is understood as "includ[ing] marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Id.* at 567-68. The expressiveness of the Boy Scouts in a real sense is even clearer, because the Boy Scouts are founded on and celebrated for their "succinctly articulable message"--expressed in the Boy Scout Oath, along with other formulae.

Indeed, the New Jersey Supreme Court plainly acknowledges that the Boy Scouts have a guiding philosophy that they seek to impart: "We agree that Boy Scouts *expresses a belief in moral values* and uses its activities to *encourage the moral development* of its members. *Dale v. Boy Scouts of America*, 160 N.J. at 613 (citations omitted) (emphasis added). The Scouts are involved in "disseminat[ing a] message." *Id.* at 612.

Even though the New Jersey court as much as admits that the Scouts are an expressive enterprise, the court argues, in essence, that Scouts aren't expressive *enough*--they aren't sufficiently expressive to enjoy the First Amendment freedom accorded parade organizers. "Boy Scout leadership [is not] a form of 'pure speech' akin to a parade." *Id.* at 623. Moreover, "Dale's status as a scout leader is not equivalent to a group marching in a parade" because "Dale does not come to Boy Scout meetings . . . to promote homosexuality, or any message inconsistent with Boy Scouts' policies." *Id.* at 623.

These assertions advance too narrow a reading of *Hurley*. Although a parade may be a uniquely public undertaking, and marching in a parade may be a more public form of expression than serving as a Scout leader, *Hurley* clearly envisions its principles applying to organizations that demonstrate their expressiveness in ways less public. The St. Patrick's Day parade could condition participation "*just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.*" *Hurley*, 515 U.S. at 581 (emphasis added). In the case at hand, Mr. Dale's views were made "manifest" through his leadership in the Rutgers Lesbian/Gay Alliance and his interview with a newspaper. *Dale*, 160 N.J. at 577-79. *Hurley* affirms the right of an organization such as the Boy Scouts to exclude someone manifestly at odds with a position they take.

C. The Boy Scouts' Right to Expressive Association Includes the Freedom to Define for Themselves the Content of Their Teaching, Free from Editing by the Courts

Although the New Jersey Supreme Court essentially acknowledges the Boy Scouts' status as an expressive association (*see, e.g., Dale*, 160 N.J. at 612), the court claims that the Boy Scouts' expressive message is not what Scout officials claim that it is. Contrary to Scout officials, the court says the BSA message includes nothing in opposition to homosexuality. For instance, the court denies that the "Scout Oath" pledge to be "morally straight," on its face, "express[es] anything about sexuality." *Id.* at 614.

Such an interpretation by the court runs counter to certain other Boy Scout documents. For instance, in litigation in California concerning Boy Scout membership policies, the Scouts

> introduced a memorandum written in 1978 by the National Boy Scouts of America setting forth--in question and answer form--the official position of the Boy Scouts relating to homosexuality and scouting. The document states in relevant part: "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader? A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in scouting are appropriate."

Curran, 17 Cal. 4th at 735 n.7.

More fundamentally, the New Jersey court is abridging the constitutional right of an expressive organization to control the contour of its creed. Freedom of speech is a nullity if government can edit or add to what the speaker wants to say. It is a "fundamental rule of protection under the First

Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.

1. The New Jersey Court Would Impermissibly Force BSA into a Strident Advocacy of Its Tenets in Order to Win Them Judicial Recognition

The New Jersey Supreme Court suggests that the absence of explicit references to homosexuality in the Scout Oath defeats Scout officials' claim that BSA's governing philosophy includes a position on homosexuality. 160 N.J. at 614. The disturbing implication of such an interpretive approach is that the Scouts would have to be considerably more vociferous and strident on the issue of homosexuality in order for the court to accept that they indeed have a position on the subject. Yet stridency might itself be at odds with Scouting's precepts. Why must BSA be compelled to adopt such a tenor in order to be secure in its First Amendment freedoms?

Indeed, there is a constitutional tone-deafness in requiring that an organization shout the tenets of its creed in order for those tenets to be judicially recognized. "[P]rotected expression may also take the form of *quiet persuasion*, inculcation of traditional values, instruction of the young, ..." *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) (emphasis added).

The Boy Scouts have a right to adopt their own tenor and tone of expression without fear that modulating their institutional voice will deprive them of First Amendment freedoms.

2. A Court's Editing of an Expressive Organization's Ideology Is as Impermissible as Court Interpretation of a Religion's Doctrine

The New Jersey court makes much of the Boy Scouts' working relationship with various churches in order to justify its interpretation of Boy Scout teaching. To be specific, the court finds guidance in evidence that "the Boy Scouts' religious sponsors differ in their views about homosexuality." *Dale*,

160 N.J. at 615. What is ironic about the court's resort to religious doctrine in defense of its reading of Scout principles is that pronouncements on ecclesiastical teaching have generally been regarded as beyond the competence or constitutional authority of the judiciary. Inquiring "into the significance of words and practices to different religious faiths . . . would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Widmar v. Vincent*, 454 U.S. 263, 284 (1981).

Just as it would be impermissible, under constitutional protections of religious freedom, for the courts to offer their own reading of how Catholics should understand the Nicene Creed, so the First Amendment right of a speaker to define her or his own message prohibits the court from correcting the Boy Scouts as to the meaning of Scouting's Oath or other fundamental formulae.

D. Denying the Boy Scouts the First Amendment Freedom to Determine Their Own Membership Would Carry Chilling Implications for Other Organizations With Expressive Purposes

In *Curran v. Mount Diablo Council of Boy Scouts*, 17 Cal. 4th 670, the California Supreme Court ruled that the Boy Scouts did not constitute a "business establishment" and so were not barred under California antidiscrimination law from denying a leadership post to an admitted homosexual.

Justice Kennard, in her concurring opinion, went further and addressed federal constitutional issues. Citing *Hurley*, she observed that any contrary decision would imperil First Amendment rights:

> Were we to hold that the membership decisions of the Boy Scouts of America are subject to regulation under [California civil rights law], the organization would have a compelling argument that requiring it to accept plaintiff, or anyone else who espouses views contrary to its guiding precepts, violates the First Amendment rights of expressive association and free speech enjoyed by the organization and its members.

Id. at 725.

Justice Kennard went on to point to some of the disturbing logical extensions of forcing the Boy Scouts to adopt membership criteria at variance with their institutional message.

> Could the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-Semite? If the First Amendment protects the membership decisions of these groups, must it not afford the same protection to the membership decisions of the Boy Scouts?

Id. at 729. Contrariwise, if the Boy Scouts are denied such protection, is any organization with an expressive intent, no matter its position on the ideological spectrum, safe from the potential of government action to impose on it a different mission and altered ideology?

II

IN ADDITION TO ITS STATUS AS A CONSTITUTIONAL MANDATE, FREEDOM OF EXPRESSIVE ASSOCIATION MERITS DEFERENCE BECAUSE OF ITS IMPORTANT PRACTICAL ROLE IN PROMOTING LIBERTY

The freedom of expressive association that protects the Boy Scouts would merit deference purely for policy reasons, over and above its status as a constitutionally protected liberty. The practical benefit of fostering development of a multitude of private associations with diverse expressive purposes is famously noted by the Nineteenth Century French observer of American institutions, Alexis de Tocqueville. "Americans of all ages, all stations in life, and all types of disposition are

forever forming associations," wrote Tocqueville in a celebrated chapter of *Democracy in America*.

> There are not only commercial and industrial associations in which all take part, but others of a thousand different types--religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give fetes, found seminaries, build churches, distribute b ks, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. Finally, *if they want to proclaim a truth or propagate some feeling by the encouragement of a great example*, they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.

Alexis de Tocqueville, *Democracy in America* 485 (J.P. Macer and Max Lerner, eds., Harper & Row, 1966) (emphasis added).

Tocqueville cited the instinct to associate not just as a boon for social welfare, but also as a force that tempered despotism or "omnipotence" of the majority--a "dike to hold back tyranny of whatever sort." *Id.* at 177.

In contrast, to force private associations to hew to some governmentally defined philosophy transforms such associations from islands of independence and engines of cultural diversity into the very opposite--agents of majoritarian uniformity. Tocqueville saw just such an oppressive tendency at work in his era, in the restrictive policies toward private associations on his native continent:

> In all European nations some associations cannot be formed until the state has examined their statutes and authorized their existence. In several countries efforts are made to extend this rule to all associations. One can easily see whither success in that would lead.

Id. at 662.

BSA, one of the most venerable of America's private associations, has been subjected to a government "examination" of its "statutes," to borrow Tocqueville's terms. The New Jersey Supreme Court has found the Scouts' own definition of those statutes--*i.e.*, of the Scouts' purpose and creed--to be wanting. The court has made bold to substitute its own interpretation of Scouting's mission. If this judicial overreach is allowed to stand, an expressive association's freedom to define its own message will have been dealt a crippling blow and the United States will have taken a long stride in the direction of those nations described by Tocqueville where private associations needed government preapproval of their message before they could formally be established.

Fortunately, the First Amendment prohibits such an assault on the freedom of expressive activity.

CONCLUSION

Defending BSA's right to adhere to the mission that it has set for itself is essential to guaranteeing that private expressive organizations in general may continue to flourish in all their diversity, and that a meaningful demarcation between the

public and the private sectors is maintained. Accordingly, Amicus asks this Court to review--and reverse--the ruling by the New Jersey Supreme Court that is so dismissive of a private association's First Amendment rights.

Dated: November, 1999.

Respectfully submitted,

JOHN H. FINDLEY
Counsel of Record
HAROLD E. JOHNSON
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932
Counsel for Amicus Curiae

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IN THE
SUPREME COURT OF THE UNITED STATES

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL OF BOY SCOUTS OF AMERICA, *Petitioners*,

v.

JAMES DALE, *Respondent*.

On Petition For A Writ of Certiorari to the Supreme Court of New Jersey

BRIEF *AMICI CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION SUPPORTING PETITIONERS

JAY ALAN SEKULOW
Counsel of Record

VINCENT MCCARTHY
THE AMERICAN CENTER
FOR LAW AND JUSTICE
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

JOHN P. TUSKEY
LAURA B. HERNANDEZ
THE AMERICAN CENTER FOR
LAW AND JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 226-2489

Attorneys for Amici Curiae

22pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 3

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT. 3

A. The Lower Court's Decision Conflicts With Foundational Principles Established in This Court's First Amendment Jurisprudence. 3

B. The Decision Below Conflicts With This Court's Decision in *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.* 4

C. The Decision Below Is Inconsistent With This Court's Decisions Defining the First Amendment Right of Expressive Association. 9

D. The Lower Court's Decision that Protecting Homosexuals Is A Compelling State Interest Which Trumps Boy Scouts' First Amendment Rights Conflicts With This Court's Decisions..... 14

II. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE..... 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES: Page(s)

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 4

Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987) 11, 12

Bowers v. Hardwick, 478 U.S. 186 (1986) 15

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1992) 15

Curran v. Mount Diablo Council of Boy Scouts, 29 Cal. Rptr. 2d 580 (Ct. App. 1994) 17

Curran v. Mount Diablo Council of Boy Scouts, 952 P.2d 218 (Cal. 1998) 5, 16, 17, 18

Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999) 6, 7, 11, 12

Democratic Party v. Wisconsin, 450 U.S. 107 (1981) 9, 10

Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1988) 9, 10

Hsu v. Roslyn Union Free School Dist., 85 F.3d 839 (2d Cir. 1996) 10

Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) .....*passim*

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 12

Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities, 528 A 2d 352 (Conn. 1987) 17

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 5, 8, 11, 12, 13

Seabourn v. Coronado Area Council of Boy Scouts, 891 P.2d 385 (Kan. 1995) 17

Swanner v. Equal Rights Commission, 513 U.S. 979 (1994) 15

Texas v. Johnson, 491 U.S. 397 (1989) 8

Welsh v. Boy Scouts, 993 F.2d 1267 (7th Cir. 1993) 6, 18

Widmar v. Vincent, 454 U.S. 263, 276 (1981) 15

INTEREST OF AMICI*

The Ethics & Religious Liberty Commission of the Southern Baptist Convention is the ethics, moral concerns, public policy and religious liberty agency of the Southern Baptist Convention, the nation's largest Protestant denomination with nearly sixteen million members in 40,000 local congregations. The Southern Baptist Convention has assigned the Ethics and Religious Liberty Commission the responsibility for addressing a wide range of moral and public policy concerns, including First Amendment issues. The Ethics and Religious Liberty Commission is profoundly concerned about the deleterious effect the lower court's decision will have on the Boy Scouts' First Amendment right to instill traditional moral values in the boys and young men who join Scouting.

Representing the Ethics and Religious Liberty Commission, and appearing on its own behalf as well is the American Center for Law and Justice (ACLJ). The ACLJ is a nonprofit, public interest law firm and educational organization dedicated to protecting First Amendment freedoms, human life and the family. ACLJ attorneys have argued or participated as *amicus curiae* in numerous First Amendment cases before this Court. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Board*, 508 U.S. 384 (1993); *Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). In this case and in other cases across

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* Counsel of record for the parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, amici ACLJ and Ethics and Liberty Commission disclose that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amici curiae*.

the nation, the ACLJ opposes the misuse of state anti-discrimination laws to compel individuals and organizations to endorse currently fashionable sexual ethics.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in Petitioners' Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

A. The Lower Court's Decision Conflicts With Foundational Principles Established in This Court's First Amendment Jurisprudence.

The salient feature of the lower court's decision is the insouciance with which it cast aside or otherwise ignored foundational First Amendment principles. The lower court ordered Boy Scouts to believe that a man's sexual morality is irrelevant to the question of his suitability as a leader in Boy Scouts. In holding that Boy Scouts must accept homosexual advocates as role models for young boys, the lower court both circumvented and ignored several of this Court's controlling free speech and expressive association cases.

This Court long has recognized the interdependence of the First Amendment right of free thought and speech with the right to associate with others who share similar views. Those rights necessarily include the right to hold and express views different from what others might consider culturally orthodox:

> Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments.

. . .

> At the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State. . . . *"If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act therein."*

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-35 (1977) (emphasis added) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). The lower court did precisely what *Abood* and *Barnette* forbid. In dictating that Boy Scouts must subscribe to the currently fashionable view that sexual morality is irrelevant to a person's character, it "prescribed what shall be orthodox in politics and . . . matters of opinion."

B. The Decision Below Conflicts With This Court's Decision in *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*

A State's public accommodation law cannot be used to compel Boy Scouts to accept that an avowed homosexual is an appropriate role model for young boys. In *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), this Court unanimously held that Massachusetts' anti-discrimination law could not be applied to force the organizers of a St. Patrick's Day parade to allow a gay, lesbian, and bisexual group ("GLIB") to march. GLIB wanted to march in the parade to celebrate its members' heritage as Irish gays, lesbians, and bisexuals. *Id.* at 570.

Even though the parade organizers had no specific articulable message, this Court held that requiring them to include GLIB forced them to convey a message about the acceptability of homosexuality that they did not wish to convey. *Id.* at 572-73. Massachusetts' attempted use of its public accommodation law to coerce a private organization into endorsing GLIB

> violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message. . . . [T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion or endorsement, but equally to statements of fact the speaker would rather avoid.

. . .

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Id. at 578-79 (emphasis added).

Hurley controls this case. Boy Scouts is an expressive association that exists to foster the moral development of young males. Its "protected expression… take[s] the form of quiet persuasion, including the inculcation of traditional values in the young." *Roberts v. United States Jaycees*, 468 U.S. at 636 & n.* (O'Connor, J., concurring) (citing Boy Scouts as an example of an expressive organization); *see also Curran v. Mount Diablo Council of Boy Scouts*, 952 P.2d 218, 236 (Cal. 1998) (the primary function of Boy

Scouts is the inculcation of traditional moral values); *id.* at 253 (J., Kennard, concurring) (because Boy Scouts is an organization whose activities are "overwhelmingly expressive" under *Hurley,* applying California's anti-discrimination law to Boy Scouts would violate their First Amendment rights.); *Welsh v. Boy Scouts,* 993 F.2d 1267, 1274 (7th Cir.), *cert. denied,* 510 U.S. 1012 (1993) (Boy Scouts' purpose is to train young boys to respect God, their country and their fellow man, while developing a good moral character).

To avoid *Hurley*, the lower court trivialized the critical fact that Boy Scouts' expressive activity consists largely of adult men acting as role models for boys. *See Dale v. Boy Scouts of America,* 734 A.2d 1196, 1229 (N.J. 1999). The 1972 Scoutmasters' Handbook highlights the Scoutmaster's duty to be a good role model:

> You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons. . . . *What you are speaks louder than what you say. This ranges from simple things like wearing the uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.*

(emphasis added). Pet. A. 2652. Thus, who a man is is even more important than what he says. Boy Scouts' official policy is that homosexuality is not morally "straight" or "clean." Pet. A. 3241-3247, 3238-3247. Men who by word or deed condone homosexuality cannot, therefore, be good role models.

Dale's views on homosexuality are clearly at odds with those of Boy Scouts. Dale has stated openly that

homosexual conduct is acceptable. Dale expressly declared that he wants to "correct" Boy Scouts' policy against appointing avowed homosexuals to leadership positions in Boy Scouts: "I owe it to the organization to point out to them how bad and how wrong this policy is. . . . Being proud of who I am is something the Boy Scouts taught me. They taught me to stand up for what I believe in." Pet. A. 3366-3367, 3548. Dale does not share Boy Scouts' views on the proper male sexual identity.

The lower court expressed the hope that Dale will "refer boys to their parents on matters of religion and sex." 734 A.2d at 1229. While Dale may well do so, that does not change the fact that Dale is an advocate for homosexual rights. According to the Scoutmasters' Handbook, Dale's identity as a homosexual advocate is more significant than what he says to individual boys. While Dale certainly has the right to be a homosexual advocate, the Boys Scouts has an equivalent right not to hold Dale out as an example for male youth.

In the same vein, the lower court held that because Boy Scouts does not teach specific sexual ethics to its members, it cannot exclude from leadership a man whose sexual morality it disapproves. 734 A.2d at 1224-25. The court's holding is inconsistent with *Hurley*. That Boy Scouts' message is communicated primarily through role modeling, and that it does not *focus* on the subject of homosexuality, makes it no less worthy of First Amendment protection than the parade in *Hurley*. The parade organizers in *Hurley* had no previously articulated views on homosexuality. Moreover, they had no written rules about who could participate in the parade, and they made ad hoc determinations about group participation. Observing the lack of any coherent message in the parade, this Court nonetheless held that the parade

organizers' could not be forced to endorse GLIB's message by allowing them to march: "A narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley*, 515 U.S. at 569. In contrast to the parade organizers in *Hurley*, Boy Scouts has a coherent message, and Boy Scouts' views on homosexuality have been articulated clearly. Pet. A. 3241-3247. Accordingly, stripping Boy Scouts of autonomy over the content of its message by foisting Dale on it as a leader is an even more egregious infringement of its First Amendment rights.

In ignoring the essential part that role modeling plays in communicating Boy Scouts' message, the lower court's decision also conflicts with this Court's historically broad definition of symbolic speech. Expressive conduct is entitled to First Amendment protection if the activity is intended to convey a message likely to be understood by a particular audience. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 404 (1989) (burning of American flag is protected speech); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) ("even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and desire for self-improvement"). It is undisputed that the Scout Oath, the Scout Law, and all Scouting activities are designed to convey a message about what is ideal manhood, including an ideal man's sexual identity (heterosexual husband and father). Pet. A. 2531-2532, 4395. Scouting's values are to be exemplified in its adult volunteer leaders. Because Scouting's message is much more articulate than the parade's message in *Hurley* and, therefore, much more likely to be understood, Scouting's message is that much more entitled to protection.

C. The Decision Below Is Inconsistent With This Court's Decisions Defining the First Amendment Right of Expressive Association.

The lower court either distorted or ignored most of this Court's jurisprudence defining a private organization's First Amendment right to expressive association. First, the court ignored this Court's decisions in *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 233 (1988) and *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981) which held that in the context of group expression, an association's ability to select the content of its message is inextricably woven with its freedom to select its leaders and members.

In *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981), this Court held that forcing the national Democratic party to alter its delegate selection criteria would violate the party's First Amendment right to expressive association. Specifically, the Court stated that freedom to associate to promote shared values includes "freedom to identify the people who constitute the association, and to limit the association to those people only. . . . 'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'" *Id.* at 122 & n.22 (quoting L. Tribe, *American Constitutional Law* 791 (1st ed. 1978)).

More significantly, this Court warned lower courts against exactly the sort of presumption the lower court exercised in this case. Rejecting the argument that the national Democratic Party delegate selection procedures were ineffective or unnecessary to the goal of achieving ideological purity, the Court stated:

> [A] State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution. *And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.*

450 U.S. at 123 (emphasis added).

Similarly, in *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 233 (1988), this Court held that an expressive organization's freedom to select its leaders is essential to the exercise of its First Amendment free speech and associational rights. There, a California law imposed several restrictions on the identity and selection process of local party chairmen and committee members. *Id.* at 218. This Court struck down the restrictions as unconstitutionally infringing of the local parties' expressive associational rights. *Id.* at 229. Rejecting California's assertion of a compelling interest in the "integrity" of internal party affairs, the Court held that "a state cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure, any more than it can tell a party that its proposed communication to party members is unwise." *Id.* at 233. Again in that case, the Court chided the lower court for "impos[ing] its views about membership and leadership criteria" on the local Democratic Party. *Id.* at 233; *see also Hsu v. Roslyn Union Free School Dist.*, 85 F.3d 839, 857-59 (2d Cir. 1996) (holding that a school club's free speech and expressive associational rights were violated when the school enforced

its anti-discrimination rule against the club in the selection of its leaders.)

Both *Eu* and *Democratic Party* contradict the lower court's holding that Boy Scouts can only exclude from its leadership those who oppose Boy Scouts' mission. Those two cases establish that it is not the business of the judiciary to second-guess an expressive organization's leadership and membership criteria. The lower court violated the dictates of *Eu* and *Democratic Party* by improperly substituting its own interpretation of Boy Scouts' views and policies. Specifically, the court declared by ipse dixit that Boy Scouts' position on homosexuality is: 1) inconsistent with other Scouting values; 2) disingenuously taken up in response to litigation; and 3) insignificant because it is not "central" to Scouting's mission. *See* 734 A.2d at 1223-25.

In similar fashion, the lower court ignored this Court's expressive association analysis in *Hurley*. The lower court's ruling that Boy Scouts could not exclude avowed homosexuals from its leadership because Boy Scouts was not formed specifically to oppose homosexuality flatly contradicts *Hurley*. Even though the parade in *Hurley* was not organized to oppose homosexuality, this Court said that GLIB "could be refused admission [to the parade] just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *See* 515 U.S. at 581.[1]

The lower court also distorted this Court's decisions in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International v. Rotary Club*,

[1] Although the Court's free speech analysis determined the outcome in that case, the unanimous opinion made clear that the same result would obtain under an expressive association analysis. *See* 515 U.S. at 581.

481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988) (collectively, the *Roberts* trilogy). The lower court relied on the *Roberts* trilogy, as it relied on *Hurley*, to support its holding that the Boy Scouts' right of expressive association was not violated because Boy Scouts was not formed to oppose homosexuality. The lower court twisted language from those cases into the proposition that an expressive association can only exclude from its leadership those whose views differ on key matters, as that term is defined by the reviewing court. 734 A.2d at 1224-25.

In *Roberts* and *Rotary Club*, the Jaycees and the Rotary Club invited women to participate on some level, but excluded them from full membership privileges. In both cases, this Court recognized the organization's expressive associational rights but held that the state's compelling interest in eradicating sex discrimination outweighed the minimal burden placed on those rights. 468 U.S. at 623; 481 U.S. at 549. *Cf. New York State Club Ass'n*, 487 U.S. at 13 (affirming constitutionality of New York City's anti-discrimination ordinance against facial challenge). In the *Roberts* trilogy, this Court also held that a limitation on an expressive association's right to select its members according to its own criteria must be unrelated to the expression of ideas. *See, e.g.*, *Roberts*, 468 U.S. at 623. Because the private associations at issue admitted women as members but denied them full privileges, this Court held that applying the anti-discrimination law "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Roberts*, 468 U.S. at 627; *Rotary Club*, 481 U.S. at 548 (application of law did "not require the clubs to abandon or alter" any of their views); *see also New York State Club Association*, 487 U.S. at 13 (law did not prevent a "club from seek[ing] to exclude individuals

who do not share the views that the club's members wish to promote.").

This case is a prototype of the sort of case anticipated in the *Roberts* trilogy. New Jersey may not violate the Boy Scouts' First Amendment rights of free speech and expressive association unless a compelling state interest so requires, *and* application of the law in question is unrelated to the expression of ideas. *See Roberts*, 468 U.S. at 623. Whatever ambiguity existed in the *Roberts* trilogy about the extent to which a private association can exclude persons with different ideologies was eliminated in *Hurley*. The ideology upon which exclusion is based need not be central to the group's mission. Indeed, it need not be about any subject the group has even ever addressed before. 515 U.S. at 581. Here, the Boy Scouts' exclusion of Dale is based purely on ideological grounds, and it is therefore absolutely protected under the First Amendment.

The lower court's reading of the *Roberts* trilogy would virtually emasculate the right of expressive association. Reserving the freedom to exclude based on ideology only to those groups that are formed for the primary purpose of discriminating against a certain class of persons means that few associations would be protected. The lower court's reading of *Roberts* also leads to the rather perverse result that only groups' whose raison d'etre is discrimination would have expressive associational rights. Nothing in the *Roberts* trilogy supports such a confined view of the right to expressive association.

In essence, the lower court's objective in enforcing the LAD against the Boy Scouts is nothing short of an attempt to "free" the Boy Scouts of its "biases" and change its expressive conduct so that "it is at least neutral toward"

homosexuals. *See Hurley*, 515 U.S. at 579. As this Court said in *Hurley*, the First Amendment renders this a "decidedly fatal objective." *Id.*

D. The Lower Court's Decision that Protecting Homosexuals Is A Compelling State Interest Which Trumps Boy Scouts' First Amendment Rights Conflicts With This Court's Decisions.

The lower court's holding that protecting homosexuals from discrimination is a compelling state interest which trumps Boy Scouts' First Amendment rights conflicts with *Hurley*. In response to the same assertion, this Court held that eliminating discrimination against homosexuals can never trump the First Amendment right of speaker autonomy:

> [No] legitimate interest has been identified in support of applying the Massachusetts statute in this way to expressive activity like the parade.
>
> . . .
>
> On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference. *When the law is applied to expressive activity the way it was here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.*

515 U.S. at 578 (emphasis added). Thus, Boy Scouts' right of speaker autonomy is supreme over any interest New Jersey has in protecting homosexuals from discrimination.

The lower court's decree that protecting homosexuals from discrimination is a compelling state interest also disregards this Court's multiple pronouncements about the rigor of strict scrutiny. "First Amendment rights are entitled to special constitutional solicitude," and the Supreme Court has "required the most exacting scrutiny" in cases where state action burdens free speech. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Strict scrutiny is not "watered . . . down but really means what it says." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 545 (1992) (quotations omitted).

In his dissenting opinion from the denial of a writ of certiorari in *Swanner v. Equal Rights Commission*, 513 U.S. 979 (1994), Justice Thomas warned against a modern trend toward "drain[ing] the word compelling of any meaning." In a case involving a landlord's refusal to rent to an unmarried couple, Justice Thomas cited the myriad ways that state insurance and succession laws discriminate on the basis of marital status, and observed that if the state's interest against marital status discrimination is compelling, it is difficult to imagine a governmental interest that is not compelling. *Id.* at 982 (Thomas, J., dissenting). New Jersey criminalized homosexual conduct until 1979. In *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), this Court upheld the constitutionality of a state's sodomy law because the state's legitimate moral objection to homosexual conduct provided a rational basis for the law. If homosexual conduct which was, until

recently, a crime in New Jersey, and which states still may constitutionally criminalize, can be a compelling state interest, then the word 'compelling' certainly is drained of all meaning.

If Dale and others wish to form alternative Scouting organizations where homosexuality is permitted or even extolled, they are free to do so. Moreover, the First Amendment guarantees their right to speak out against Boy Scouts' policies. The First Amendment prevents them, however, from remaking Boy Scouts into their concept of a proper Scouting association. Requiring Boy Scouts to accept Dale as an assistant Scoutmaster is nothing less than an effort to silence Boy Scouts' views and message on homosexuality. As such, it is a severe intrusion on Boy Scouts' First Amendment rights of free speech and expressive association.

II. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE.

Granting this petition is necessary to avert the possibility that federal and state courts will adopt conflicting decisions concerning the free speech and expressive associational rights of private youth service organizations like Boy Scouts. Several other appellate courts have already decided cases concerning the applicability of public accommodation statutes to Boy Scouts. *See Welsh v. Boy Scouts*, 993 F.2d 1267, 1274 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993) (holding that Boy Scouts was not a public accommodation under Title II of the federal Civil Rights Act of 1964); *Curran v. Mount Diablo Council of Boy Scouts*, 952 P.2d 218 (Cal. 1998) (holding that Boy Scouts was not a business establishment under California's Unruh Act); *Seabourn v.*

Coronado Area Council of Boy Scouts, 891 P.2d 385 (Kan. 1995) (holding that Boy Scouts was not a Public Accommodation under Kansas' Act Against Discrimination); *Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and Opportunities*, 528 A.2d 352 (Conn. 1987) (holding that Connecticut's anti-discrimination statute applied to Boy Scouts but did not preclude them from refusing to allow a female to become a Scoutmaster.)

In *Curran v. Mount Diablo Council of Boy Scouts*, 29 Cal. Rptr. 2d 580, 595 (Ct. App. 1994), the California Court of Appeals held that applying California's Unruh Act would violate Boy Scouts' First Amendment free speech and expressive associational rights. The California Supreme Court affirmed, however, on the basis that the Act did not cover Boy Scouts because Boy Scouts was not a business establishment. *See* 952 P.2d at 219. Although the New Jersey Supreme Court is the first appellate court to hold that a state public accommodation statute applies to the Boy Scouts and compels them to accept avowed homosexuals as leaders, the First Amendment issue raised in this case is likely to arise in the future and occasion conflicting decisions among federal and state courts. To avoid potential confusion, this Court's direction is needed and the petition should be granted.

If the lower court's decision stands, it is only a matter of time before Boy Scouts' position on homosexuality is completely compromised. Dale's victory would open the door to other advocates of homosexuality requesting appointment as Scoutmasters. Just days after the decision below was issued, a circuit judge from Cook County Illinois held that Boy Scouts could not refuse to hire a homosexual in the Chicago Area Boy Scouts Council office. The circuit

judge's order was stayed pending an appeal to the Illinois Appellate Court. See Tom Ragan, *Gay Wins Court Ruling Against Scouts,* Chi. Trib., August 14, 1999, at 5 and Tom Ragan, *Scouts' Policy Not to Hire Gays Stands, For Now,* Chi. Trib., September 9, 1999, at 4. In *Curran v. Mount Diablo Council of Boy Scouts*, 952 P.2d 218 (Cal. 1998), a homosexual advocate also sought a Boy Scouts leadership position as a forum for proclaiming his views on homosexuality. Accepting homosexual advocates as Scoutmasters and assistant Scoutmasters and holding them out as approved role models for young boys would certainly alter Boy Scouts' message that homosexuality is not morally "straight" or "clean."

CONCLUSION

The decision below directly conflicts with this Court's jurisprudence governing freedom of speech and the right to expressive association. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record

VINCENT MCCARTHY
THE AMERICAN CENTER
FOR LAW AND JUSTICE
8 S. Main St.
New Milford, CT 06776
(860) 355-1902

JOHN F. TUSKEY
LAURA B. HERNANDEZ
THE AMERICAN CENTER FOR
LAW AND JUSTICE 1000
Regent University Dr.
Virginia Beach, VA 23464
(757) 226-2489

Attorneys for Amici Curiae for The American Center for Law and Justice and The Ethics & Liberty Commission Of The Southern Baptist Convention

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

Brief Of *Amici Curiae* The General Board Of Church And Society Of The United Methodist Church, The United Church Board For Homeland Ministries, The Religious Action Center Of Reform Judaism, The Diocesan Council Of The Episcopal Diocese Of Newark And The Unitarian Universalist Association In Support Of Respondent

MICHAEL D. SILVERMAN
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
Attorneys for Amici Curiae
590 Madison Avenue
New York, New York 10022-4616
(212) 872-1039

156388

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of the *Amici Curiae*	1
Summary of Argument	3
Argument	4
Petitioners' Claim To A First Amendment Right To Exclude Gay Boys And Men Fails Under This Court's Precedents Because The Members Of Scouting Do Not Share, And Did Not Come Together To Express, Any View About Homosexuality	4
A. The Views of *Amici Curiae* Religious Sponsors and Members of Scouting	6
1. The United Methodist Church	6
2. The United Church of Christ	9
3. Reform Judaism	12
4. The Protestant Episcopal Church in the U.S.A.	15
5. Unitarian Universalist Association	16
B. Governmental Sponsors of Boy Scouts	18
Conclusion	20

TABLE OF CITED AUTHORITIES

Page

Cases:

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 6

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Romer v. Evans, 517 U.S. 620 (1996) 18

United States Constitution:

First Amendment 4, 5, 20

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Page

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Eleventh General Synod of the United Church of Christ, Resolution Deploring the Violation of Civil Rights of Gay and Bisexual Persons (1977) 10

Executive Board of the Central Conference of American Rabbis, Resolution (April 9, 1992) 14

Executive Board of the National Federation of Temple Youth, Resolution (1992-'93) 14

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General Assembly of the Unitarian Universalist Association, Resolution on Ministerial Employment Opportunities (1980) 17

General Assembly of the Unitarian Universalist Association, Resolution on Supporting Legal Equity for Gays and Lesbians (1987) 17

Cited Authorities

Page

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General Synod of the United Church of Christ, Resolution on Affirming Gay, Lesbian and Bisexual Persons and Their Ministries (1991) 10

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Jewish Groups Decry Gay Ban, Washington Times, July 11, 1992 14

Frank J. Murray, *Methodist Panel Chides Scouts On Gay Troops*, Washington Times, October 13, 1999 8

Deb Price, *Times Have Changed, But Not Fast Enough*, San Francisco Examiner, June 21, 1994 10

Gay Rabbis, Time, July 9, 1999 13

Cited Authorities

Page

Peter Steinfels, *Lesbian Ordained Episcopal Priest*, N.Y. Times, July 6, 1991 16

Statement of Rabbi David Sapperstein (August 5, 1999) 14

Statement of the General Board of Church and Society of The United Methodist Church, adopted October 10, 1999 8

The Book of Discipline of The United Methodist Church — 1996 ..... 1, 7

United Methodist News Service, *United Methodist Men to Support New Jersey Boy Scout Appeal*, September 20, 1999 9

INTEREST OF THE *AMICI CURIAE*[1]

The General Board of Church and Society of The United Methodist Church (the "Methodist Board") is the public policy and social action agency of The United Methodist Church. The United Methodist Church is the *largest* single sponsor of Boy Scout troops in the country. It sponsors more than 11,700 Boy Scout troops consisting of more than 415,000 boys and men. Pursuant to *The United Methodist Church Book of Discipline — 1996*, the primary responsibility of the Methodist Board is to seek the implementation of the Social Principles of The United Methodist Church. Through its Social Principles, The United Methodist Church has decreed — in irreconcilable opposition to the "moral code" alleged in the Petition — that all persons, regardless of sexual orientation, are entitled to have their human and civil rights protected and that homosexual persons no less than heterosexual persons are individuals of sacred worth. Consistent with the Methodist Board's mission to implement these Social Principles, the General Board of Church and Society of The United Methodist Church opposes the characterization of Boy Scout members' moral views contained in the Petition.

The United Church Board for Homeland Ministries (the "Homeland Ministries") is the domestic mission arm of the United Church of Christ (the "United Church"), which has 1.4 million members in 6,000 congregations. United Church congregations sponsor 1,450 Boy Scout troops consisting of more than 54,000 boys and men. Homeland Ministries is the agency within the United Church responsible for the United Church's relationship with the Boy Scouts of America through its Office for Youth and Young Adult Ministries. The mission

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1. The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici curiae* and their counsel, made any monetary contribution to the preparation and submission of this brief.

of Homeland Ministries is to serve God by declaring God's love for all people and demonstrating the fruits of that love. Homeland Ministries, like the United Church's General Synod (its highest decision making body) is committed to the full inclusion of lesbian, gay, bisexual and transgender persons in the life and ministry of the church and in society. There are more than 100 openly gay and lesbian clergy serving full time as pastors of United Church congregations. Consistent with the United Church's policies opposing discrimination based on sexual orientation, the United Church Board for Homeland Ministries opposes the Petition's characterization of the views that brought the United Church into Scouting.

The Religious Action Center of Reform Judaism pursues social justice and religious liberty as the official representative of the Union of American Hebrew Congregations, the governing body of Reform Judaism, North America's largest Jewish body. Reform Judaism's 875 congregations (representing 1.5 million people in the United States and Canada) sponsor Boy Scout troops consisting of more than 2,000 boys and men. Reform Jews are aware of the costs to individuals, families and society of the oppression of those who differ from society's majority. For this reason — and in accordance with the teaching of Reform Judaism that all individuals are created *betselem elohim* (in the divine image) — Reform Judaism strongly condemns discrimination on the basis of sexual or affectional orientation and rejects the claimed moral views ascribed to Scouting's members in the Petition as antithetical to the true purposes of Scouting.

The Diocesan Council of the Episcopal Diocese of Newark represents 130 congregations made up of 30,000 confirmed communicants and 275 clergy in seven counties in the State of New Jersey. Congregations represented by the Diocesan Council sponsor Boy Scout troops consisting of hundreds of boys and men. The Diocesan Council, in accordance with the teachings of the Episcopal Church in the United States of America, affirms

the rights of lesbians and gay men to the equal protection of the laws and to live free from discrimination based upon affectional or sexual orientation. The Diocesan Council opposes the Petition's characterization of Boy Scout members' moral views regarding gay boys and men.

The Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States, Canada and elsewhere. Unitarian congregations sponsor Boy Scout troops consisting of more than 1,000 boys and men. Through its democratic processes, the Unitarian Universalist Association has adopted numerous resolutions affirming the rights of lesbians and gay men to live free from discrimination based on sexual orientation and affirming the goals of equality, dignity and respect for all people, regardless of affectional or sexual orientation. Consistent with these resolutions, the Unitarian Universalist Association rejects the claimed moral views ascribed to Scouting's members in the Petition.

SUMMARY OF ARGUMENT

Together with public schools and other government entities joining us in the Boy Scouts of America ("Boy Scouts" or "BSA"), we — *amici curiae* — represent a vast number of the sponsors and members actually in the Boy Scouts. Because we have come together with others in the Boy Scouts for its true purposes — teaching *our* boys and young men values such as trustworthiness, loyalty and kindness — and not for discrimination, we affirm to this Court that we have no First Amendment problem in this case. Specifically, *amici curiae* and our boys and young men do not participate in the Boy Scouts for the purpose of expressing the view that gay boys and men are immoral. We believe, in fact, that it is discrimination against gay people that is immoral, a position at odds with the policy cavalierly ascribed to us in the Petition. Accordingly, James Dale's membership in the Boy Scouts will not impair the current members' ability to express any of the views that, in fact, did

bring us together, such as the inculcation in *all* of our boys and young men of values that will " 'prepare them to make ethical choices over their lifetime in achieving their full potential.' " Pet. Mem. at 2, *citing* A.2238.[2]

ARGUMENT

PETITIONERS' CLAIM TO A FIRST AMENDMENT RIGHT TO EXCLUDE GAY BOYS AND MEN FAILS UNDER THIS COURT'S PRECEDENTS BECAUSE THE MEMBERS OF SCOUTING DO NOT SHARE, AND DID NOT COME TOGETHER TO EXPRESS, ANY VIEW ABOUT HOMOSEXUALITY

If it were true, BSA's assertion that "Boy Scout members associate in order to promote . . . the view that homosexuality is immoral" might establish its *members*' First Amendment right to exclude James Dale (and all other gay boys and men) from Scouting. Pet. Mem. at 24. But that assertion is false. As members and sponsors in Scouting for decades, representing a vast share of Scouting's members (youth and adult), we state emphatically that our expressive purposes in Scouting are not impaired by the participation of gay youth and men. BSA's Petition seeks to effectuate personal biases of some under the guise of *our* First Amendment associational freedoms which are *not* implicated by the participation of gay boys and men in Scouting.

Amici curiae religious organizations collectively sponsor (or are the official agencies of religious organizations that sponsor) thousands of Boy Scout troops consisting of hundreds of thousands of boys and men. We are the Boy Scouts' chartered sponsors and we speak both for our boys and young men who

2. "Pet. Mem." refers to Boy Scouts of America and Monmouth Council, Boy Scouts of America's Petition for a Writ of *Certiorari*. Numbers preceded by "A" refer to pages in the record before the New Jersey Supreme Court.

are the members of Scouting and for the adults among us who are the volunteer leaders who run our troops and support our involvement in Scouting.[3] While acutely aware of the critical importance of the First Amendment freedom of expression association, we submit this brief to alert the Court to the *actual* views of BSA members regarding gay boys and men and anti-gay discrimination — views that differ fundamentally and irreconcilably with the views ascribed to Boy Scout sponsors and members in BSA's petition for a writ of *certiorari*. Whatever the BSA may say, neither we nor the public schools, fire departments, police departments and other public entities who join us, participate in Scouting to promote the view that gay boys and men are immoral.

We *do* participate in Scouting — and sponsor troops for our boys and young men to participate in Scouting — for Scouting's *true* purposes as set forth in the Scout Oath and Law. These include teaching *all* of our boys and young men important values that Scouting's members do, in fact, share, such as trustworthiness, loyalty, kindness, respect for others, and bravery. *Dale v. Boy Scouts of America*, 160 N.J. 562, 574-75, 734 A.2d 1196, 1202 (1999). In all of our decades of participation in Scouting, we have never seen any written reference, in any Scouting literature sent to us, to an anti-gay policy. As we have learned of BSA's covert anti-gay policy

3. Organizationally, the Boy Scouts grants unit charters to sponsors consisting of "organizations and groups of citizens" that establish and "maintain units . . . and . . . issue certificates of membership . . . to the officers and members thereof." *Dale v. Boy Scouts of America*, 160 N.J. 562, 572, 734 A.2d 1196, 1201 (1999). Unit charters allow the "organization to use the Scouting program *under its own leadership to serve the youth and families for which it has concern*, to help it accomplish its own objectives." *Id.* (emphasis supplied). As the Boy Scouts' chartered sponsors and members, it is our expressive association rights (and those of the youth and families for which we have concern) that are implicated here. The First Amendment right to associate belongs to an organizations's members. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

(through media coverage of various litigations), we have spoken out in opposition to the exclusion of gay boys and men. We will continue to speak out for inclusion of all of our boys and young men as we continue to come together with other members of the Boy Scouts to promote boys' development in accordance with the membership's shared belief in the Scout Oath and Law.

We are familiar with and support the *Roberts* trilogy framework for balancing an organization's legitimate interests in its membership policies with a State's compelling interest in eradicating discrimination. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). The *Roberts* trilogy makes clear that an organization may exclude an individual in defiance of an anti-discrimination law *only* when that individual's presence as a member will interfere with the current members' ability to promote those views *that brought them together. Id.* In this case, while some BSA members may believe that gay boys and men are immoral, *amici curiae and the public entities involved in the Boy Scouts do not*, rendering untenable the Boy Scouts' assertions that we, Scouting's members, have come together to express a shared view of the morality of gay boys and men or that the inclusion of gay boys and men in the Boy Scouts will impair our ability to express those views that did, in fact, bring us all together.

A. The Views of *Amici Curiae* Religious Sponsors and Members of Scouting

1. *The United Methodist Church*

The United Methodist Church (of which *amicus curiae* the General Board of Church and Society of The United Methodist Church is the official agency empowered to promote its Social Principles) is the *largest* single sponsor of the Boy Scouts nationally with more than 11,700 troops

consisting of more than 415,000 boys and men. In fact, James Dale's Boy Scout troop — Troop 73 — was sponsored by The United Methodist Church and met in a hall provided by the Matawan First United Methodist Church. A.205. The United Methodist Church has for decades supported the true purposes of Scouting, including teaching all boys and young men to be loyal, courageous, honest and reverent. The United Methodist Church does not participate in Scouting to promote the view that gay boys and men are immoral.

Indeed, the United Methodist Church strongly condemns discrimination against gay boys and men. *See generally* A.3965. The *Book of Discipline of The United Methodist Church — 1996* (the "*Book of Discipline*"), adopted by the General Conference of The United Methodist Church in 1996, states that "[w]e insist that all persons, regardless of age, gender, marital status, or sexual orientation, are entitled to have their human and civil rights ensured." *Book of Discipline* Section II, ¶ 65(G) ("Human Sexuality") at 89. The *Book of Discipline* also affirms that "[h]omosexual persons no less then heterosexual persons are individuals of sacred worth," *id.*, and states that United Methodists "are committed to supporting [human] rights and [civil] liberties for homosexual persons." *Id.* Section III, ¶ 66(H) ("Equal Rights Regardless of Sexual Orientation") at 94. It recognizes as well that claims of gay people to "equal protection before the law" present "a clear issue of simple justice." *Id.* As The United Methodist Church's policies demonstrate, the Boy Scouts' assertion that The United Methodist Church participates in Scouting to promote the view that homosexuality is immoral is false.

Accordingly, when it learned about the Boy Scouts' anti-gay litigation policy, The United Methodist Church's General Board of Church and Society, fulfilling its obligation to ensure the implementation of the Social Principles of The United Methodist Church which unequivocally prohibit discrimination

against gay boys and men, condemned the anti-gay policy and stated that:

> [T]he Boy Scouts of America's discrimination against gays . . . conflicts with [The United Methodist Church's] Social Principles. . . . The General Board of Church and Society affirms the decision of the New Jersey Supreme Court in the case *James Dale v. Boy Scouts of America* that ruled the Boy Scouts of America is discriminatory in its exclusion of gays. We . . . call upon the Boy Scouts of America to discontinue this exclusion of gays.

Statement of the General Board of Church and Society of The United Methodist Church, adopted October 10, 1999.

Tellingly, rather than seeking to exclude its largest sponsor from the Boy Scouts because of The Methodist Church's condemnation of discrimination against homosexuals, the Boy Scouts responded to adoption of the Methodist Board's October 10, 1999 Statement affirming the New Jersey Supreme Court's decision in this case by stating that "[w]e hope that we could continue the relationship with [T]he United Methodist Church." Frank J. Murray, *Methodist Panel Chides Scouts On Gay Troops,* Washington Times, October 13, 1999, at A3. By contrast, James Dale, who had expressed no view, was summarily excluded from the Boy Scouts *not* because of any conflict between his views and the views of the Boy Scouts' existing members, but solely because Boy Scout officials fortuitously discovered that he is gay.[4]

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4. It bears explaining why the General Commission on United Methodist Men (the "UMM"), a newly formed entity that recently acts as The United Methodist Church's liaison to the Boy Scouts, has chosen to file a brief *amicus curiae* in support of Petitioners and in opposition to the positions of The United Methodist Church. Under The United Methodist Church organizational policy, UMM may file such a brief (Cont'd)

2. *The United Church of Christ*

The United Church of Christ, whose congregations sponsor more than 1,450 Boy Scout troops consisting of more than 54,000 boys and men (making it one of the Boy Scouts' 15 largest chartered organizations as of 1997), has a long history of participation in the Boy Scouts of America. We have always understood the true purposes of Scouting to be to teach our boys and young men to live in accordance with the Scout Oath and Law obediently, bravely, kindly and reverently. The assertion by BSA officials that United Church congregations and boys participate in Scouting to promote the view that gay boys and men are immoral is simply incorrect.

In fact, we have a long history of opposing discrimination based on sexual orientation. In 1977, for example, the biennial United Church General Synod (the United Church's highest decision making body):

(Cont'd)
expressing *only* the views of the 23 UMM board members. *Amicus curiae* The General Board of Church and Society of The United Methodist Church, by contrast, is required by The United Methodist Church to implement the Social Principles of The United Methodist Church (including those condemning discrimination against homosexuals) that have been adopted by the General Conference (and which thereby represent the view of the The United Methodist Church as a whole). As Rev. Faith Conklin, who is a board member of UMM, explained upon voting against UMM filing an *amicus* brief on Petitioners' behalf, "[s]uch action [ ] conflicts and is inconsistent with [the Church's] stated affirmation of the worth of every person and [the Church's] commitment to reject justice denying policies of discrimination." United Methodist News Service, *United Methodist Men to Support New Jersey Boy Scout Appeal*, September 20, 1999. In any event, UMM's unwillingness to abide by The United Methodist Church's policy opposing discrimination against homosexuals only serves to further demonstrate that the members of the Boy Scouts do not share any view of homosexuality and did not come together in the Boy Scouts to express any such view.

> 1. Reaffirm[ed] the action of the Tenth General Synod in its pronouncement on Civil Liberties Without Discrimination Relating to Affectional or Sexual Preference [or Orientation];
>
> 2. Deplore[d] the use of scripture to generate hatred, and the violation of civil rights of gay and bisexual persons; and
>
> 3. Call[ed] upon individual [United Church] members, local churches, Associations, Conferences, and Instrumentalities to continue to work for the enactment of civil rights legislation at the federal, state, and local levels of government.

Eleventh General Synod of the United Church of Christ, Resolution Deploring the Violation of Civil Rights of Gay and Bisexual Persons (1977). A.3823. Indeed, the United Church was an early supporter of the rights of lesbians and gay men; in 1972, in fact, the United Church ordained its first openly gay minister. Deb Price, *Times Have Changed, But Not Fast Enough,* San Francisco Examiner, June 21, 1994, at B7. Since 1975, the United Church has reaffirmed its commitment to ensuring full civil rights for lesbians and gay men and has taken steps to "facilitate the ordination and placement of qualified lesbian, gay and bisexual candidates" for ministry in United Church congregations. General Synod of the United Church of Christ, Resolution on Affirming Gay, Lesbian and Bisexual Persons and Their Ministries (1991). A.3858.

As our policies make clear, the Petition's assertion that we participate in Scouting to promote the view that homosexuality is immoral is false. In fact, as word spread through the media of the Boy Scouts' litigation position regarding gay boys and men, we concluded that this shocking stance was incompatible with our own anti-discrimination policies. Accordingly, on February 8, 1993, Rev. Gordon J. Svoboda, II, *amicus curiae* United

Church Board for Homeland Ministries' Secretary for Education in Human Identity and Youth and Young Adult Programs, wrote to the Boy Scouts, noting that:

> [n]o less than eleven votes in the national setting have been taken inviting study and action to overcome homophobia and the resultant prejudice against gay, lesbian, and bisexual persons. These votes, taken by the church's highest deliberative body, the General Synod, and its Executive Council, address our needs: to affirm the civil liberties of all persons without discrimination based on sexual orientation; to encourage the welcoming of gay, lesbian, and bisexual persons into membership and ordained ministry in the United Church of Christ; and, to protect the right to privacy of all people in consensual, adult relationships.

The letter implored "the Boy Scouts of America [to] stop its discriminatory practices of prohibiting openly gay, lesbian, and bisexual persons from holding leadership positions at all levels of the scouting organization."

Despite our expressed moral views (contrary to those in the Petition), the Boy Scouts nevertheless sought the endorsement of the United Church in 1998 in order to recruit local United Church congregations as Boy Scouts sponsors. On September 18, 1998, Rev. Dr. Paul H. Sherry, President of the United Church, wrote to Jere B. Ratcliffe, Chief Scouting Executive of the Boy Scouts and Thomas R. Deimler, Director of Religious Relationships of the Boy Scouts, stating again that:

> The General Synod of the United Church of Christ has a twenty-nine year history of pronouncements, resolutions, and prophetic actions seeking affirmation and justice for gay, lesbian, and bisexual persons, both in the church and in the larger

> society. . . . *I ask you, again, to abandon policies and practices which, in our judgment, perpetuate homophobia, hate and hurt to others, and fail to support the most fundamental values of respect and compassion for others which Scouting seeks to encourage*. We are deeply concerned about the damage being done to gay youth who wish to participate in scouting and the destructive effects upon non-gay youth whose anti-gay prejudices may be reinforced by your policies.

(Emphasis supplied).

In response, Mr. Deimler of the Boy Scouts wrote to Rev. Dr. Sherry of the United Church on November 23, 1998 that "[o]ur goal will be to continue the national support of the Boy Scouts of America in serving youth of the United Church of Christ through Scouting." As with The United Methodist Church, it is apparent that while heterosexual members and sponsors may hold *any* view of homosexuality contrary to the claims of the Petition, gay boys and men are automatically excluded from membership solely because of who they are.[5]

3. *Reform Judaism*

The Union of American Hebrew Congregations ("UAHC") (represented in this action by its social justice agency, *amicus curiae* Religious Action Center of Reform Judaism), the governing body of Reform Judaism, North America's largest Jewish body, sponsors BSA troops in order to teach our boys

5. Unlike this anti-gay policy, the opposing views of *amici curiae* and other members were always known. When deciding whether to grant or renew an individual unit charter, BSA investigates "the general objectives, purpose, character, intent, and programs of the prospective chartered organization or community group and its compatibility with the aims and purposes of the Boy Scouts of America." *Dale*, 160 N.J. at 572.

and young men to live in a trustworthy, loyal, kind, brave and reverent manner consistent with the Scout Oath and Law.[6] We do not participate in Scouting for our boys to learn that gay boys and men are immoral or should be excluded, beliefs we simply do not hold.

On the contrary, the UAHC "has consistently supported the civil rights and civil liberties of all persons" and has stated in particular "that homosexual persons are entitled to equal protection under the law. We oppose discrimination against homosexuals in areas of opportunity, including employment and housing. We call upon our society to see that such protection is provided in actuality." General Assembly of UAHC, Statement on Human Rights of Homosexuals (1977). A.3897.

Not only have we consistently opposed discrimination based upon affectional or sexual orientation, we have specifically welcomed lesbian and gay Jews as leaders of our congregations. The Central Conference of American Rabbis declared in 1990 that "[a]ll Jews are religiously equal regardless of sexual orientation." That being the case, the statement continued, "all rabbis, regardless of sexual orientation, [should] be accorded the opportunity to fulfill the vocation which they have chosen." Central Conference of American Rabbis, Ad Hoc Committee on Homosexuality and the Rabbinate, Report (June 25, 1990). A.3902; *see also Gay Rabbis*, Time, July 9, 1999, at 62; Ari L. Goldman, *Reform Judaism Votes to Accept Active Homosexuals in Rabbinate*, N.Y. Times, June 26, 1990, at A1. The Boy Scouts' assertion that we participate in Scouting to promote the Petition's asserted "moral code" is incorrect. Pet. Mem. at 15.

Indeed, we believe that discrimination against an individual because of his sexual orientation is no more morally acceptable

6. UAHC congregations sponsor Boy Scout troops consisting of at least 2,000 boys and men. Many more Reform Jews are affiliated with Scouting through non-UAHC organizations.

because it is practiced by an organization which otherwise promotes laudatory values. We have specifically voiced our condemnation of BSA's anti-gay policy. On April 9, 1992, the Executive Board of the Central Conference of American Rabbis called upon Petitioners "to open [their] membership and leadership to all men and boys without regard to their sexual orientation." Executive Board of the Central Conference of American Rabbis, Resolution (April 9, 1992). A.3893; *see also* A.3886-A.3887; A.3894 (Executive Board of the National Federation of Temple Youth, the largest youth organization of Reform Judaism, Resolution (1992-'93), calling upon the Boy Scouts "to open its membership and leadership to all men . . . and boys without regard to their sexual orientation"). We have urged BSA officials to reverse this policy barring gay members, noting that our congregations sponsor Boy Scouts troops consistent with our support for human rights, including "full inclusion of lesbian and gay Jews in all aspects of synagogue life." *Jewish Groups Decry Gay Ban,* Washington Times, July 11, 1992, at B4.

In response to the New Jersey Supreme Court's decision in this case, *amicus curiae* Religious Action Center of Reform Judaism on August 5, 1999 stated:

> We applaud yesterday's decision by the New Jersey Supreme Court requiring the Boy Scouts of America to stop discriminating against homosexuals who wish to participate in scouting activities. . . . The Justices made clear that they find discrimination on the basis of sexual orientation repugnant. So do we. . . . Rank discrimination should have no place in an organization that aspires to inculcate fundamental American values in our nation's boys.

Statement of Rabbi David Sapperstein, Director of the Religious Action Center of Reform Judaism (August 5, 1999). BSA officials have not expelled us for stating our opposing views.

4. *The Protestant Episcopal Church in the U.S.A.*

The Diocesan Council of the Episcopal Diocese of Newark sponsors Boy Scout troops to teach our boys and young men values consistent with the true purposes of Scouting, such as loyalty, courage, kindness, cleanliness, obedience and reverence. We do not participate in Scouting to promote the view that homosexuality is immoral.

Such a view, in fact, contradicts the teachings of The Protestant Episcopal Church in the U.S.A. (the "Episcopal Church") which has a long history of opposition to discrimination on the basis of affectional or sexual orientation.[7] In 1976, the Episcopal Church issued the following statement:

> Resolved, House of Bishops concurring, that it is the sense of this General Convention that homosexual persons are children of God, who have a full and equal claim with all other persons upon the love, acceptance, and pastoral concern and care of the Church.
>
> * * *
>
> [T]his General Convention expresses its conviction that homosexual persons are entitled to equal protection of the law with all other citizens, and calls upon our society to see such protection provided in actuality.

General Convention of the Protestant Episcopal Church in the U.S.A., Statement on Homosexuality (1976). A.3949. In 1982, the General Convention of the Episcopal Church reaffirmed its position that "homosexual persons are children of God and are entitled to full civil rights." General Convention of the Episcopal

7. The Episcopal Church sponsors more than 1,400 BSA troops consisting of more than 50,000 boys and men.

Church, Resolution on Civil Rights of Homosexuals (1982). A.3950.

Additionally, since that time, the Standing Commission on Human Affairs of the Episcopal Church has recommended that the church allow gay and lesbian clergy at the discretion of local bishops. *See, e.g.*, Peter Steinfels, *Lesbian Ordained Episcopal Priest*, N.Y. Times, July 6, 1991, at A1. The Boy Scouts' assertion that we participate in Scouting to promote the Petition's incompatible view of gay youth and men is incorrect and fundamentally ignores the beliefs and policies of the Episcopal Church.

Consistent with these beliefs and policies, we opposed this anti-gay policy upon learning of it and have called upon BSA officials "to admit to full membership otherwise qualified homosexual persons." Diocesan Council of the Episcopal Diocese of Newark, Resolution on the Diocese of Newark and the Boy Scouts of America (June 9, 1993). A.3958; *see also* A.3913. BSA officials have not expelled us for stating our opposing views.

5. *Unitarian Universalist Association*

Like other members of Scouting, congregations affiliated with the Unitarian Universalist Association ("UUA") sponsor Boy Scout troops for Scouting's true purposes — teaching our boys and young men, among other things, to live kindly, obediently and bravely. Unitarian Universalists do not participate in Scouting to promote the "morality" described in the Petition.

In fact, Unitarians long ago recognized that "[h]omosexuality has been the target of severe discrimination by society" and "urge[d] all peoples immediately to bring an end to discrimination against homosexuals, homosexuality, bisexuals, and bisexuality." General Assembly of the Unitarian Universalist Association, Resolution on Discrimination Against

Homosexuals and Bisexuals (1970). A.3807. Specifically, the Unitarian Universalist Association:

> call[ed] upon the UUA and its member churches, fellowships, and organizations immediately to end all discrimination against homosexuals in employment practices, expending special effort to assist homosexuals to find employment in our midst consistent with their abilities and desires; [and]
>
> urge[d] all churches and fellowships . . . to initiate meaningful programs . . . with the particular aim to end all discrimination against homosexuals and bisexuals.

Id.

Since that time, the UUA has continued to support the rights of lesbians and gay men through its Office of Lesbian, Bisexual and Gay Concerns. In particular, in 1980, the UUA called upon the Unitarian Universalist Ministers' Association and the UUA Department of Ministerial and Congregational Service "to lend full assistance in the settlement of qualified openly gay, lesbian and bisexual religious leaders." General Assembly of the Unitarian Universalist Association, Resolution on Ministerial Employment Opportunities (1980). A.3809. Moreover, in 1987, the UUA renewed its call for "organizations and society at large to end discrimination against gay and lesbian people" and again expressed its support "for the passage of laws prohibiting discrimination based on sexual orientation." General Assembly of the Unitarian Universalist Association, Resolution on Supporting Legal Equity for Gays and Lesbians (1987). A.3811. BSA officials' assertion that we participate in Scouting to promote the view that homosexuality is immoral is incorrect and ignores our beliefs and policies.

B. Governmental Sponsors of Boy Scouts

More than any single religious denomination, government entities (including public schools) — which sponsor well over 19,000 Boy Scout troops consisting of more than 575,000 boys and men — constitute the largest sponsor of Boy Scout troops in the nation. *Chartered Organizations: Top 30 For 1997 Ranked By Total Youth*, BSA Today, No. 5-886, February/March 1998 ("Chartered Organizations"). Like *amici curiae* religious members, government entities subject to Constitutional equal protection guarantees and state civil rights laws such as New Jersey's Law Against Discrimination do not (and may not) participate in the Boy Scouts to express the view that gay boys and men are immoral or that they should be subject to exclusion from the Boy Scouts. *See generally Romer v. Evans*, 517 U.S. 620 (1996). Like other members of the Boy Scouts, they participate in order to teach boys and young men the fundamental and inclusive values set forth in the Scout Oath and Law that have always brought Scouting's members together.

Governmental sponsors of the Boy Scouts include civilian branches of the U.S. Air Force, U.S. Army, U.S. Coast Guard, U.S. Coast Guard Auxiliary, U.S. Marine Corps and U.S. Navy. A.4455. NASA is a sponsor of the Boy Scouts, A.4456, as is the Department of Housing and Urban Development. *Chartered Organizations*. Throughout the nation, local government entities, including fire and police departments, are also sponsors of Boy Scouts troops. *Id.*; *see generally* A.1592. The New Jersey Supreme Court found that "in New Jersey, for example, public schools [which are barred by the Law Against Discrimination from discriminating against gay boys in the provision of public school services] and school-affiliated groups sponsor close to 500 scouting units, comprising approximately one-fifth of the chartering organizations in the State. Other governmental entities, such as law enforcement agencies, fire departments, city governments, and the [civilian] military, sponsor approximately 250 scouting units in New Jersey." *Dale*, 160

N.J. at 573. The same is true nationally. A.4455; *Chartered Organizations*.

Public schools, in particular, are one of the largest sponsors of Boy Scout troops in the nation. *Chartered Organizations*. Public schools participate in the Boy Scouts because they wish their students to learn the fundamental values set forth in the Scout Oath and Law, *not* because they wish to promote the view that gay youth and men are immoral.

In fact, consistent with applicable Constitutional equal protection guarantees and legal prohibitions on discrimination, public school boards and public school organizations nationwide prohibit discrimination against gay youth in school and school-sponsored activities such as the Boy Scouts. The National School Boards Association, for example, which serves as the national voice for 17,000 local school districts nationwide and which is a national leader in the formulation and implementation of federal and national educational policy, has stated unequivocally that its member schools must "ensure that students are not subjected to discrimination on the basis of socioeconomic status, race, color, national origin, religion, gender, disability, or *sexual orientation*." Beliefs and Policies of the National School Boards Association, as amended April 12, 1999, Article II ("Responsibilities of Local School Boards"), Sec. 3.4 (emphasis supplied).[8]

Schools and other public entities are members of Scouting side by side with diverse religious groups who agree to disagree on many doctrines and moral views in order to join together to support the goals we do agree upon. Like us, these public entities participate in Scouting for the reasons that we, as Scouting's members, have always come together — to teach all our boys

8. A copy of this document is on file with counsel and available upon request. It is also available on the internet at the website of the National School Boards Association (http://www.nsba.org/about/beliefs.htm).

and young men (including gay boys and young men) the values and skills of citizenship, community service and self-respect embodied in the Scout Oath and Law.

CONCLUSION

The broad support among the Boy Scouts' religious and governmental sponsors and members for the equal legal rights and human dignity of gay boys and men belies the Petition's contention that these diverse public and religious sponsors and members come together in Scouting for an expressive purpose that mandates exclusion of gay boys and men. The Petition's characterization of a "moral code" that gay youth and adults among us automatically cannot share in is a smokescreen for invidious discrimination against gay youth and adults in violation of New Jersey law. BSA's policy excludes gay boys and men from Scouting without regard to their adherence to the Petition's "moral code," while, by contrast, any heterosexual or sponsoring organization may participate in the Boy Scouts even if that individual or organization loudly opposes the Petition's "moral code" and the policy regarding gay youth and men.

The New Jersey Supreme Court correctly recognized that Petitioners' summary exclusion of gay boys and men — and inconsistent tolerance of conflicting opinions regarding gay boys and men from heterosexuals — forecloses the possibility that BSA "seeks to exclude individuals who do not share the views that the clubs' members wish to promote," *New York State Club Ass'n*, 487 U.S. at 13, and leads inexorably to the conclusion that the BSA is impermissibly using sexual orientation as a shorthand measure "in place of . . . legitimate criteria for determining membership." *Id.* We, the members and sponsors of Scouting, have no First Amendment problem with enforcement of the Law Against Discrimination. This case raises no First Amendment concerns and the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

MICHAEL D. SILVERMAN
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
Attorneys for Amici Curiae
590 Madison Avenue
New York, New York 10022-4616
(212) 872-1039

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA
Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

JOHN C. EASTMAN
THE CLAREMONT INSTITUTE
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
250 W. FIRST ST., SUITE 330
CLAREMONT, CA 91711

EDWIN MEESE III
COUNSEL OF RECORD
214 MASSACHUSETTS AVE., N.E.
WASHINGTON, D.C. 20002
(202) 546-4400

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

QUESTIONS PRESENTED

1. Whether a state law requiring the Boy Scouts, a private membership organization dedicated to fostering the development of civic and moral virtue in young boys, to appoint an avowed homosexual activist as an Assistant Scoutmaster infringes the Boy Scouts rights of freedom of speech and association?

2. Whether such a state law infringes the rights of parents, who choose to augment the moral education of their children by participating in the Boy Scouts organization, to direct the upbringing of their own children.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iv

INTEREST OF AMICUS CURIAE. 1

REASONS FOR GRANTING THE WRIT 3

A. THE DECISION BELOW DANGEROUSLY INTERFERES WITH THE MORAL TRAINING PROVIDED BY THE BOY SCOUTS, TRAINING WHICH THE AMERICAN FOUNDERS BELIEVED TO BE ESSENTIAL IN A REPUBLICAN FORM OF GOVERNMENT 3

B. THE NEW JERSEY SUPREME COURT'S RULING IS CONTRARY TO WELL-ESTABLISHED PRECEDENT OF THIS COURT. 7

1. Forcing the Boy Scouts to Admit Dale as an Adult Leader Violates the Boy Scouts' Freedom of Association. 7

2. Forcing the Boy Scouts to Accept Dale as a Spokesman/Adult Leader Constitutes Constitutionally-Prohibited Compelled Speech 10

3. Undermining the Boy Scouts' Mission Infringes the Constitutional Right of Parents to Direct the Moral Upbringing of their Children. 11

C. THE RULING BELOW IS IMPLICITLY IN CONFLICT WITH DECISIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS AND SEVERAL STATE COURTS OF LAST RESORT 12

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977).....7

Board of Directors of Rotary International v. *Rotary Club of Duarte*, 481 U.S. 537 (1987).....7, 8, 9, 15

Bowers v. *Hardwick*, 478 U.S. 186 (1986) 12

Curran v. *Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998) ... passim

Curran v. *Mount Diablo Council of the Boy Scouts of America*, 48 Cal.App.4th 670, 29 Cal.Rptr.2d 580 (Cal.App. 1994), *aff'd*, 17 Cal. 4th 670, 952 P.2d 218 (Cal. 1998) 8

Dale v. *Boy Scouts of America*, 308 N.J. Super. 516, 706 A.2d 270 (N.J. Super., App. Div., 1998) 11, 13

Dale v. *Boy Scouts of America*, 160 N.J. 562, 734 A.2d 1196 (N.J. 1999) ..... passim

Engel v. *Vitale*, 370 U.S. 421 (1962) 6

Everson v. *Board of Education*, 330 U.S. 1 (1947) 6

Hurley v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).....10, 11, 13

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 6

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 11

New York State Club Ass'n v. *City of New York*, 487 U.S. 1 (1988).....7, 8, 9

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 11

Quinnipiac Council, Boy Scouts of America, Inc. v. *Commission on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987) 14

Randall v. *Orange County Council*, 17 Cal.4th 736, 952 P.2d 261 (1998).....11

Roberts v. United States Jaycees, 468 U.S. 609 (1984).....7, 8, 9

Seabourn v. *Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995) 4

Wallace v. *Jaffree*, 472 U.S. 38 (1985).....9

Warfield v. *Peninsula Golf & Country Club*, 10 Cal.4th 594, 896 P.2d 776 (Cal. 1995) 14

Welsh v. *Boy Scouts of America*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993).....6, 12

West Virginia State Bd. of Ed. v. *Barnette*, 319 U.S. 624 (1943).....10

Wooley v. *Maynard*, 430 U.S. 705 (1977) 10

CONSTITUTIONS AND STATUTES

Mass. Const. of 1780, Pt. 1, Art. 3 3

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THE FEDERALIST NO. 55, at 346 (Clinton Rossiter and Charles Kesler eds., Mentor 1999) 4

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Alexis de Tocqueville, *Democracy in America* (J. P. Mayer ed. & George Lawrence trans., HarperPerrenial 1969) (1835).....5

George Washington, *Farewell Address*, reprinted in *George Washington: A Collection* 521 (William B. Allen ed., Liberty Classics 1988) 5

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No. 99-699

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA
Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the inculcation of virtue in the citizenry was deemed by the Founders to be essential in a republican form of government.[1]

[1]The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as amicus curiae in cases of constitutional significance. Of particular relevance here, the Institute has published extensively about the foundations of representative government and the constitutional protections of speech and association that are necessary to protect those foundations, including a monograph entitled "On the Front Lines of the Culture War: Recent Attacks on the Boy Scouts." In addition, the Claremont Institute participated as an amicus curiae in the case below, filing briefs with both the intermediate appellate court and the Supreme Court of New Jersey.

Recently, in order to further advance its mission, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence. The Center's purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of amicus curiae briefs in cases that involve issues of constitutional significance going to the heart of the founding principles of this nation. This is such a case.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW DANGEROUSLY INTERFERES WITH THE MORAL TRAINING PROVIDED BY THE BOY SCOUTS, TRAINING WHICH THE AMERICAN FOUNDERS BELIEVED TO BE ESSENTIAL IN A REPUBLICAN FORM OF GOVERNMENT.

At a time when the nation is searching its soul seeking explanation for the child-killer tragedies in Columbine, Jonesboro, and elsewhere, the New Jersey Supreme Court has lent its voice to the full-scale assault that has been launched against the Boy Scouts of America, one of the few remaining organizations still devoted to instilling in our nation's citizenry the kind of moral virtue that the Founders of this nation thought essential in a republican form of government.

The virtually universal view of the Founders on the necessity of a virtuous citizenry to support a republican form of government is evident in the constitutions they adopted, in their public writings, and in their private correspondence. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec.15. The Massachusetts Constitution of 1780 echoes the sentiment: "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality . . . ." Mass. Const. of 1780, Pt. 1, Art. 3. And the Pennsylvania Constitution of 1776 went even further, asserting that "Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution." Pa. Const. of 1776, Art. II, § 45.

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers: "Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another." The Federalist No. 55, at 346 (Clinton Rossiter and Charles Kesler eds., Mentor 1999).

In short, the Founders viewed a virtuous citizenry as an essential pre-condition of republican self-government. As political theorist (and Claremont Institute Senior Fellow) Thomas G. West noted in his recent book, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* 160 (Rowman & Littlefield 1997):

> The Founders understood the term *self-government* in a double sense: 1) governing oneself morally, controlling one's own tendency to indulge the selfish and violent passions unreasonably; and 2) governing oneself politically, through democratic institutions that provide a wide scope for self-governing private associations such as families, churches, private schools, and businesses.

Fostering the first definition of self-government by use of a private institution envisioned in the second is what the Boy Scouts, and hence this case, is about. *See Seabourn* v. *Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 180, 891 P.2d 385, 388 (1995) ("[The Boy Scouts] tends to conserve the moral, intellectual, and physical life of the coming generation, and in its immediate results does much to reduce the problem of juvenile delinquency in the cities . . . ." (quoting Congressional Report in Support of Act to Incorporate Boy Scouts of America)).

The Founders were also fully cognizant of the fact that virtue must be continually fostered in order for republican institutions, once established, to survive. Most of the leading Founders, therefore, turned their attentions at one time or another to education. Perhaps the best example, but by no means the only one, of this sentiment is expressed in the Northwest Ordinance, adopted by Congress for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 3, 1 Stat. 51, 53 n. a; *see also*, *e.g.*, Mass. Const. of 1780, Ch. V, Sec. 2 ("wisdom and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties").

Moreover, the Founders did not rely on public institutions alone to foster a virtuous citizenry. In America, numerous private associations devoted to the development of moral character also existed and were encouraged. As Alexis de Tocqueville observed more than a century and a half ago, "[the intellectual and moral associations in America] are as necessary as the [political and industrial associations] to the American people, perhaps more so." Alexis de Tocqueville, *Democracy in America* 517 (J. P. Mayer ed. & George Lawrence trans., HarperPerrenial 1969) (1835).

The fostering of moral excellence was, for the Founders, a task intimately tied to religion. As President Washington noted in his Farewell Address, "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, *Farewell Address*, reprinted in *George Washington: A Collection* 521 (William B. Allen ed., Liberty Classics 1988). The Establishment Clause of the First Amendment, however, has been interpreted to prevent public schools from providing

moral instruction tied in any way to religion. *See, e.g., Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947) (noting in *dicta* that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions"); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). As a result, the teaching of morality and virtue–so necessary to our republican form of government–is left largely to private associations, primarily churches and groups such as the Boy Scouts. Much more is at stake in the decision of the New Jersey Supreme Court, therefore, than simply the membership policies of a single private group. As the United States Court of Appeals for the Seventh Circuit noted in a parallel case addressing whether the Boy Scouts could be compelled to admit atheists to membership:

> A great deal is at stake in the interpretation of [public accommodations] statutes. The Founding Fathers recognized that a republic cannot endure without a virtuous citizenry. . . . The central question for those concerned about maintaining the health of our republic must be, "how do individuals acquire the virtues necessary for self-government?" History provides only one answer: through the institutions of civil society, like the family, religious groups, and voluntary associations which inculcate a sense of moral values in the young.

Welsh v. *Boy Scouts of America*, 993 F.2d 1267, 1278 (CA7), *cert. denied*, 510 U.S. 1012 (1993). Especially when combined with the more customary methods discussed below by which the decision whether to grant certiorari is generally measured, the importance of this case to the perpetuation of republican institutions warrants, indeed compels, review by this Court.

B. THE NEW JERSEY SUPREME COURT'S RULING IS CONTRARY TO WELL-ESTABLISHED PRECEDENT OF THIS COURT.

1. Forcing the Boy Scouts to Admit Dale as an Adult Leader Violates the Boy Scouts' Freedom of Association.

There is perhaps no more fundamental tenet of the freedom of association than the right of the association itself to determine who shall be admitted to membership. During debate in the convention which gave us our Constitution, Gouverneur Morris noted that "every Society from a great nation down to a club had the right of declaring the conditions on which new members should be admitted . . . ." *The Records of the Federal Convention of 1787, at* 238 (Max Farrand ed., Yale Univ. Press 1966). As the Boy Scouts points out in its petition (and as The Claremont Institute noted in its brief below), the sanctity of that principal continues to be recognized to this day: "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). "Freedom of association . . . plainly presupposes a freedom not to associate." *Id.* (citing *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 234-35 (1977)).

Although not absolute, *id.*, the freedom to choose one's associates is particularly strong in the context of intimate and expressive associations, such as those fostered by the Boy Scouts at issue here. There are exceptions, as this Court's rulings in *Roberts* and two subsequent cases, *Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1 (1988), make clear. But the New Jersey Supreme Court mistook the exception recognized in those cases for the principle, and on the principle, the Boy

Scouts organization is readily distinguishable from the associations at issue in all three cases, for several reasons.

First, *Roberts*, *Rotary Club*, and *New York State Club Ass'n* all dealt with associations that fostered business and commercial connections. *Roberts*, 468 U.S. at 616, 626; *Rotary Club*, 481 U.S. at 549; *New York State Club Ass'n.*, 487 U.S. at 5-6. The Boy Scouts, on the other hand, is not a commercial organization. *See, e.g., Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 673, 952 P.2d 218, 220 (1998) (holding that the Boy Scouts is not a "business establishment" under the California Unruh Civil Rights Act). Second, unlike the Jaycees or Rotary Club, the Boy Scouts' structure and purpose foster relationships second to virtually no group other than a family in its degree of intimacy. *See, e.g., Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 48 Cal.App.4th 670, 29 Cal.Rptr.2d 580, 598 (Cal.App. 1994), *aff'd*, 17 Cal. 4th 670, 952 P.2d 218 (Cal. 1998).

Finally, and perhaps most importantly, the membership criterion at issue here is not based on a stereotypical generalization such as was at issue in *Roberts,* where it was claimed that admitting women would force the club to alter its civic, political or business messages (apparently based on the stereotypical view that women have a different view of such matters than men). 468 U.S. at 627-28. The Boy Scouts is *not* claiming that homosexual adult leaders are less likely than heterosexual adult leaders to be trustworthy, or brave, or loyal, and thus less able to serve as role models for those aspects of the Scout Law. But the Boy Scouts *is* contending that an avowed homosexual adult leader is less able than heterosexual adult leaders to serve as a role model for the aspect of the Scout Oath that calls on boys to be "morally straight," a phrase which the Boy Scouts itself interprets as encompassing the belief that homosexual conduct is immoral. *Curran*, 17 Cal.4th at 672, 952 P.2d at 219.

By forcing the Boy Scouts to place in an adult leadership position someone who espouses by word and deed a position about the immorality of homosexuality inimical to that taken by the Boy Scouts, the New Jersey Supreme Court repudiated the principle articulated in *Roberts*, *Rotary Club*, and *New York State Club Ass'n* that a private association could not be forced to admit members whose views were contrary to those of the organization. In *Roberts*, this Court upheld a decision requiring the Jaycees to admit women *only after* finding that the Minnesota public accommodations law did not require any change in the organization's creed or impose any restrictions on its "ability to exclude individuals or philosophies different from those of its existing members." 468 U.S. at 627. In *Rotary Club*, this Court upheld a similar decision requiring the Rotary Clubs to admit women *only after* finding that the admission of women would not affect that organization's ability to carry out its purposes "in any significant way." 481 U.S. at 548-49.

And in *New York State Club Ass'n*, this Court specifically noted: "If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacles to this end." 487 U.S. at 13. Indeed, Justice O'Connor pointed out in her concurring opinion that the right to exclude individuals who do not share the organization's views exists even if the organization's purpose requires that membership be based–legitimately rather than stereotypically– on race, religion, or some other "suspect" classification. *Id.* at 19 (O'Connor, J., concurring); *see also Wallace* v. *Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) ("the question whether racial or sex-based classifications communicate an *invidious* message [is] in large part a legal question to be answered on the basis of judicial interpretation of social facts" (emphasis added)). Invidious discrimination is simply not at work when, for example, the Knights of Columbus limits membership to Catholics.

Apparently recognizing the force of this distinction, the New Jersey court simply mischaracterized the Boy Scouts' own beliefs, in order to avoid the force of this Court's precedents. In an opinion that can only be called Orwellian, the New Jersey court rejected the Boy Scouts' own clearly and repeatedly articulated position that homosexual conduct was immoral and therefore incompatible with the virtues the organization seeks to foster. *See Dale* v. *Boy Scouts of America*, 160 N.J. 562, 613 n.12, 614-15, 734 A.2d 1196, 1224 (N.J. 1999). This Court should not allow its precedent to be so cavalierly circumvented.

2. Forcing the Boy Scouts to Accept Dale as a Spokesman/Adult Leader Constitutes Constitutionally-Prohibited Compelled Speech.

The ruling below also flatly contravenes the unanimous holding of this Court just five terms ago in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), a ruling solidly grounded in this Court's First Amendment jurisprudence. As Justice Jackson, writing for the Court, noted more than fifty years ago, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943). The State's interest in disseminating an ideology "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977).

The New Jersey Supreme Court's attempt to distinguish *Hurley* and the long line of cases on which it relies denigrates the speech both of the Boy Scouts and of James Dale himself. Dale has become a staunch advocate for gay rights. Indeed, his activism is what led to the news article that brought his avowed homosexuality to the Boy Scouts' attention. Pet. at 6. Moreover, by his own reported admission, Dale seeks to re-

join the Boy Scouts as an adult leader in order to persuade the Boy Scouts that its position on the immorality of homosexual conduct is wrong. Pet. at 7. Dale's purpose here is therefore clearly speech, and under *Hurley*, the Boy Scouts cannot be compelled to carry his message. *Hurley*, 515 U.S. at 573. The New Jersey Supreme Court may be correct in its assertion that Dale does not come to Boy Scout meetings "carrying a banner," 160 N.J. at 623, but Dale clearly wears his homosexuality as a badge for all to see. It takes a blind eye to fail to recognize that the appointment by the Boy Scouts of Dale as an Assistant Scoutmaster would be the height of symbolic speech, severely undermining the Boy Scouts' own speech about the immorality of homosexuality.

3. Undermining the Boy Scouts' Mission Infringes the Constitutional Right of Parents to Direct the Moral Upbringing of their Children.

The ruling below also severely undermines the right of parents to direct the moral upbringing of their children, a right recognized by this Court more than three-quarters of a century ago as constitutionally protected. *See Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). The Boy Scouts is not simply another after-school playtime organization; its purpose is "to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime." *Dale* v. *Boy Scouts of America*, 308 N.J. Super. 516, 524, 706 A.2d 270, 274 (N.J. Super., App. Div., 1998) (quoting Boy Scouts Mission Statement). While the Boy Scouts does not provide the complete alternative to public education that was at issue in *Pierce* and *Meyer*, there is no question that the organization fills a moral void in that education. As the California Supreme Court noted in *Randall* v. *Orange County Council*, "Parents of Cub Scouts . . . testified that they hoped certain values, including religious ones, would be instilled through the Cub Scout program, as promised by the parent handbook

for new Cub Scouts." 17 Cal.4th 736, 742, 952 P.2d 261, 265 (1998).

The view that homosexuality is immoral, though currently denigrated in some elite circles, has a long and revered tradition in this and most other countries and in most major religions. *See, e.g., Bowers* v. *Hardwick*, 478 U.S. 186, 192-94 (1986); *id.* at 196-97 (Burger, C.J., concurring). And it is still supported by criminal prohibitions against sodomy in many States and in the Uniform Code of Military Justice. *Id.* at 193-94; Jeffrey G. Sherman, "Love Speech: The Social Utility of Pornography," 47 Stan. L. Rev. 661, 698 (April 1995) (citing state statutes and Uniform Code of Military Justice). The parents who participate in the Boy Scouts because they wish to impart that and kindred moral views to their children have a constitutionally protected right to do so. The New Jersey Supreme Court's decision makes a mockery of that right.

C. THE RULING BELOW IS IMPLICITLY IN CONFLICT WITH DECISIONS OF THE SEVENTH CIRCUIT COURT OF APPEALS AND SEVERAL STATE COURTS OF LAST RESORT.

The Claremont Institute agrees with the Boy Scouts' claim that the New Jersey Supreme Court decision is implicitly in conflict with the decision of the Seventh Circuit in *Welsh* v. *Boy Scouts of America*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993), and with the decisions of several state courts of last resort. It further agrees with the Boy Scouts that a more stark conflict is unlikely to arise because any court inclined to agree with the Boy Scouts' position about the unconstitutionality of applying public accommodations statutes to private membership groups such as the Boy Scouts would simply interpret the relevant statute narrowly, where possible, in order to avoid the constitutional question. Because of the strength of the implicit conflict that does currently exist, however, especially with the decision of the California Supreme Court in *Curran* v. *Mount Diablo Council*

of the Boy Scouts of America, 17 Cal. 4th 670, 952 P.2d 218 (1998), The Claremont Institute believes that further elaboration would be beneficial to the Court.

In *Curran*, the California Supreme Court narrowly interpreted the California Unruh Civil Rights Act as not applicable to the Boy Scouts, and therefore avoided the significant constitutional issues presented by the case. But three members of the seven member court (and arguably four), in *seriatim* concurring opinions, recognized that the Constitution required such a narrow interpretation. Justice Joyce Kennard, for example, stated that "it is highly doubtful that a state may, consistent with the First Amendment guarantees of freedom of speech and of association, compel an organization like the Boy Scouts to accept as a member someone who actively opposes one of that organization's basic precepts and who seeks membership in order to promote those contrary views." 17 Cal. 4th at 722. Indeed, Justice Kennard found the Boy Scouts' constitutional arguments "compelling." *Id.* at 725. She noted that the breadth of this Court's unanimous decision in *Hurley* "raises grave doubts whether California's legislature could ever constitutionally enact, or this court enforce, a law requiring an organization like the Boy Scouts, whose mission is to instill in boys a certain philosophy of moral behavior, to admit an individual who advances contrary views." *Id.* at 726. Significantly, Justice Kennard expressly disagreed with the decision of the intermediate appellate court which was affirmed by the New Jersey Supreme Court in the decision under review here. *See id.* at 726 n.1 (citing *Dale* v. *Boy Scouts of America*, 308 N.J. Super. 516, 706 A.2d 270 (1998)).

Justice Janice Brown echoed Justice Kennard's concern: "Any definition of [the statutory phrase] business establishment that failed to make such an accommodation [to the Boy Scouts freedom of expressive association and free speech] would raise serious constitutional questions as to application of the act." *Id.* at 734-35. Even Justice Stanley Mosk, who quite clearly disagreed with the Boy Scouts' views

on homosexuality, recognized the constitutional difficulty that would arise if the legislature sought to bring the Boy Scouts within the statute. *Id.* at 702 (citing concurring opinion of Justice Kennard).

A fourth member of the court, Justice Kathryn Werdegar, noted that the court's statutory interpretation was inconsistent with the court's own prior precedent. *Id.* at 731. Indeed, the trial court, faithfully applying that very precedent, had held that the Unruh Civil Rights Act was applicable to the membership decisions of the Boy Scouts. The trial court then held–in a decision squarely in conflict with the New Jersey Supreme Court's ruling below–that the application of the Act to the Boy Scouts was an unconstitutional infringement of the Boy Scouts right of expressive association. *Id.* at 672 (majority opinion). Because Justice Werdegar had concurred with the majority opinion in the most recent of the relevant prior cases, *see Warfield* v. *Peninsula Golf & Country Club*, 10 Cal.4th 594, 630, 896 P.2d 776, 798 (Cal. 1995), and because she gives no indication in her *Curran* concurring opinion that she had changed her view of the *Warfield* holding, she, too, should be understood as believing that the application of the Unruh Civil Rights Act to the Boy Scouts would be constitutionally prohibited. The overly-subtle distinction of existing precedent made by the California Supreme Court should therefore be seen for what it truly is–a recognition by that court that the federal constitution precluded applying the California Unruh Civil Rights Act to groups like the Boy Scouts.

The factual findings of the California courts also conflict with those made by the New Jersey court in the ruling under review. While factual errors normally do not warrant review by this court, *see* Sup.Ct. R. 10, an exception is in order when, as here, different courts make contradictory factual determinations about the same national organization and when, as here, those factual determinations are outcome-determinative in ways that affect the entire organization. *Cf. Quinnipiac*

Council, Boy Scouts of America, Inc. v. *Commission on Human Rights & Opportunities*, 204 Conn. 287, 300, 528 A.2d 352, 359 (1987) ("All of our antidiscrimination law is essentially fact-bound").

As noted by the California Supreme Court, the *Curran* trial court found, after a trial: "that sexual morality is addressed in the Boy Scout Oath and Law under the rubric of 'morally straight' and 'clean'"; "that the Boy Scouts of America as an organization has taken a consistent position that homosexuality is immoral and incompatible with the Boy Scout Oath and Law"; and that "this is the view that is communicated whenever the issue comes up." 17 Cal. 4th at 682.

In stark contrast, the New Jersey Supreme Court found–on its own initiative and in utter disregard of the Boy Scouts' undisputed evidence to the contrary, *see Dale*, 160 N.J. at 613 n.12, 734 A.2d at 1224 n.12–that "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral" and that "[t]he words 'morally straight' and 'clean' do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral." *Id.*, 160 N.J. at 612, 614, 734 A.2d at 1224. As a result of its impromptu "factual" findings, which not only conflict with those of the California trial court but with New Jersey's own trial court in this case, *see id.*, 160 N.J. at 580-81, 734 A.2d at 1206, the New Jersey Supreme Court was able to hold "that Dale's membership does not violate Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [Boy Scouts] existing members' ability to carry out their various purposes." *Id.*, 160 N.J. at 614, 734 A.2d at 1225 (quoting *Rotary Club*, 481 U.S. at 548).

This case involves more than just a question of factual error, therefore. The New Jersey court's "factual" determination has enabled it to avoid the legal mandate of this Court's binding precedent. Moreover, because the Boy Scouts

is a national organization whose members and adult leaders may and often do participate in Boy Scouts activities elsewhere in the country, the New Jersey court is effectively able to impose the legal consequences of its "factual" findings on Boy Scout units operating in other states. In short, even the factual conflict that is present here suggests that a grant of certiorari is warranted in this case.

CONCLUSION

The Boy Scouts' petition for a *writ of certiorari* should be granted.

Respectfully submitted,

JOHN C. EASTMAN
THE CLAREMONT INSTITUTE
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
250 W. First St., Suite 330
Claremont, California 91711

EDWIN MEESE III
Counsel of Record
214 Massachusetts Ave., NE
Washington, D.C. 20002
(202) 546-4400

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

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BRIEF OF AMICUS CURIAE, THE INDIVIDUAL RIGHTS FOUNDATION, IN SUPPORT OF PETITIONERS

PAUL A. HOFFMAN
Counsel of Record
DRACUP & PATTERSON
505 N. Tustin Avenue, Suite 282
Santa Ana, California 92705
(714) 542-3500

PATRICK MANSHARDT
One Bunker Hill Building
601 W. 5th Street, 8th Floor
Los Angeles, California 90071

Attorneys for Amicus Curiae The Individual Rights Foundation

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

2398

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
The Record Below	2
Ruling of Appellate Courts Below	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. STATE-MANDATED ACCEPTANCE OF SELF-IDENTIFYING HOMOSEXUALS AS ROLE MODELS OF BOY SCOUTS' VALUES IMPERMISSIBLY REQUIRES BOY SCOUTS TO ACCEPT SPEECH WHICH IS CONTRARY TO THE VALUES THEY WISH TO CONVEY	6
II. BOY SCOUTS' UNIQUE EMPHASIS ON TEACHING BY EXAMPLE AND BY ROLE MODELING IS ITSELF A FORM OF SPEECH OR EXPRESSIVE CONDUCT PROTECTED BY THE FIRST AMENDMENT	10
III. THE FACT THAT BOY SCOUTS' MEMBERS' OR SPONSORS' VIEWS MAY NOT BE UNANIMOUS DOES NOT DIMINISH BOY SCOUTS' RIGHT TO EXCLUDE CONTRARY ROLE MODELS BECAUSE THE RIGHT OF SPEAKER'S AUTONOMY IS NOT LIMITED TO CONSISTENT, DISTINCT OR ARTICULATE MESSAGES	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Dale v. Boy Scouts of America and Monmouth Council, Boy Scouts of America, 160 N.J. 562, 734 A.2d 1196 (1999) 4, 6, 9-10, 17

High Tech Gays v. Defense Ind. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) 7

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) ..... *passim*

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 14

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) 14

Spence v. Washington, 418 U.S. 405 (1974) 11

Texas v. Johnson, 491 U.S. 397 (1989) 5, 11-15

United States v. O'Brien, 391 U.S. 367 (1968) 14

STATUTES:

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William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route To Equality? Some Reflections on the Construction of the 'Hate-Speech' Debate from a Lesbian/Gay Perspective*, in *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, And Civil Liberties* (1994) 7

TABLE OF AUTHORITIES—Continued

Page

The Guide to Gifts and Bequests, 1995-1997: A Directory of Philanthropically Supported Institutions (1995) 18

Evan Wolfson & Robert S. Mower, *When the Police Are In Our Bedrooms, Shouldn't The Courts Go In After Them?: An Update On The Fight Against "Sodomy" Laws*, 21 Fordham Urb.L.J. 997 (1994) 7

IN THE

Supreme Court of the United States

No. 99-699

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE, THE INDIVIDUAL RIGHTS FOUNDATION, IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America ("Petitioners" or "Boy Scouts") and Respondent James Dale ("Respondent" or "Dale") have each consented to the filing of this amicus curiae brief [1] by the Individual Rights Foundation ("IRF").

The IRF was founded in 1993 and is dedicated to educating the public about the importance of the First

[1] Counsel of record, Paul A. Hoffman, authored this amicus curiae brief in its entirety. No person or entity, outside of amicus curiae, The Individual Rights Foundation, its members or its counsel of record, has made a monetary contribution to the preparation or submission of the present amicus curiae brief. The written consents of Petitioners and Respondent have been filed with the Clerk of the Court.

Amendment's free speech and associational guarantees. To further its educational goals, the IRF conducts seminars and other public events, publishes newsletters, and files amicus curiae briefs in appellate cases involving First Amendment speech and associational rights issues. The IRF seeks to resist attempts from anywhere along the political spectrum to limit public expression because such attempts pose a serious threat both to cultural diversity and to our free form of government.

STATEMENT OF THE CASE

This amicus adopts the Statement of the Case set forth in the Petition for a Writ of Certiorari ("Petition") by Boy Scouts.[2] Nonetheless, the IRF wishes to highlight a few points in the record below.

The Record Below

It is important at the outset to focus on what is not contained in the record below. There is no evidence that Boy Scouts bar anyone based on mere status, unannounced and unbroadcasted, as homosexuals. The record below reveals that Boy Scouts are not interested in the *private* sexual status of any of their adult leaders, but only in their *public* expressions regarding sexuality, which may affect their ability to effectively teach or role model *Scouting's* beliefs regarding traditional morality. This is shown by Dale's own admission that he is "aware of other homosexuals active in Scouting against whom no adverse action has been taken because they have not 'gone public' with their sexual orientation." (160a.) This is consistent with Boy Scouts' position that "Boy Scouting makes no

[2] Numbers preceded by "A." refer to pages in the record before the New Jersey Supreme Court; numbers preceded by "P." refer to the Petition for a Writ of Certiorari; numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition.

effort to investigate the sexual orientation of members or leaders." (P.4 n.2) Nor is there any evidence in the record below that Boy Scouts ever asked Dale or any other applicant about his or her private sexual life.

What the record below does show is that Boy Scouts' membership policies are concerned with *public expression*. Boy Scouts' policy excludes only "avowed homosexuals." (A.1957.) Boy Scouts were interested in Dale's *public* statements and conduct only because of the obvious impact such behavior would have on his ability to serve as a role model for Scouting's preferred values. (207a; 223a.)

Citing an extensive review of material, the Superior Court of New Jersey, Chancery Division ("Chancery Division"), expressly found that "from its inception Scouting has excluded from membership and adult leadership any person *who openly declares* himself a homosexual and that such policy has continued unchanged, to the present . . . . It is the firm position of BSA that [homosexual] conduct is not 'morally straight' under the Scout Oath nor is it 'clean' under the Scout Law." (192a) (emphasis added).

There is no evidence in the record that anyone in Boy Scouts knew of Dale's homosexuality, or would likely ever have known, but for Dale's extraordinary efforts to *publicly broadcast* his views as a homosexual advocate to a reporter for *The Newark Star-Ledger*, who identified Dale as Co-President of the Rutgers University Lesbian/Gay Alliance. (A.1946.) Boy Scouts became aware of Dale's homosexuality solely as a result of his voluntary newspaper interview. (A.3576.) Thus, had Dale not taken efforts to *publicize* his views as a homosexual, his

membership in Boy Scouts would not have been revoked. Based thereon, the Chancery Division ruled that Boy Scouts could revoke his membership.

Ruling of Appellate Courts Below

The Superior Court of New Jersey, Appellate Division, reversed in a split decision (Landau, J., dissenting), concluding, among other things, that: (1) Boy Scouts of America is a place of public accommodation within the meaning of the New Jersey Law Against Discrimination ("LAD") (124a); (2) enforcement of the LAD is unrelated to the suppression of ideas because it will not significantly affect Boy Scouts' ability to carry out expressive purposes (136a); and (3) Boy Scouts failed to show that the policy of excluding avowed homosexuals was a collective viewpoint that brought members together. (143a-144a.)

The New Jersey Supreme Court ("NJSC") affirmed, by ruling, among other things, as follows:

> We find that the LAD does not violate Boy Scouts freedom of expressive association because the statute *does not have a significant impact on* Boy Scout members' ability to associate with one another in *pursuit of shared views.* The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scouts *members do not associate for the purpose of disseminating the belief that homosexuality is immoral*; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and *Boys Scouts include sponsors and members who subscribe to different views in respect of homosexuality.*

Dale v. Boy Scouts of America, 160 N.J. 562, 612, 734 A.2d 1196 (1999) (emphasis added).

SUMMARY OF ARGUMENT

Your amicus respectfully submits that several constitutional errors by the NJSC demand this Court's review in order to avoid serious erosion of the freedoms of speech and expressive association:

(1) The NJSC's decision below erroneously concluded that discrimination based on self-identifying *speech* is the same as discrimination based on status. However, under this Court's First Amendment jurisprudence, the fact that homosexual "coming out" speech is "self-identifying speech" does not grant the State of New Jersey a greater right to regulate the content of private speech or diminish the right of expressive associations to exclude those whose self-identifying speech is contrary to their expressive purposes.

(2) Scout leader role modeling constitutes symbolic speech and expressive conduct under *Texas v. Johnson*, 491 U.S. 397 (1989) because the record below shows that Boy Scouting intends to and does effectively convey specific messages and values (i.e., the principles embodied in the Boy Scout Oath and Law) by means of role modeling. Boy Scouts' role modeling is founded on the belief that a Scout leader's example is more effective than the spoken word in transmitting moral values to young Scouts. Therefore, requiring the appointment of someone whose public example runs counter to the organization's values alters both the form and content of Boy Scouts' intended speech and constitutes state suppression of free expression.

(3) The NJSC mistakenly held that only those messages in which an expressive association shares a "single view" which functions as "a unifying associational goal of the organization" can justify exclusion of those representing contrary viewpoints. Limiting the right of expressive

association to only those few viewpoints that bring the entire membership together would not only eviscerate this Court's opinion in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), but would all but destroy the right of expressive association for large associations, including political parties, which cannot meet this test.

ARGUMENT

I. STATE-MANDATED ACCEPTANCE OF SELF-IDENTIFYING HOMOSEXUALS AS ROLE MODELS OF BOY SCOUTS' VALUES IMPERMISSIBLY REQUIRES BOY SCOUTS TO ACCEPT SPEECH WHICH IS CONTRARY TO THE VALUES THEY WISH TO CONVEY

The NJSC's opinion attempts to distinguish the facts presented in this case from this Court's ruling in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), by stating that "Dale's status as a scout leader is not equivalent to a group marching in a parade" and that Boy Scout leadership is not a "form of 'pure speech' akin to a parade." *Dale, supra*, 160 N.J. at 623. However, the applicability of the speech principles announced in *Hurley* cannot be so easily dismissed.[3] As shown below, this Court should

[3] The NJSC's opinion tries to distinguish *Hurley* because "Dale does not come to Boy Scout meetings 'carrying a banner.'" *Dale, supra*, 160 N.J. at 623. The NJSC's cramped reading of *Hurley leads to a strange anomaly:* Only if Boy Scouts obtain a permit and march in a *parade* may they lawfully exclude leaders, like Dale, who may want to wear a sign in such a parade stating "I am a gay Scoutmaster," but Boy Scouts may not lawfully exclude those same individuals at any other Scouting event, such as a Scout-O-Rama, a Boy Scout Jamboree, or a Scout meeting, who may stand and announce that "I am a gay Scoutmaster." This example illustrates how the speech principles announced in *Hurley* are broad and cannot be limited to just one narrow category of speech (i.e., parades).

grant the Petition in this case because serious issues regarding the applicability of *Hurley* are clearly raised.

Since homosexuality is generally a latent characteristic, unlike race and gender,[4] homosexuals who wish to openly proclaim their homosexuality must, by definition, *send a message to* others. Such a message constitutes speech and is inherently expressive. *See, e.g.*, Nan D. Hunter, et al., *The Rights of Lesbians and Gay Men: The Basic ACLU Guide to a Gay Person's Rights* 9 (3d ed. 1992) ("*coming out speech ought to be recognized by the courts as political expression*") (emphasis added); David Cole & William N. Eskridge, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L.Rev. 319, 325 (1993) ("An *admission of sexual identity is expressive* in the strictest sense of the word.") (emphasis added); Jose Gomez, *The Public Expression of Lesbian/Gay Personhood As Protected Speech*, 1 Law & Ineq. J. 121 (1983).[5] One of the messages of such speech is that the homosexual lifestyle is acceptable. Comment, *Expression By Associa-*

[4] "Homosexuality is . . . behavioral and hence is fundamentally different from traits such as race, gender, or alienage . . . ." *High Tech Gays v. Defense Ind. Sec. Clearance Office*, 895 F.2d 563, 573 (CA9 1990). *See also* William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the 'Hate-Speech' Debate from a Lesbian/Gay Perspective*, in *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, And Civil Liberties* 283 (1994) ("sexual orientation is not, like race or gender, visually identifiable: individuals must take on a lesbian/gay identity through some speech or speech act known as 'coming out'").

[5] One of Dale's attorneys, Evan Wolfson, admits that there are "inherently political dimensions to being *openly* gay or lesbian." (Evan Wolfson & Robert S. Mower, *When the Police Are In Our Bedrooms, Shouldn't The Courts Go In After Them?: An Update On The Fight Against "Sodomy" Laws*, 21 Fordham Urb. L.J. 997, 1025 n.100 (1994) (emphasis added).)

tion: Towards Defining An Expressive Association Defense In Unruh-Based Sexual Orientation Discrimination Actions, 33 Santa Clara L. Rev. 467, 510 (1993) ("it seems that an individual's decision to publicly express his or her sexuality *is a personal affirmation that such conduct is legitimate or acceptable*") (emphasis added).

The issue of whether a direct burden would be placed on Boy Scouts' First Amendment rights by forcing them to accept Dale's speech, not just his status, is most clearly raised in *Hurley*. The parade organizers in *Hurley* represented that they reflected "traditional religious and social values" and wished to exclude "groups with sexual themes." *Hurley*, 515 U.S. at 562. Although participation by the Irish-American Gay, Lesbian & Bisexual Group of Boston ("GLIB") was also expressive in character, *id.* at 570, the only *public* message manifested at the parade by GLIB was its own *self-identifying speech*, when it "marched behind a shamrock-strewn banner with the simple inscription 'Irish American Gay, Lesbian and Bisexual Group of Boston.'" *Id.* Based on these facts, this Court concluded that GLIB had sought to "communicate its ideas as part of the existing parade." *Id.* This alone was enough to find an implied message that conflicted with the wishes of the parade organizers. The same conflict is inherent in the present case.

Openly gay persons who apply to be Scoutmasters when they know that Boy Scouts take a position against alternative sexual lifestyles [6] are, in essence, *requesting that Boy Scouts accept their political message or speech,* not just their sexual orientation status. When public

[6] For example, it is hardly disputable that Boy Scouts have the right to reject other messages or speakers who seek to use Scouting as a vehicle to "legitimize" other sexual lifestyles, such as prostitution, polygamy, adultery or unmarried heterosexual cohabitation.

accommodation statutes, however well intentioned, are used to require acceptance, the state is clearly compelling acceptance of private political speech, directly contrary to this Court's holding in *Hurley*. As stated by Judge Landau in his dissent below in the Superior Court, Appellate Division: "This principle is not changed merely because the altered message is implicitly, but no less strongly, conveyed by example rather than by verbal articulation or by signs." (153a.) Accordingly, the present Petition plainly raises the issue of whether the rule of "speaker's autonomy" established by this Court in *Hurley* is being threatened by misapplication of state public accommodation laws.

Moreover, the constitutional conflict raised by the Petition is not laid to rest by the counter-argument that, since homosexuals are known almost exclusively by their self-identifying speech, or because homosexual status cannot be separated from homosexual speech, therefore, a homosexual person cannot be excluded based on his or her "coming out" speech. *See, e.g., Dale, supra,* 160 N.J. at 641 (concurring opinion of Justice Handler).[7] This argument only begs the very question at issue in this case: whether self-identifying *speech* is interfering with Boy Scouts' rights of speech and expressive association.

Speech is speech, whether it is self-identifying speech or some other type of speech. Accordingly, if homosexual status really cannot be separated from homosexual self-identifying speech, then forcing expressive associations opposed to the homosexual lifestyle to accept openly

[7] This counter-argument clearly fails if carried to its logical conclusion. For example, most Catholics also cannot be identified other than by their self-identifying speech. However, this fact does not give them a right to join a Protestant or Jewish fraternal organization.

homosexual persons is also, *a priori,* forcing them to accept such persons' speech. Unless this Court is willing to carve out a new exception to First Amendment jurisprudence for self-identifying speech, it seems self-evident that homosexuals do not have a special right above other Americans to compel private expressive associations to accept their speech.

By the same token, if homosexual status truly cannot be separated from homosexual speech, then an expressive association's rejection of an openly homosexual person is not necessarily based on a rejection of such person's status. It may be legitimately based on rejection of the message of such person's "coming out" speech. Accordingly, one of the basic assumptions on which rests much of the reasoning of the NJSC's ruling, that Boy Scouts revoked Dale's membership "solely because of his status as a homosexual" (160 N.J. at 624), is very doubtful. Therefore, the Petition squarely raises the serious constitutional issue of whether Boy Scouts' rejection of openly homosexual persons like Dale is not necessarily an act of prohibited discrimination based on status but is logically related to exclusion of adverse ideological speech which would inherently subvert the expressive association.

II. BOY SCOUTS' UNIQUE EMPHASIS ON TEACHING BY EXAMPLE AND BY ROLE MODELING IS ITSELF A FORM OF SPEECH OR EXPRESSIVE CONDUCT PROTECTED BY THE FIRST AMENDMENT

In addition to raising the issue of whether Boy Scouts should be required to accept someone else's speech, the Petition raises a second but equally important issue: whether the NJSC's ruling alters or limits Boy Scouts' own affirmative speech communicated through the medium of role modeling.

In *Hurley, supra,* this Court stated that "the Constitution looks beyond written or spoken words as mediums of expression." 515 U.S. at 569. For example, parading is expressive because it is not simply movement from one place to another but is a form of "making some sort of collective point, not just to each other but to bystanders along the way." *Id.* at 568.

Because expressive *conduct,* and not just words, convey a message which constitutes speech, the First Amendment protects expressive associations which limit the content of their speech by their choice of role models. Common examples of such expressive activity include appointment of church ministers and youth counselors, who often teach more *by their example* than by their preaching.

In *Texas v. Johnson,* 491 U.S. 397, 403-405 (1989), this Court reiterated its two-part test for determining whether a state regulation, as applied to conduct alleged to be expressive, violates the First Amendment: (1) whether the conduct itself is expressive, as shown by an intent to convey a particularized message which is likely to be understood by those viewing it, and (2) if so, whether the state's interest in regulating such conduct is "related to the suppression of free expression."

With respect to the first prong of *Texas v. Johnson,* the record below reveals a strong case for finding expressive conduct because there can be little doubt that *Boy Scouting intends to convey a particularized message (i.e., the principles embodied in the Boy Scout Oath and Law) through its choice of role models* and that " 'the likelihood was great that the message would be understood by those who viewed it.' " *Id.* at 404 (citing *Spence v. Washington,* 418 U.S. 405, 410-411 (1974)). The communicative intent of Boy Scouts is clearly stated in their Mission Statement: "It is the mission of Boy Scouts . . . *to instill*

values in young people . . . . The values we strive *to instill* are based on those found in the Scout Oath and Law." (A.2238) (emphasis added).

Boy Scouts control the messages and values instilled in young Scouts, in part, by excluding individuals who would *express views or model behavior contrary to Scouting's views.* The Chancery Division below expressly found that "*Scoutmasters are* teachers and *role models* of 'what a man should be like' *in all aspects* of male adulthood." (207a) (emphasis added). It further found that "[t]o be an adult leader of Scouting one must agree to be bound not only by the Scout Oath or Promise but also by the Declaration of Religious Principles." (206a.) Such a leader "must possess the moral, educational, and emotional qualities deemed necessary by BSA for leadership before he will be commissioned." (222a.) The Chancery Division concluded that requiring Dale to be admitted as a Scout leader "would be devastating to the essential nature of scouting" partly because a role model's example is "critical" to Scouting's mission of conveying the values of the Scout Oath and Law. (223a.) These facts clearly show that there is an *intent* by Boy Scouts to communicate a *specific message* through role modeling.

The record below also shows a great likelihood that those viewing the conduct would understand the message. Boy Scout literature is replete with statements that boys best *understand* the message of Scouting through role modeling. The Official Scoutmaster Handbook, which Dale had when he registered as a Scout leader, stated:

> In his quest for manhood, every boy needs contact with men *he can copy*. Living, breathing men provide *models* of what manhood is like. *Boys copy whatever models are available to them* . . . . You are providing a good *example* of what a man should be like. What you do and *what you are* may be worth a thousand lectures and sermons.

(A.3200) (emphasis added). The Handbook further stated: "*What you are* speaks louder than what you say." (A.3201) (emphasis added). The Scoutmaster Handbook also advises Scout leaders: "When you're on a Scout camp out, remember that *boys will look up to you as a role model—someone they want to* respect and *copy*." (A.2685) (emphasis added). "Boys learn from the *example* set by their adult leaders." (A.2652) (emphasis added).

Recognizing the power of example on young Scouts, Dale himself admitted that it was his responsibility "to set an example of living by the Scout oath and law . . . ." (A.3333.) He also admitted that, in order to effectively instill Scouting values in youth, it is important for a Scout leader "*never to do or say anything inconsistent* with the values embodied in the Scout Oath or the Scout Law." (A.1914) (emphasis added).

Evidence in the record indicated the drastic effect that admission of known or avowed homosexuals would have on the communicative aspects of role modeling and on young Scouts' *understanding* of what it means to be morally straight and clean. (A.3226-A.3232.) Professor Slavings described the various mechanisms by which adult leaders' role modeling contributes to value transmission and showed how each method would be weakened and disrupted if someone like Dale were placed in the position of adult leader. (*Id.*) These facts show that young Scouts *understand* the messages of role models.

Since the record below shows that Boy Scouts' role modeling is clearly expressive in character, the second prong of *Texas v. Johnson* requires a determination

"whether the State's regulation is related to the suppression of free expression." 491 U.S. at 403. If the state's interest is related to suppression of ideas, then strict scrutiny is the standard of review. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Even a regulation which is intended to vindicate a compelling state interest must be shown to be "unrelated to the suppression of free expression" and "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Id.*

The NJSC's ruling results in the suppression of expression because Dale's forced admission to Boy Scouts would alter both the form and content of Boy Scouts' expressive role modeling. In *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), this Court stated that "[m]andating speech that a speaker would not otherwise make *necessarily alters the content* of the speech." 487 U.S. at 795 (emphasis added). Instead, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say *and how to say it* . . . . To this end, the government, even with the purest of motives, may not substitute its judgment as to *how* best to speak . . . ." *Id.* at 790-791 (emphasis added). Moreover, "[g]overnmental restraint on [speech] need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

In *Texas v. Johnson*, this Court, while recognizing the special place of the flag in our tradition and history, expressly declined to create an exception under the First Amendment that would allow the government to restrict expressive conduct to orthodox viewpoints. 491 U.S. at 418. The Court also suggested that "other concepts virtually sacred to our Nation as a whole," such as the state's interest in preventing discrimination, may be questioned "in the marketplace of ideas" and cannot be used to override the supremacy of the First Amendment. *Id.*

This case raises serious issues of state-mandated censorship precisely because of the controversial nature of Boy Scouts' definition of what is "morally straight." "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414. "[T]hat the government may not prohibit expression simply because it disagrees with its message, is *not dependent on the particular mode in which one chooses to express an idea.*" *Id.* at 416 (emphasis added). Accordingly, the government may not "ensure that a symbol be used to express only one view of that symbol or its referents." *Id.* at 417.

The role of Scoutmaster is clearly symbolic in large measure. Hence, to deny the symbolic nature of Boy Scouts' role modeling arguably limits the number of messages that can be conveyed through Scoutmaster role modeling and amounts to a limitation on speech. "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries." *Id.*

The present Petition clearly raises the issue that Boy Scouts seek to control the messages they send to youth and the public through their unique emphasis on role modeling. Choosing a role model in such a context is just as vital to Boy Scouts' expressive purposes as choosing their speakers or their speech at a Court of Honor. Thus, when the state seeks, as in this case, to dictate who may occupy role modeling positions, there is a great

danger that it may be substantially altering both the *form* and the *content* of such expression.

It is precisely in the area of governmental regulation of expressive conduct through public accommodation statutes that the danger of ideological constraint is high, especially if the nexus between the expressive nature of the activity and the interest being regulated is not well understood. Since Boy Scouts seek to teach their messages and values *by quiet role modeling* and not by boisterous debate, there is a great danger that outsiders (including the state) may interpret such a position as no position at all, as the NJSC has done in this case. However, this does not mean that such quiet advocacy is not worthy of protection under the First Amendment.

The danger of state-mandated orthodoxy is especially high in this case because there remains a strong likelihood that requiring admission of openly gay Scoutmasters will confuse both the Scouts and the community as to what message Boy Scouts are really sending. For example, even if openly gay persons promised to teach only Boy Scouts' viewpoint on sexual morality, their contradictory example *could lead to a logical conclusion in the minds of young Scouts* and other observers of *"do as I say, not as I do."* Such a message would completely undermine the pedagogical value of role modeling as well as destroy the moral teaching against homosexual conduct. Therefore, the state's attempt to dictate appropriate role models in this case is little different than, for instance, a state regulation requiring non-celibates to be admitted as Catholic priests. Accordingly, there is a great likelihood that the NJSC's ruling, if left intact, will be disruptive of core First Amendment expression.

III. THE FACT THAT BOY SCOUTS' MEMBERS' OR SPONSORS' VIEWS MAY NOT BE UNANIMOUS DOES NOT DIMINISH BOY SCOUTS' RIGHT TO EXCLUDE CONTRARY ROLE MODELS BECAUSE THE RIGHT OF SPEAKER'S AUTONOMY IS NOT LIMITED TO CONSISTENT, DISTINCT OR ARTICULATE MESSAGES

The NJSC's decision below also demands review because it denigrates the principle established in *Hurley* that the right of speaker's autonomy is not limited to consistent, distinct or articulate messages. The NJSC appears to have mistakenly assumed that all or most members of Boy Scouts must have as a "shared goal" the "view that homosexuality is immoral" in order for that viewpoint to achieve any constitutional protection. *Dale, supra,* 160 N.J. at 613. The NJSC concluded that "Boy Scouts' religious sponsors differ in their views about homosexuality" and, therefore, "it appears that *no single view on this subject functions as a unifying associational goal* of the organization." *Id.* at 615 (emphasis added). The NJSC's limited view of the rights of speech and expressive association in this regard were clearly rejected in *Hurley*.

Notwithstanding the fact that the *Hurley* parade had "multifarious" and "conflicting" voices, this Court ruled that it was, nevertheless, still an expressive association entitled to First Amendment protection. *Hurley,* 515 U.S. at 562, 569. Unlike Boy Scouts, the parade organizers "had no written criteria and employed no particular procedures for admission, voted on new applications in batches, had occasionally admitted groups who simply showed up at the parade without having submitted an application, and did 'not generally inquire into the specific messages or views of each applicant.'" *Id.* at 562 (citations omitted). These facts did not diminish their First Amendment right to exclude from the parade individuals

bearing an undesirable message. Since the record in this case discloses that Boy Scouts are much more selective and have a clearer sense of expressive purposes, the protection from government interference arguably should be greater here.

Furthermore, there are important policy reasons why the right of expressive association should not be limited to viewpoints in which the members of an association agree. As a practical matter, such a limitation would so limit the right of expressive association as to make it meaningless to any large organization. There are many large private groups in this country which lack "genuine selectivity" and contain many members whose "messages" contradict each other.[8] For example, only two generations ago, the Democratic Party had some members who wanted to enact extensive civil rights legislation (such as Senators Hubert Humphrey and Paul Douglas) and other members who believed with equal fervor in segregation (such as Senator Richard Russell). The Democratic Party also did not have (and still does not have) a consistent way of selecting its members. Merely because the Democratic Party members who believed in segregation as well as those who wanted extensive civil rights laws enacted does

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[8] For example, the American Bible Society, American Mizrachi Women, Inc., Baptist World Alliance, Catholic Relief Services, Christian Records Services, Inc., Ecumenical Association For Housing, Episcopal Community Services, Girl Scouts of the U.S.A., Graduate Theological Union, Jewish Community Centers Association of North America, The Jerusalem Fund of Aish HaTorah, Jewish Vocational and Career Counseling Service, Lutheran World Relief, Inc., Masonic Lodges, The Salvation Army, The Society For The Propagation Of The Faith, Union of American Hebrew Congregations, Union Rescue Mission, and Young Women's Christian Association. *See The Guide to Gifts and Bequests, 1995-1997: A Directory of Philanthropically Supported Institutions* (1995) at 23-239.

not mean that the First Amendment right of expressive association does not apply to the Democratic Party and its chosen platform. This Court in *Hurley* clearly rejected the view limiting expressive association rights to small homogeneous groups with narrow viewpoints or rigid rules of selection. Thus, the NJSC's decision below deserves review because it directly conflicts with this Court's opinion in *Hurley* regarding the applicability of expressive association rights to large and diverse private associations.

CONCLUSION

This amicus respectfully submits that this Court should overturn efforts from any part of the political spectrum to compel ideological orthodoxy, especially when it is directed against expressive associations. Far from vindicating the rights of homosexuals, a ruling which undermines the right of expressive association in this case may lay the groundwork for denial of First Amendment rights of all citizens, including First Amendment rights of homosexuals.

Granting certiorari in this case and reversing the ruling below will not lead to a general undermining of legal protection for gays and lesbians. Hotels, restaurants, and other commercial establishments rarely, if ever, exist for an expressive purpose. Unlike Boy Scouts, the purpose of most commercial establishments is to make a profit, not a moral point. It simply strains credibility to suggest that most, or even many, businesses exist to teach their customers, clients, or membership the virtues of traditional fatherhood and family values. Therefore, their conduct can be constitutionally regulated in conformity with the civil rights laws.

However, by refusing to grant the Petition in this case, the freedom of all private expressive associations to speak and associate for the promotion of their expressive pur-

poses will be substantially chilled. Therefore, your amicus respectfully urges this Court to grant the Petition in this case in order to avoid erosion of important First Amendment rights of all expressive associations.

Respectfully submitted,

PAUL A. HOFFMAN
Counsel of Record
DRACUP & PATTERSON
505 N. Tustin Avenue, Suite 282
Santa Ana, California 92705
(714) 542-3500

PATRICK MANSHARDT
One Bunker Hill Building
601 W. 5th Street, 8th Floor
Los Angeles, California 90071

Attorneys for Amicus Curiae
The Individual Rights
Foundation

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BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of New Jersey

BRIEF OF PUBLIC ADVOCATE OF THE UNITED STATES AND LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

Attorneys for
Public Advocate of the
United States and
Lincoln Institute for
Research and Education

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

**Counsel of Record*
November 26, 1999

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT

INTRODUCTION 3

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDING AND PRINCIPLES IN *HURLEY* 4

II. THE DECISION BELOW CONFLICTS WITH THE FIRST AMENDMENT'S RIGHT TO ASSEMBLE 6

III. THE DECISION BELOW CONFLICTS WITH THE CONSTITUTIONALLY-PERMISSIBLE LIMITS ON FREEDOM OF ASSOCIATION ... 11

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Board of Dir. Of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) ..... 3, *passim*

Burson v. Freeman, 504 U.S. 191 (1992) 14

Cox v. Louisiana, 379 U.S. 536 (1965) 12

Dale v. Boy Scouts of America, 160 N.J. 562, 734 A. 2d 1196 (1999) ..... 3, *passim*

DeJonge v. Oregon, 299 U.S. 353 (1937) 8, 9, 11

Edwards v. South Carolina, 372 U.S. 229 (1963) 19

Griffin v. Strong, 983 F. 2d 1544 (10th Cir. 1993) 6

Hague v. CIO, 307 U.S. 496 (1939) 8, 9

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) ..... 2, *passim*

NAACP v. Alabama, 357 U.S. 449 (1958). 10, 12

NAACP v. Button, 371 U.S. 415 (1963) 10, 11, 13

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 10

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988). 3

Roberts v. United States Jaycees, 468 U.S. 609 (1984) ..... 3, *passim*

Rosenberger v. University of Virginia, 515 U.S. 819 (1995) 15

Sanitation and Recycling Industry, Inc. v. City of New York, 107 F. 3d 985 (2d Cir. 1997) 6

Shapiro v. Thompson, 394 U.S. 618 (1969) 13

Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105 (1991) 13

Thomas v. Collins, 323 U.S. 516 (1945) 9, 11

United States v. Cruikshank, 92 U.S. 542 (1876) 8, 9

Winik-Nystrup v. Manufacturers Life Insurance Co., 8 F. Supp. 2d 1 (D. Conn. 1998) 6

Page

U.S. CONSTITUTION

Amendment I ..... 2, *passim*

Amendment XIV 10

MISCELLANEOUS

Article XVI of the August 16, 1776 Constitution of Pennsylvania, reprinted in Sources of Our Liberties 331 (Perry, ed., American Bar Foundation, 1972) 8

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Jay, K., and Young, A., *The Gay Report* (New York: Summit Books, 1979) 17

Masters, W., and Johnson, V., *Human Sexual Inadequacy* (Boston: Little, Brown and Company, 1970) 18

Reisman, J., "Partner Solicitation Language As A Reflection Of Male Sexual Orientation" (Collected Papers from the NARTH Annual Conference, Saturday, 29 July 1995) 17

No. 99-699

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OCTOBER TERM, 1999

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BRIEF OF PUBLIC ADVOCATE OF THE UNITED STATES AND LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Amici curiae, Public Advocate of the United States and the Lincoln Institute for Research and Education, are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.[1] Both *amici* were established in the District of Columbia within the past twenty years for public education purposes

[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

related to participation in the public policy process. For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. In the past, the *amici* have conducted research on other issues involving constitutional interpretation and filed *amicus curiae* briefs in other federal litigation involving constitutional issues.[2]

SUMMARY OF ARGUMENT

The decision below is in conflict with this Court's unanimous decision in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995). It also conflicts with this Court's rulings recognizing a constitutional right of association independent of "intimate" and "expressive" associations. Finally, it conflicts with this Court's rulings limiting governments to the imposition of content-neutral time, place and manner regulations upon the right of the people peaceably to assemble. If allowed to stand, the decision below will not only spawn confusion regarding the proper application of the First Amendment to claims of freedom of association, but will jeopardize fundamental constitutional principles long established by this Court.

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[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the various parties, have been submitted for filing to the Clerk of Court.

ARGUMENT

INTRODUCTION

On August 4, 1999, the New Jersey Supreme Court ruled that the Monmouth Council of the Boy Scouts of America (hereinafter "Boy Scouts") was a "place of public accommodation" within the meaning of the state's law against discrimination. Having so ruled, the court concluded that the Boy Scouts could not refuse to allow a publicly professed homosexual man from serving as a Scoutmaster because New Jersey law prohibits discrimination based upon "affectional or sexual orientation" in places of public accommodation.[3]

The Boy Scouts failed to convince the New Jersey Supreme Court that it fit within one of three statutory exceptions, and failed to persuade the court that the First and Fourteenth Amendments protected it from being compelled to accept a man in a leadership position that it viewed as antithetical to the Boy Scout Oath and Law. Based on its reading of this Court's opinions in Roberts v. United States Jaycees, 468 U.S. 609 (1984), Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987), and New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988), the New Jersey Supreme Court rejected the Boy Scouts' freedom of association argument. The state court found that the Boy Scouts failed to demonstrate "a protectable intimate association right under the First Amendment" and, further, that the Scouts' "right of

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[3] *See* Dale v. Boy Scouts of America, 160 N.J. 562, 734 A. 2d 1196 (1999). That opinion is included at pages 1a-101a of Appendix A to the Petition for a Writ of Certiorari herein. Further references to that opinion in this brief will be designated, with the appropriate appendix page reference, as "N.J. Op."

expressive association" would not be affected in any "significant way." N.J. Op., pp. 50a, 56a.

Moreover, the New Jersey justices found that New Jersey had a "compelling interest ... to eliminate the destructive consequences of [sexual orientation] discrimination from our society," which, they observed, the State legislature had found to "menace ... the institutions and foundations of a free and democratic state." N.J. Op., p. 62a. Because of their opinion that New Jersey's Law Against Discrimination based upon "affectional and sexual orientation" was one designed to combat "ignorance and prejudice" founded on nothing but "'archaic' and 'stereotypical notions' about homosexuals," the justices concluded that the Boy Scouts' First and Fourteenth Amendment rights could be "abridged" if necessary to accomplish the state's anti-discrimination purpose. *Id.*, pp. 62a-64a.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDING AND PRINCIPLES IN *HURLEY.*

As petitioners have ably demonstrated, the decision below directly conflicts with this Court's unanimous decision in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995). In Hurley, this Court reversed the Massachusetts Supreme Judicial Court, holding that requiring private organizers of a parade to permit a gay rights group to march in the parade violated the organizers' First Amendment rights. Ignoring the balancing test utilized in Roberts v. United States Jaycees, 468 U.S. 609 (1984), this Court determined that the state's public accommodations law, as applied to South Boston's St. Patrick's Day Parade, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his message." Hurley, *supra*, 515 U.S. at 573.

Applying the lessons of Hurley, the New Jersey Supreme Court likewise should have determined that the petitioners must not be forced into changing the Boy Scouts' message by requiring them to include an individual as a member and leader whose avowed homosexuality is at odds with that message. Nevertheless, that court decided otherwise, based in part on its disapproval of the Boy Scouts' message. *See* N.J. Op., pp. 58a-62a, 64a-67a. In Hurley, this Court avoided basing its decision on its approval or non-approval of either party's message, relying on the time-honored speech principle that "shield[s] ... those choices of content that in someone's eyes are misguided, or even hurtful." Hurley, *supra,* 515 U.S. at 574.

The same standard of review and a similar analysis should obtain in this case. Not only is respondent's avowed homosexual identity inconsistent with the Boy Scouts' external message, his role as a Boy Scout leader would interfere with the internal communication of that message. As this Court observed in Hurley, marchers in a "parade" make "some sort of collective point ... to each other" as well as "to bystanders along the way." *Id.*, 515 U.S. at 568. Thus, the right of "speaker autonomy" does not turn on the existence of "a narrow succinctly articulable message" to outsiders, but upon the absolute right to select the "contingents to make a parade...." *Id.*, 515 U.S. at 569-70.

The New Jersey Supreme Court completely missed this aspect of the First Amendment, denying to the Boy Scouts the right to select the "contingents" to constituting a Boy Scout troop, solely because, in the court's opinion, the Boy Scout Oath and Law had failed to "disseminate" to outsiders a concrete and specific-enough message "that homosexuality is immoral...." *See* N.J. Op., p. 64a. According to Hurley, it is not for the courts or any other government official to grant or

deny First Amendment rights "based on the content" of what is, or is not, said. Hurley, *supra,* 515 U.S. at 575, 579.

Without question, the New Jersey courts below misapplied this Court's ruling in Hurley, opting instead to apply a different set of rules governing "freedom of association" purportedly derived from a trilogy of this Court's opinions beginning with Roberts v. United States Jaycees, *supra.* The New Jersey Supreme Court applied these cases not only in conflict with Hurley, but in conflict with the original text of the First Amendment and this Court's traditional decisions protecting the right of association that pre-dated Roberts. Such conflicts provide additional reasons for this Court to grant the Boy Scouts' petition for review.

II. THE DECISION BELOW CONFLICTS WITH THE FIRST AMENDMENT'S RIGHT TO ASSEMBLE.

In Roberts v. United States Jaycees, *supra,* 468 U.S. at 522, this Court identified the First Amendment "right of association" "as implicit in the right to engage in activities protected by" that Amendment. Thus, this Court, in Roberts, treated "the right of association" as "correlative" to such express rights as "freedom to speak, to worship and to petition the government for redress of grievances...." *Id.* As a "correlative" right, some lower courts, citing Roberts, have insisted that any person who claims a First Amendment constitutional right to associate must claim and prove his right to an "intimate association" or must demonstrate that the association is for "expressive purposes." *See, e.g.*, Sanitation and Recycling Industry, Inc. v. City of New York, 107 F. 3d 985, 996 (2d Cir. 1997); Griffin v. Strong, 983 F. 2d 1544, 1546 (10th Cir. 1993); Winik-Nystrup v. Manufacturers Life Insurance Co., 8 F. Supp. 2d 1, 10-23 (D. Conn. 1998). That is precisely what the New Jersey Supreme Court did in this case.

In a section of the opinion below labeled, "Freedom of Expressive Association," the New Jersey justices conducted their First Amendment analysis of the Boy Scout policy with respect to open, avowed homosexuals **solely** in relation of that policy to the "dissemination" of the Boy Scout message:

> We find that the LAD [Law Against Discrimination] does not violate Boy Scouts' freedom of expressive association because the statute does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views. The organization's ability to **disseminate** its message is not significantly affected by Dale's exclusion because Boy Scout members do not associate for the purpose of **disseminating** the belief that homosexuality is immoral; Boy Scouts discourages its leaders from **disseminating any** views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect to homosexuality. [N.J. Op., p. 52a (emphasis added).]

Within this framework of analysis, the New Jersey court dismissed the petitioners' claim that the Boy Scout Oath and Law requires the exclusion of avowed homosexual Scoutmasters because the Oath and the Law do not "on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral." N.J. Op., p. 56a. Finding that "no single view" on the "subject" of sexual morality "functions as a unifying associational goal of the organization," the court held that requiring the Boy Scouts to welcome an open, avowed homosexual Scoutmaster into its ranks "does not violate Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [Boy Scouts] existing members' ability to carry out their various purposes.' Rotary Club, *supra*, 481 U.S. at 548...." N.J. Op., p. 56a.

Having limited its analysis of the Boy Scouts' claim of freedom of association to its "correlative" roles recognized in the Roberts and Rotary Club cases, the New Jersey court failed to abide by this Court's long line of cases which recognize a constitutional right of freedom of association **independently** rooted in "the right of the people peaceably to assemble," as expressed in the First Amendment and understood by America's founders.

In the seminal case of DeJonge v. Oregon, 299 U.S. 353, 364 (1937), this Court ruled that the right of the people peaceably to assemble was "a right **cognate** to those of free speech and free press and is **equally** fundamental." (Emphasis added.) As an "equal and cognate" right, the Court affirmed its earlier observation in United States v. Cruikshank, 92 U.S. 542, 552 (1876), that the right of the people to assemble was the right of "'citizens to meet peaceably **for consultation** in respect to public affairs....'" *Id.* (Emphasis added.) Thus, this Court embraced the historic understanding that the foundational purpose of the right of the people peaceably to assemble was to "**consult** for their common good." Article XVI of the August 16, 1776 Constitution of Pennsylvania reprinted in Sources of Our Liberties 331 (Perry, ed., American Bar Foundation, 1972) (emphasis added).

Two years after the DeJonge decision, in Hague v. CIO, 307 U.S. 496 (1939), Justice Owen Roberts, in an opinion concurred in by Justice Hugo Black, engaged in an extensive review of the nature and application of the right of the people peaceably to assemble. First, in posing the question before the Court, Justice Roberts made clear that the issue of peaceable assembly related to "**dissemination** [of] information [about] and **discussion** of the [National Labor Relations] Act, and of the opportunities and advantages offered by it...." *Id.*, 307 U.S.

at 512 (emphasis added). Second, relying on Cruikshank, *supra*, Justice Roberts linked the labor act's policy of "freedom of association" to the constitutional "right peaceably to assemble and to **discuss** ... and **communicate**...." *Id.*, 307 U.S. at 512-13 (emphasis added). Finally, Justice Roberts reached his conclusion, often referred to and relied upon by this Court up to the present day:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, **communicating** thoughts between citizens and **discussing** public questions. [*Id.*, 307 U.S. at 515 (emphasis added).]

Justice Roberts' understanding of the consultative purpose of the people's right of assembly not only conformed to this Court's "right of association" cases in Cruikshank and DeJonge, but also was a focus of this Court's freedom of association rationale in case after case prior to the decision in Roberts v. United States Jaycees, *supra*. Relying explicitly upon Justice Roberts' opinion in Hague, this Court ruled in Thomas v. Collins, 323 U.S. 516, 532 (1945), that "[t]he right to **discuss**, and **inform** people concerning the advantages and disadvantaged of unions and joining them is protected ... as part of free assembly" (emphasis added). Later, the Court returned to this theme, concluding that "the right either of workmen or of unions ... to assemble **and discuss their own affairs** is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and enlist the support of others." *Id.*, 323 U.S. at 539 (emphasis added).

In a series of cases involving the NAACP, this Court struck a similar note in its assessment of the purpose of the right of

association. In NAACP v. Alabama, 357 U.S. 449, 460, 466 (1958), this Court, emphasizing the importance of protecting "the rights of [NAACP's] rank-and-file members to engage in lawful association in support of their common beliefs," whether they be "political, economic, religious or cultural," relied upon **both** the speech and the assembly clauses for its ruling that "the right of the members to pursue their **lawful private interests privately** and to associate with others in doing so ... come[s] within the protection of the Fourteenth Amendment" (emphasis added). In NAACP v. Button, 371 U.S. 415, 428, 431, 437, 444-45 (1963), this Court repeatedly treated freedom of "association" as a separate and distinct freedom from that of "expression." As for the former freedom, the Court observed that the Virginia rule against lawyer solicitation created "the gravest danger of smothering all **discussion** looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority." *Id.*, 371 U.S. at 434-37 (emphasis added). Nineteen years later, in NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909 (1982), this Court continued to recognize that the right to "assemble peaceably" was distinct from the freedom of speech, the former primarily protecting the right of the NAACP to "**discuss among themselves** their grievances against governmental and business policy." (Emphasis added.)

To collapse this distinctive freedom of association into one of "expressive association," as the New Jersey courts did below, disregards these venerable authorities. By failing to utilize the traditional applications of the right to associate, independently grounded in the right of the people peaceably to assemble, the Roberts and Rotary Club opinions unwittingly opened the door to the very government intrusions that the Assembly Clause was designed to prohibit. Instead of the people deciding with whom they will associate to discuss and advance common beliefs pertaining to "political, economic,

religious or cultural matters," governments have been given license to impose their views of political, economic, religious and cultural orthodoxy, so long as they purport to do so in the cause of eliminating "invidious discrimination."

In his concurring opinion in Thomas v. Collins, *supra,* Justice Robert Jackson warned that the government would invent all kinds of reasons to intrude upon the right of the people to associate, but that the courts must remain vigilant to insure that the right of the people to assemble does not become a "hollow one." *Id.*, 323 U.S. at 547.

The New Jersey Supreme Court opinion below illustrates the "hollowness" of a constitutional right of association if limited to the "correlative" right of freedom of association, recognized in the Roberts/Rotary Club/New York State Club line of cases. By focusing exclusively upon the "expressive" aspect of Scouting, the New Jersey judges were enabled to disregard completely the internal camaraderie of the organization, and thus to discard the essential role that common beliefs and attitudes must play to ensure freedom of association. *See* NAACP v. Button, *supra,* 371 U.S. at 429-31.

III. THE DECISION BELOW CONFLICTS WITH THE CONSTITUTIONALLY-PERMISSIBLE LIMITS ON FREEDOM OF ASSOCIATION.

According to the express language of the Assembly Clause, there is only one constitutionally-permitted condition that governments may impose without "abridging" the right of the people to assemble. That condition is that the assembly must be "peaceable." In its seminal decision in DeJonge v. Oregon, *supra*, this Court overruled a criminal conviction under a state syndicalism act because there was not a scintilla of evidence of an "incite[ment] to violence and crime." By so ruling, this

Court rejected the State's attempt to criminalize conduct simply because it was engaged in under the auspices of an organization which taught and advocated the violent overthrow of the government. As dangerous as such teaching was to the stability of the government, this Court stood firm in favor of "the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means." *Id.*, 299 U.S. at 365.

By demanding explicit proof of breach of the peace in DeJonge, this Court forged a legacy of constitutional protection from government intrusions upon the freedom of assembly and association that prevailed through the civil rights movement of the 1960's. Thus, in Cox v. Louisiana, 379 U.S. 536, 538-52 (1965), this Court struck down a conviction under a "breach of the peace" statute because there was no evidence of any threat to the physical peace of the community. In the same case, this Court struck down a conviction under an "Obstructing Public Passages" statute because there was evidence that it had been enforced in a discriminatory manner inconsistent with this Court's insistence upon an idea-neutral policy of "time, place and manner." *Id.*, 379 U.S. at 553-58.

This Court's insistence upon real evidence of a threat to the community's physical well-being has not been confined to cases applying criminal statutes to public assemblies. In NAACP v. Alabama, *supra*, 357 U.S. at 465, the Court rejected Alabama's effort to obtain the membership list of the Alabama chapter of the NAACP, distinguishing an earlier decision approving a New York law requiring disclosure of membership in the Ku Klux Klan on the ground that "the Klan's activities ... involv[ed] acts of unlawful intimidation and violence."

Beginning in the 1960's, however, and continuing to the present day, this Court has sometimes departed from this narrow test of constitutional permissibility, opting for a broader, more flexible test, namely, whether "a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." NAACP v. Button, *supra*, 371 U.S. at 438.

Application of the "compelling state interest" test, first formulated and applied by this Court in equal protection cases, has not been without controversy. As early as 1969, Justice John Marshall Harlan cautioned this Court to use the test sparingly, limiting it to cases involving race discrimination. Shapiro v. Thompson, 394 U.S. 618, 658-62 (1969) (Harlan, J., dissenting).

More recently, Justice Anthony Kennedy has voiced concern about the indiscriminate use of the compelling state interest test in First Amendment cases. In his concurring opinion in Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105 (1991), Justice Kennedy reminded the Court, as had Justice Harlan before him, that the compelling state interest test "derives from our equal protection jurisprudence ... and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only, apart from considerations of time, place, and manner of use of public forums." *Id.*, at 124. In a case decided upon the heels of Simon & Schuster, Justice Kennedy reiterated his concern, this time expressing his opinion that "our adoption of the compelling-interest test was accomplished by accident..., and as a general matter produces a misunderstanding that has the potential to encourage attempts to suppress legitimate expres-

sion." Burson v. Freeman, 504 U.S. 191, 212 (1992) (Kennedy, J., concurring).

Justice Kennedy has not been the sole voice expressing such concerns. In Roberts v. United States Jaycees, *supra*, 468 U. S. at 633, Justice Sandra Day O'Connor questioned this Court's "mechanical application of a 'compelling interest' test," and stated that the "First Amendment is offended by direct state control of the membership of a private organization engaged exclusively in protected expressive activity...." *Id.*, at 638. Referring to, *inter alia*, The Official Boy Scout Handbook, Justice O'Conner noted that "[e]ven the training of outdoor survival skills, or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.*, at 636. Freedom of association for such expressive associations, like the freedom of speech, should only be governed by "content-neutral state regulation of the time, place, and manner of any organization's relations with its members or with the State," and only then when such regulations are "'narrowly drawn' to serve a 'sufficiently strong, subordinating interest' 'without unnecessarily interfering with First Amendment freedoms.'" *Id.*, 468 U.S. at 634.

Finally, as discussed above, this Court unanimously eschewed application of the compelling state interest test in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), relying instead upon the absolute principle of "speaker autonomy" to turn back an attempt to use the Massachusetts public accommodation law to overlook the freedom of speech in the name of "eradicating discrimination." In doing so, the Court deliberately refused to follow the lead of the lower court, which had applied the compelling state interest test on the authority of the Roberts case. *Id.*, 515 U S. at 563.

Had this Court done otherwise in Hurley, it would have been drawn into the kind of balancing of interests engaged in by the New Jersey Supreme Court below. After finding that the petitioners enjoyed the constitutional right of expressive association, the New Jersey justices opined that "[t]he right of expressive association must ... be weighed against" the compelling interest of the state to prevent "invidious discrimination" in each case. This probe led the state court, in turn, to determine the purpose of the Boy Scouts and the meaning of the Boy Scout Oath and Law, rather than to defend the right of the Boy Scouts to determine those for itself, thereby trampling on the very constitutional "autonomy"expressed and applied by this Court in Hurley.

Not only that, but the compelling state interest test led the New Jersey courts into a probing critique of the Boy Scouts' views on homosexuality, labeling them "archaic," "stereotypical" and "bigoted." N.J. Op., p. 62a. In contrast, the New Jersey courts have upheld the New Jersey legislature's views against discrimination on the basis of homosexuality or other sexual or affectional orientation as enlightened and commendable — a "recognition that discrimination based on 'archaic' and 'stereotypical notions' about homosexuals that bears no relationship to reality...." N.J. Op., p. 62a.

Only by relying upon the compelling state interest test could the New Jersey Supreme Court have justified a law that infringed upon the right of the Boy Scouts to hold views contrary to a state-imposed orthodoxy. Such viewpoint discrimination has been found by this Court to be *per se* a violation of the First Amendment. *See* Rosenberger v. University of Virginia, 515 U.S. 819 (1995). Yet, the compelling state interest test inevitably leads to such discrimination when applied to a law designed to prohibit certain acts of discrimina-

tion by an organization dedicated to views considered anathema by the state.

This point is best illustrated by an examination of New Jersey Supreme Court Justice Handler's concurring opinion in which, referring to the Roberts test, he declared that the state has a compelling interest to prohibit organizations from using "stereotypical assumptions about homosexuals" in determining its standards for membership:

> One particular stereotype that we renounce today is that homosexuals are inherently immoral.[4] That myth is repudiated by decades of **social science data** that convincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in and contribute responsibly and positively to society.... Accordingly ... there is no reason to view "a gay scoutmaster, solely because he is a homosexual, [as lacking the] strength of character necessary to properly care for [and] impart BSA humanitarian ideals to the young boys in his charge." [N.J. Op., pp. 95a-96a (emphasis added).]

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[4] Armed with the "compelling state interest" broadax, Justice Handler chops down 6,000 years of Judaeo-Christian tradition and teaching. "Thou shalt not lie with mankind, as with womankind; it is abomination." Leviticus 18:22. "But the men of Sodom were wicked and sinners before the Lord exceedingly." Genesis 13:13. "And turning the cities of Sodom and Gomorrah into ashes condemned them with an overthrow, making them an ensample unto those that after should live ungodly." II Peter 2:6. "[F]or even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly...." Romans 1:26-27. While Justice Handler is within his province as a judge to decide what is unlawful, he has no authority to determine what is immoral.

Justice Handler's reliance on social science literature to defend his legal ruling would raise serious problems even if it accurately described a consensus of experts. But the experts do not agree. Social science data other than that cited by Justice Handler demonstrate the wisdom of a content-neutral First Amendment test. For example:

Dr. Judith Reisman found that adult homosexuals are far more likely to solicit teenaged sexual partners when compared to adult heterosexuals. "Partner Solicitation Language As A Reflection Of Male Sexual Orientation." Collected Papers from the NARTH Annual Conference, Saturday, 29 July 1995. In her analysis of "In Search Of" ("ISO") advertisements placed by males in two magazines, the *Washingtonian*, which is predominantly heterosexual in orientation, and *The Advocate*, which is predominantly homosexual, she found that under 1 percent of *Washingtonian* ISO advertisers as against 53 percent of *Advocate* ISO advertisers sought teens. She also found that on average only once a month did advertisers in *Washingtonian* seek a teenage girl, while 15 percent of the advertisers in *The Advocate* sought an average of 130 boys per month. *Id.*

Dr. Reisman's findings are supported by studies conducted by the homosexual community. In *Gay Report*, a survey of homosexual attitudes and behavior, homosexual researchers Jay and Young found that 73 percent of homosexuals surveyed had at some time had sex with boys sixteen to nineteen years of age or younger. K. Jay and A. Young, *The Gay Report* (New York: Summit Books, 1979), p. 275. Approximately one out of four homosexuals admitted to sex with children and younger teens. Jay and Young, p. 275; A.P. Bell and M.S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* (New York: Simon & Schuster, 1978), p. 85.

Pedophilia plays a key role in the recruitment of future homosexuals. Regarding the homosexual recruitment process, noted sex researchers Masters and Johnson observed:

> In most instances, homophile interests developed in the early to midteens.... There was no history of overt heterosexual experience prior to homophile orientation. Recruitment usually was accomplished by an older male, frequently in his twenties, but occasionally men in their thirties were the initiators. When the homosexual commitment was terminated, in most instances, the relationship was broken by the elder partner. With termination, the teenager was left with the concept that whether or not he continued as an active homosexual, he would always be homophile-oriented. [W. Masters and V. Johnson, *Human Sexual Inadequacy* (Boston: Little, Brown and Company, 1970), pp. 179-180.]

In one study (Bell and Weinberg, *supra*, p. 87), over 60 percent of the respondents identified their first homosexual partner as someone older; in another (P. Gephard and A.P. Johnson, *The Kinsey Data: Marginal Tabulations of the 1958-63 Interviews Conducted by the Institute for Sex Research* (Indiana University Press: Bloomington, Ind., 1979), p. 495), over 64 percent of the respondents identified their first homosexual partner as having initiated the sexual experience.

During the period 1971 through November 1991, the Boy Scouts banned 1,871 individuals from Scouting for sexual abuse. P. Boyle, *Scout's Honor* (Rocklin, Calif.: Prima Publishing, 1984), p. 315. (Not all of these cases involved male scout leaders abusing male Scouts). At least 2,071 Scouts reported being abused by leaders, with another 2,737 victims who may or may not have been Scouts. Boyle, p. 316. It could be said that based on their experience as well as the social

science literature, the Boy Scouts would be violating the trust conferred on them by the parents of countless young boys if they allowed avowed homosexuals to continue in leadership roles, modeling their lifestyle to those impressionable boys, resulting in the very immoral behavior by those boys which the Boy Scout Oath and Law seek to avoid.

It is not for judges, much less state legislatures, to survey the sociological studies on homosexuality and, then, in pursuit of some ideal society without discrimination, force people to associate with each other only in conformity with the views endorsed by the civil authorities. The right to associate presupposes a right to refuse to associate with those who embrace antithetical values. Civilly-enforced associational conformity is the very evil that the Assembly Clause was designed to prevent, guaranteeing to the people the right to decide with whom they will associate so long as they conduct themselves in a manner that is consistent with the physical peace of the community.

During the 1950's and 1960's, this Court was called upon again and again to declare and apply the First Amendment to speeches, assemblies and petitions of people who actively opposed the racial views held by civil authorities in the South. During those tumultuous times, this Court applied content-neutral constitutional principles that did not permit it or any other court to take sides in the ongoing political debate. Rather, as in Edwards v. South Carolina, 372 U.S. 229, 235 (1963), it held the constitutional line protecting "free speech, free assembly and freedom to petition for redress of ... grievances ... in their most pristine and classic form." This Court did so because it adhered to the original principles of content neutrality unencumbered by the compelling interest test that invites an open-ended balancing of governmental interests against those of the individual. The case below presents an excellent

opportunity for this Court to reject the compelling interest test as having no permanent place in its First Amendment jurisprudence, and to return to its time-honored, content-neutral principles permitting the state to regulate people's assemblies only on the basis of necessary and narrowly-drawn time, place and manner restrictions.

CONCLUSION

For the reasons set forth above, Public Advocate of the United States and Lincoln Institute for Research and Education respectfully urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

Attorneys for *amici curiae*
Public Advocate of the
United States and
Lincoln Institute for
Research and Education

* *Counsel of Record*
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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF OF NATIONAL CATHOLIC COMMITTEE ON SCOUTING, GENERAL COMMISSION ON UNITED METHODIST MEN OF THE UNITED METHODIST CHURCH, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS AND THE LUTHERAN CHURCH-MISSOURI SYNOD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

VON G. KEETCH
Counsel of Record
ALEXANDER DUSHKU
KIRTON & MCCONKIE
1800 Eagle Gate Tower
60 East South Temple
Salt LAKE CITY, Utah 84111
(801) 328-3600
Attorneys for Amici

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. THE HOLDING OF THE COURT BELOW CREATES SERIOUS UNCERTAINTY ABOUT WHETHER THE RELIGIOUS SPONSORS OF SCOUTING HAVE THE RIGHT TO SELECT SCOUT LEADERS ACCORDING TO SCOUTING'S TRADITIONAL GUIDELINES AND THEIR OWN UNIQUE RELIGIOUS CRITERIA	4
A. Scouting Is an Expressive, Value-Inculcating Program That Many Churches Have Adopted as Part of Their Youth Ministries	5
B. The Decision Below Potentially Impacts All Scouting Units, Regardless of the Character of the Sponsor	8
C. The Decision Below Brings Grave Uncertainty and Potential Disruption to *Amici*'s Ability to Express Their Views and to Regulate the Selection of Leaders and Role Models As They Inculcate Moral and Religious Values	8
II. THE LOWER COURT'S DECISION CREATES SIGNIFICANT LEGAL CONFLICT AND PRACTICAL DIFFICULTIES THAT WEIGH HEAVILY IN FAVOR OF GRANTING THE PETITION	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASES	Page
Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987)	11
Employment Division v. Smith, 494 U.S. 872 (1990)	3
Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 566 (1995)	15-19
Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952)	3
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)	4
New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988)	11
Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969)	13
Randall v. Orange County Council, Boy Scouts of America, 17 Cal. 4th 736, 952 P.2d 261, 72 Cal. Rptr. 453 (1998)	15
Roberts v. United States Jaycees, 468 U.S. 609 (1984)	4, 10-11
West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)	16
Yeaw v. Boy Scouts of America, 64 Cal. Rptr. 2d 85 (Cal. Ct. App. 1997)	15
PUBLICATIONS	
THE BOY SCOUT HANDBOOK (11th ed. 1998)	5
William D. Murray, THE HISTORY OF THE BOY SCOUTS OF AMERICA (1937)	2, 5-6

INTEREST OF THE *AMICI CURIAE*

Amici are the largest religious sponsors of Scouting in the United States.[1] Nationally, *amici* and their affiliated denominations sponsor over 50,000 Scouting units and almost 1.2 million boy scouts. In New Jersey, over 20,000 scouts are affiliated with *amici*. Among Scouting's many supporters, there are none more important than *amici*.

1. *Amicus* National Catholic Committee on Scouting oversees the Scouting ministry of the Catholic Church. Nationwide, the Catholic Church sponsors over 355,000 scouts and almost 10,000 Scouting units, making it the third largest sponsor of Scouting units among religious institutions in the United States. In New Jersey, the Catholic Church is the largest religious supporter of Scouting, sponsoring over 14,000 scouts and about 370 Scouting units.

2. *Amicus* General Commission on United Methodist Men of the United Methodist Church ("United Methodist Men") is the church-wide organization within the United Methodist Church authorized to direct and coordinate the activities of the Church's Scouting ministry throughout the denomination. Nationwide, the United Methodist Church sponsors over 421,000 scouts and almost 12,000 Scouting units, making it the largest single sponsor of individual scouts and the second largest sponsor of Scouting units. In New Jersey, the United Methodist Church sponsors over 8,000 scouts and almost 200 Scouting units.

There are other groups affiliated with the United Methodist Church that have expressed an opinion as to whether Boy Scouts of America should be forced to accept homo-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief in whole, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

sexual Scout leaders. However, the United Methodist Men is the church-wide organization authorized to oversee and manage Scouting in the United Methodist Church.

3. *Amicus* The Church of Jesus Christ of Latter-day Saints sponsors over 400,000 scouts and over 30,000 Scouting units nationwide, making it the second largest sponsor of scouts and the largest single sponsor of Scouting units in the United States. In New Jersey, The Church of Jesus Christ of Latter-day Saints sponsors over 700 scouts and about 60 units.

4. *Amicus* Lutheran Church-Missouri Synod sponsors approximately 1,000 Scouting units nationwide, including units in New Jersey.

SUMMARY OF THE ARGUMENT

For almost a century, Boy Scouts of America and many of this nation's religious organizations have been involved in a close partnership to develop the moral character of young men. In the early days, dating back to the early 1900s, this partnership was virtually exclusive, with an overwhelming number of Scouting units sponsored by religious entities. *See* WILLIAM D. MURRAY, THE HISTORY OF THE BOY SCOUTS OF AMERICA 527 (1937) [hereinafter "HISTORY"]. Today, recognizing the important character development that BSA champions, civic groups and other secular organizations have also invested themselves in Scouting. Comparatively speaking, however, churches and other religious organizations continue to take the leading role. More than six out of every ten Scouting units in America are chartered by religious organizations, with these *amici* sponsoring almost 70% of religiously affiliated units.

The lower court's decision—which on its face appears to apply to all Scouting units in the State of New Jersey—creates great uncertainty for *amici* and the Scouting units

they sponsor. As related in more detail below, Scouting is an integral part of the youth ministries of these *amici*. State intrusion into these programs, whether through New Jersey's Law Against Discrimination ("LAD") or through some other means, raises constitutional concerns of the highest order.

The lower court's First Amendment analysis is especially disconcerting because for decades these *amici* have grounded their decisions affecting the membership, leadership, and staffing of their Scouting units in the long-protected freedoms of association and speech.[2] At least as far as the lower court is concerned, those protections are now gone, replaced by a mandate that Scouting units in New Jersey admit, as leaders of young boys, individuals who do not subscribe to or live the basic moral tenets of Scouting and its sponsoring organizations. It is difficult to conceive of a set of circumstances that would create greater uncertainty for Scouting in general, or for the specific Scouting programs sponsored by these *amici*. Indeed, one of these *amici* would withdraw from Scouting if the government were allowed to force BSA to alter its standards regarding homosexual Scout leaders. The others would be forced to reevaluate their sponsorship, with the serious possibility of arriving at the same conclusion.

First Amendment intricacies aside, the very notion of government having the power to control the selection of youth leaders in private, value-inculcating organizations is deeply troubling. Much like the prohibition against governmental interference with the selection of clergy, *see Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952),

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[2] Historically, *amici* have also relied upon the Free Exercise Clause to protect such decisions. Since *Employment Division v. Smith*, 494 U.S. 872 (1990), however, and because the New Jersey law at issue here is ostensibly "generally applicable" and "neutral," it remains very unclear whether the Free Exercise Clause would protect *amici* in the administration of their Scouting units.

private, voluntary, noncommercial organizations like Scouting have always had the freedom to choose their own leaders. Throughout our history, that freedom has been "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Thus, with many other private groups in this country, *amici* have long assumed it was "beyond debate" that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the [Constitution]." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This basic right is threatened by the decision below. The Court's guidance is required to clarify whether organizations like BSA and *amici* still have the right to select youth leaders according to their own moral codes, or whether the state now has the power to regulate such sensitive matters.

ARGUMENT

I. THE HOLDING OF THE COURT BELOW CREATES SERIOUS UNCERTAINTY ABOUT WHETHER THE RELIGIOUS SPONSORS OF SCOUTING HAVE THE RIGHT TO SELECT SCOUT LEADERS ACCORDING TO SCOUTING'S TRADITIONAL GUIDELINES AND THEIR OWN UNIQUE RELIGIOUS CRITERIA.

At the outset, an important preliminary point bears some mention. *Amici* all share a common, firmly held belief that sexual relations should occur only within the bonds of marriage. They believe and teach that extra-marital sex is wrong, and that one who engages therein has committed an immoral act and is not qualified to lead impressionable youth.

Amici's view of extra-marital sexual relations holds regardless of whether the specific sexual acts are homosexual, heterosexual, or bisexual. *Amici* condemn all such acts.

To these *amici*, therefore, the crucial First Amendment issues which arise in this case are not only about the right of a practicing homosexual to serve as a Scout leader. That formulation is far too narrow. Instead, as far as these *amici* are concerned, the question is whether BSA has the right to exclude an individual from a leadership position in Scouting because that individual engages in conduct contrary to Scouting's fundamental moral tenets. The mere statement of the question in this form illuminates what is at stake for Scouting in general and for these *amici* specifically: It is no less than the right to select for themselves the leaders who will train up Scouting's next generation and, by so doing, determine the values and ideals to be represented in Scouting in the coming century.

A. Scouting Is an Expressive, Value-Inculcating Program That Many Churches Have Adopted as Part of Their Youth Ministries.

On the surface, the purpose of Scouting may appear to be recreation and wholesome fun. But to those who created it, and to those like *amici* who continue to sustain it, Scouting is much more than a game. "Those who established Scouting in America deliberately planned to promote Scouting as a Movement." HISTORY at 514. And that is exactly what Scouting is: a character movement—a focused, systematized program for the inculcation of certain character traits in boys. Such traits include trustworthiness, loyalty, kindness, obedience, reverence, doing one's duty to God, and moral cleanliness. *See* THE BOY SCOUT HANDBOOK 9 (11th ed. 1998). By solemn oath, a boy scout promises to strive to be "physically strong, mentally awake, and morally straight." *Id.* ("Scout Oath").

Religion is indispensable to the Scouting Movement. From the very beginning, Lord Robert Baden-Powell, the founder of Scouting, pronounced that "every Scout should have a religion." HISTORY at 500. The foundational

creeds of Scouting—the Scout Law and Scout Oath—enjoin a scout to be "reverent" and to do his "duty to God." To assist in teaching these values, Scouting's founders actively sought to make America's churches full partners in their character movement. They designed the Scouting program so that sponsoring religious organizations could infuse Scouting's broad, nonsectarian religious themes with specific meaning derived from particular religious traditions, thereby making it an effective tool of religious ministry. As Patrick Cardinal Hayes noted during the founding era, "the sponsoring institution, if it be a Church, may take the [Scouting] program as a foundation and build upon it, and around it, its own spiritual program. Hence, the whole boy is served—body, mind and soul." *Id.* at 514. Scouting's religious sponsors have done just that, becoming in the process indispensable allies in the Scouting Movement.

As contemplated by Scouting's founders, each of the *amici* employs the Scouting program in different ways to further its own religious ends. *Amicus* National Catholic Committee on Scouting oversees Scouting in the Catholic Church. Scouting is an important part of the Catholic Church's pastoral efforts to take the Gospel message to both Catholic and non-Catholic youth. Under the guidance of ecclesiastical leaders, local Catholic committees on Scouting direct the Scouting ministries at the diocesan level. The Catholic Church supports Scouting because its high ethics and God-focused programs provide a Christian setting that enables young people to cope with today's weakened moral standards and increased violence. Catholic Scouting has also proved itself to be a time-honored means of shaping Catholic leaders for the future.

Scouting is likewise a substantial and indispensable aspect of the youth ministries of *amicus* General Commission on United Methodist Men. The United Methodist Men employs Scouting's program of character education

as part of its efforts to instill in boys of all faiths the basic principles of morality. Through Scouting, the United Methodist Church helps boys to have faith in God and to prepare for a life of Christian faith and witness. The pastor of each Methodist congregation sponsoring a Scout unit is directly responsible for selecting qualified adult leaders and supervising Scout activities. Methodist Scout leaders must affirm and live Christian values.

Amicus The Church of Jesus Christ of Latter-day Saints uses Scouting as part of the activity program of its "Aaronic Priesthood," the lay priesthood held by all young men in the Church. Thus, although the Church welcomes nonmembers as full participants in its Scouting units, Scouting serves an important religious purpose within the Church. Scouting, including Cub Scouting, is not optional for LDS boys between the ages of eight and fifteen, but rather an integral part of their priesthood training. The bishop of a Church congregation directly oversees Scouting, personally selecting (and releasing) the congregation's Scout leaders in conformity with Church canons and his understanding of God's will. Only those who live in harmony with the teachings of the Church and Scouting are asked to serve as Scout leaders. To provide divine sanction to their Scouting ministries, senior priesthood officers typically set apart new Scout leaders by the laying on of hands.

Lutheran congregations have used the Scouting program for more than seventy years as a resource for Christian ministry to boys and their families. *Amicus* The Lutheran Church-Missouri Synod requires that its Scout leaders promote the boys' loyalty to the Church, Christian faith and conduct, and responsible citizenship. It is the duty of congregational leadership to provide Scouting units with motivation, guidance, and instruction compatible with the Holy Scriptures.

In sum, *amici* have integrated the Scouting program into their youth ministries as a means of instilling in boys and young men moral and religious values. This is Scouting as it was envisioned by its earliest founders. To alter this vision is to alter Scouting itself.

B. The Decision Below Potentially Impacts All Scouting Units, Regardless of the Character of the Sponsor.

There is nothing in the decision below suggesting that the New Jersey Supreme Court intended to limit its ruling to those Boy Scout units which are sponsored by secular entities. Indeed, the ruling expressly acknowledges that religious organizations sponsor many Scouting units throughout the United States. *See* Petitioners' Appendix ("App.") at 9a.

Under the lower court's constricted view of freedom of association and speech, the First Amendment does not protect an expressive organization's membership or leadership decisions unless the clear purpose of the organization is to discriminate against or denounce the class to which the plaintiff belongs. *See* App. at 52a, 55a-57a. None of the *amici* exists to discriminate against or denounce any group; to the contrary, each attempts to reach out in compassion to every person, whether or not that person currently lives church teachings. Thus, the decision below potentially impacts all Scouting units in New Jersey affiliated with *amici*.

C. The Decision Below Brings Grave Uncertainty and Potential Disruption to *Amici*'s Ability to Express Their Views and to Regulate the Selection of Leaders and Role Models As They Inculcate Moral and Religious Values.

The decision below has created grave uncertainty among these *amici* as to exactly what standards govern their Scouting units, and exactly who has the right to decide

whether a particular individual may be included as a member of a unit or may serve as its leader. Given the natural turnover in Scouting leadership, and given their ongoing efforts to sponsor additional units, *amici* must make scores of such decisions in New Jersey (and thousands across the country) every year. They must also continually monitor the conduct and character of scouts and their leaders to ensure that Scouting's values are being taught in a manner consistent with BSA's guidelines and the sponsors' own religious beliefs. The decision below calls into serious question *amici*'s ability to perform these key oversight functions.

Scouting's program for character development is successful because it teaches morality and character not only through lessons, creeds, and activities, but also through the living examples of its adult leaders. A Scout leader has a duty to live and embody Scouting's ideals. In a very real sense, the Scout leader is not merely the messenger—he is also the message of Scouting. Moreover, sponsoring churches often expect their adult leaders to uphold in word and deed the religious teachings of their denominations. Scout leaders, therefore, are powerful role models. They inculcate the message of Scouting less by what they *say* than by who they *are* and what they *do*. It follows that the essence of Scouting—indeed, the very heart of the Movement itself—depends on the criteria used for selecting adult leaders. In Scouting, to change the messenger is literally to change the message.

1. The lower court's decision creates deep uncertainty about—and potentially undermines—*amici*'s ability to communicate their views on morality and character to the young men in their Scouting units. As demonstrated, many of Scouting's religious sponsors employ the Scouting program as a tool of youth ministry, selecting adult leaders as directed and informed by their specific religious beliefs. For most, and certainly for these *amici*, such be-

liefs include the immorality of homosexual conduct. In their central tenets and beliefs, *amici* affirm that marriage is the only venue wherein the good of sexual relations can be realized, and that sexual relations should be limited accordingly. To be sure, in the context of Scouting this message is taught expressly from time to time. But most often it is taught implicitly through role models who embody the message. For these *amici*, installing a Scout leader who openly acknowledges that he engages in homosexual conduct would be fundamentally inconsistent with that message—indeed, it would dramatically disrupt the lesson *amici* seek to transmit to their impressionable youth.[3]

Yet that is precisely what the decision below appears to require. The lower court's First Amendment ruling casts serious doubt on whether the sponsors of Scouting have the right to preserve the integrity of their message by selecting Scout leaders who affirm and live BSA's standards and the sponsors' own beliefs. That doubt alone is sufficient reason to grant the petition.

2. Where, as here, a law substantially disrupts an association's capacity to express its views, that law is virtually certain to violate the First Amendment right to expressive association. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court explained that the right of expressive association has an important "instrumental" function:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

[3] It is no response that someone (unlike Plaintiff) might successfully be able to conceal his homosexual conduct, or that some other person might be able to hide his extra-marital affair. The Scouting Movement cannot survive, much less accomplish its mission, if its leaders live a double standard. Hypocrisy is lethal to character education. *See* A.2695.

Id. at 622 (citations omitted). In *Roberts*, and subsequently in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Association v. City of New York*, 487 U.S. 1 (1988), this Court determined that the challenged laws did not (or, in *New York State Club*, might not) significantly interfere with the ability of those associations to effectively advance their viewpoints.

However, that is plainly not the case here. The New Jersey Supreme Court's assumption that its decision would have "no significant impact" on the organization (App. at 52a) is without foundation. The decision below threatens to fracture the Scouting Movement, destroying or at least severely diminishing its ability (and with it *amici*'s ability) to express and inculcate the message and values of Scouting. The threat comes from two sources. First and most directly, if the religious sponsors were compelled to appoint Scout leaders who engage in or affirm the legitimacy of extra-martial sexual relations, the Scouting Movement as now constituted would cease to exist. *Amicus* The Church of Jesus Christ of Latter-day Saints—the largest single sponsor of Scouting units in the United States—would withdraw from Scouting if it were compelled to accept openly homosexual Scout leaders. The other *amici* would be forced to reevaluate

their sponsorship of Scouting, with the serious possibility of reaching the same conclusion. The matter is all the more serious because the logic of the decision below extends beyond sexual orientation to belief in God. As religious organizations, these *amici* cannot accept the proposition that the government has the power and the authority to decide who can serve as a leader in an expressive youth ministry, and they are deeply troubled that the government might order churches and other private groups to disregard their moral and religious teachings in this important matter.

To be sure, the lower court's decision does not apply nationwide. Moreover, none of the *amici* has made a final decision as to how it might respond should the impact of the decision be confined to New Jersey—whether to part company with Scouting altogether, to withdraw from Scouting just in New Jersey, or to take some other tack. But without doubt, the decision below creates a serious threat to the existence and vitality of Scouting, at a minimum in New Jersey and probably throughout the United States. Given the extent of their support, losing any of the *amici* as sponsors (in New Jersey or nationwide) would be a serious blow to the Scouting Movement and its ability to express and inculcate its message.

Second, the threat of fragmentation comes from a somewhat less direct angle. The New Jersey court has created a new cause of action to challenge denial of leadership positions based on a number of characteristics. Not only does the State purport to proscribe certain criteria for evaluating potential members and leaders, but the State will have to examine leadership and membership decisions to determine whether they have complied with the state's dictates, in a process not unlike that in an employment discrimination claim. To adjudicate claims of discrimination, courts will have to assess why someone was terminated as a Scout leader or not appointed in the first place—

essentially an inquiry into motive. Because the religious sponsors use Scouting as a tool of youth training and ministry, and take religious considerations into account in the selection of leaders, that inquiry might require an examination of the denomination's religious beliefs, doctrines, policies, and procedures, and how they were carried out in the specific case. As regards the religious sponsors, the holding of the court below thus threatens to excessively entangle government with religion. Other private associations will face analogous problems. It is difficult to see how the government can presume to second-guess the selection of leaders by private, value-inculcating organizations without violating the First Amendment. *Cf. Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450-51 (1969) (holding that civil courts can never "engage in the forbidden process of interpreting and weighing church doctrine").

Thus, the lower court's ruling raises the specter of unconstitutional government interference with important religious affairs and with the comparably important associational interests of other private nonreligious organizations. Even assuming the religious sponsors would be able to mount a successful Free Exercise or Establishment Clause defense against such interference (an issue that is not before the Court), such a defense would carry serious risks for Scouting. The Scouting Movement is a coalition of diverse groups unified by their dedication to instilling in boys certain fundamental character traits, and it would be devastating to split the movement into religious and nonreligious camps, the latter being subject to intrusive government regulations and the former being immune. Scouting units not sponsored by religious groups would be forced to affirm that Scouting's ideals can be fully lived and embodied by a leader who violates BSA's understanding of the Scout Oath and Law, while the religious spon-

sors would remain free to affirm Scouting's original (and true) position.

A character movement like Scouting simply cannot exist with such a patent double standard. A coherent message about Scouting's fundamental values—such as what it means to be "clean" and "morally straight"—is essential because those values define and unify the Scouting Movement; they are the glue that holds Scouting together. It is highly unlikely that Scouting could remain intact if significant parts of the coalition are compelled to operate under fundamentally conflicting standards concerning such an important issue.

Of course, the exact probability of schism is unknown at this time. But the tremors of uncertainty unleashed by the holding below are very real indeed, and very dangerous to the Movement. *Amici* provide immense financial, logistical, and moral support to Scouting. However, their sponsorship is not unconditional—it has always been contingent upon the compatibility of the Scouting program, both in theory and in practice, with their religious beliefs. *Amici* all have express teachings that directly conflict with the import of the holding below. *Amici* simply cannot hold up those who engage in or affirm the legitimacy of extramarital sex as role models for their youth. There is no greater interference with the right of expressive association than the destruction or dismemberment of an expressive organization. This case raises that very real possibility.

3. Finally, it is crucial to note that the uncertainty and confusion caused by the decision below is not limited to issues of sexuality. New Jersey's Law Against Discrimination contains identical protections forbidding discrimination based on gender, marital status, and religion. Under the lower court's cramped First Amendment analysis, must these *amici* now allow girls into their Scout

troops? Must they appoint atheists or agnostics as leaders?[4]

Succinctly stated, the lower court's decision places BSA —and other private, morality-inculcating and character-developing organizations—into a most difficult situation. Defined as a place of public accommodation under state law, and stripped of associational and free speech protections, BSA is facing much more here than just a showdown over whether homosexuals must be allowed to serve as Scout leaders. It is no exaggeration to say that Scouting is in significant jeopardy. Under the mandates of the decision below, its structure, its world view, and its entire belief system about how young men should be taught and who should teach them, is at risk. If the lower court's decision is widely adopted, it is conceivable that Scouting in some form may survive. But it is inconceivable that Scouting will remain what it has been for the past century, or what it is meant to be by those, like *amici*, who now sponsor it.

II. THE LOWER COURT'S DECISION CREATES SIGNIFICANT LEGAL CONFLICT AND PRACTICAL DIFFICULTIES THAT WEIGH HEAVILY IN FAVOR OF GRANTING THE PETITION.

A. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 566 (1995), established or reaffirmed six central principles.

(1) *Symbols and symbolic acts are protected speech under the First Amendment.* " 'Symbolism' "—be it "saluting a flag ([or] refusing to do so)," "wearing an armband to protest a war," or "displaying a red flag"—is a con-

[4] These are not just rhetorical questions. Girls have already sued to gain admission to Boy Scout troops, *Yeaw v. Boy Scouts of America*, 64 Cal. Rptr. 2d 85 (Cal. Ct. App. 1997), and atheists and agnostics have litigated to become troop members, *see Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261, 72 Cal. Rptr. 453 (1998).

stitutionally protected "'way of communicating ideas.'" *Id.* at 569 (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)).

(2) *Constitutional protection for speech does not depend on an exact message.* "[A] narrow, succinctly articulable message is *not* a condition of constitutional protection;" "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70 (emphasis added).

(3) *The speaker has a fundamental right to determine the content of the message.* It is a "fundamental rule of protection under the First Amendment[] that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. The "general rule, that the speaker has the right to tailor [his or her] speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Id.*

(4) *The choice of what not to say is implicit in the right of the speaker to choose the content of the message.* "Since *all* speech [including symbolic speech] inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Id.* (citations and quotation marks omitted; emphasis in original).

(5) *The participation of unwanted persons or groups in an act of symbolic speech can alter the content of the speech.* "Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade." *Id.* at 572-73; *cf. id.* at 576-77 ("each [unit in a parade] is understood to contribute something to a

common theme"; "the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of a whole").

(6) *Based on the foregoing principles, the right of expressive association also protects a group's membership decisions from forced inclusion of those with different views.* These principles apply equally to the right of expressive association. Hence, "a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 581.

The decision below fundamentally conflicts with these principles, and thus with *Hurley*. Most obviously, the court below refused to recognize that the selection of a Scout leader—and indeed the leader himself—is protected symbolic speech. As noted above, a Scout leader is both the messenger and the message of Scouting. To the boys, he is "Mr. Scouting"—the living embodiment of Scouting's ideals, a role model. Who he is and what he does says much more to the boys than the words he speaks. That is the power of a living symbol. That is also its danger, for the selection of the wrong role model can easily undermine the intended message. An openly homosexual Scout leader—or anyone else who openly practices a lifestyle contrary to Scouting's standards—would send the clear message that such conduct is consistent with Scouting's ideals (or at least, that it is *not inconsistent* with those ideals). BSA emphatically does not want to send that message. Under *Hurley*, it cannot be compelled to do so. Yet, in direct disregard of this principle, the court below refused to accord any constitutional protection to the selection of Scouting's most powerful symbol. *See* App. at 66a.

Next, the court below refused to apply associational and free speech protections to BSA because it found that

BSA is not organized for the purpose of opposing homosexuality. *See id.* at 52a.[5] This flatly contradicts *Hurley*'s holding that protection of a speaker's message does not depend on the core purpose of the organization, or on the reason the organization came into being. Contrary to the holding below, the fact that denouncing homosexuality is not the purpose of the Scouting Movement, or that Scout leaders do not often discuss sexual issues, is constitutionally irrelevant. The parade in *Hurley* likewise did not exist to denounce homosexuals or to "disseminate any views on sexual issues" (*id.* at 52a), yet this Court unanimously granted it First Amendment protection from an analogous attack. The conflict is evident.

The same is true of the lower court's ruling that the First Amendment affords no protection to BSA's message because "Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality." *Id.* *Hurley* expressly disclaimed the need for such solidarity as a condition of First Amendment protection: "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes . . . ." 515 U.S. at 569. There is little doubt that the various groups marching in or providing entries to the Boston parade would, if asked, have very different views on homosexuality. This Court's ruling in *Hurley*, however, held those diverse views to be immaterial. It was the view of the parade *as an organization*—and not the views of its individual members—that counted in *Hurley*, a principle that seems utterly lost on the court below.

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[5] Ironically, while the majority opinion refused to extend First Amendment protections because it was unconvinced that BSA opposed homosexuality as one of its core principles (App. at 52a), the concurring opinion castigated BSA (and others) for supposedly holding "pernicious" and "patently false" beliefs about homosexuals. *Id.* at 97a.

Finally, the lower court turned its back on *Hurley*'s teaching that the membership of an expressive enterprise can affect its message. *See* App. at 65a-66a. The parade in *Hurley* was a living drama, and thus the addition of each new parade unit necessarily impacted its message. *See* 515 U.S. at 572-73 & 576-77. In even deeper and more significant ways, the same is true of Scouting. A Scouting unit is a dynamic association in which the adult leader and the boys express, model, and live certain viewpoints about life. In ways both subtle and obvious, every member impacts the dynamic of the unit and thus its message and meaning. Each troop has its own unique narrative; each is its own human drama. Coercing the inclusion of an unwanted individual who openly admits a lifestyle that runs contrary to Scouting's moral code unavoidably alters the message and meaning of the troop. If nothing else, *Hurley* squarely teaches that when government forces a group to include those with opposing views, First Amendment protections are triggered.

In short, a stark legal conflict exists between recent Supreme Court precedent and the holding of the court below. That conflict alone is reason enough for this Court to grant the petition, especially when it arises in one of the most sensitive and most important areas of constitutional protection.

B. Just as compelling are the practical difficulties that arise as a result of the New Jersey court's decision. If allowed to stand, the lower court's ruling provides a natural springboard for similar legal attacks in other jurisdictions. Indeed, those attacks have already begun. *See* Pet. Br. at 28 n.10. As discussed in more detail by Petitioners, courts in several states have refused to order Scouting to accept homosexual leaders, generally ruling that state "public accommodation" statutes do not apply to BSA. *See id.* at 26-27.

The difficulty for these *amici*—and for BSA as a whole—is that Scouting is a national organization, with regional and national development and training programs, national policies and procedures, and regional and national events. Many of the *amici* administer and sponsor BSA programs through national committees, with guidance from regional, national, or international religious bodies. In this context, a state-by-state development of the law is particularly unattractive for those on both sides of the issue. If, on the one hand, Scouting really has no protection from the First Amendment in the areas of speech and association, BSA should be put on notice as soon as possible, so that together with *amici* and its other sponsors it can determine what type of organization it must become to comply with government dictates and, in that light, whether it can continue to exist. If, on the other hand, Scouting is indeed entitled to constitutional protection in the programs that it offers—as these *amici* strongly believe—BSA is similarly entitled to a timely and expeditious resolution of the matter. Anything less subjects Scouting to a difficult and potentially divisive process, and tremendous uncertainty.

The New Jersey decision presents an unprecedented and previously unimagined impact on Scouting and its programs, arguably much more so than the membership and related issues previously resolved by this Court in *Hurley*, *Roberts*, and *New York State Club*. As this Court determined to hear and decide those cases because of the overriding First Amendment interests involved, so too should this Court grant the petition in this case to clarify the boundaries of free association and free speech as those rights impact upon one of American's most well-known and most cherished youth organizations.

CONCLUSION

The Court should issue a Writ of Certiorari to review the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

VON G. KEETCH
Counsel of Record
ALEXANDER DUSHKU
KIRTON & MCCONKIE
1800 Eagle Gate Tower
60 East South Temple
Salt LAKE CITY, Utah 84111
(801) 328-3600
Attorneys for Amici

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

ABBA COHEN
AGUDATH ISRAEL OF AMERICA
1730 Rhode Island Ave., NW
Washington, D.C. 20036
(202) 835-0414

DAVID ZWIEBEL*
MORTON M. AVIGDOR
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, NY 10038
(212) 797-9000

Attorneys for Amicus Curiae
Agudath Israel of America

* Counsel of Record

9 11

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

ARGUMENT 6

CONCLUSION 6

TABLE OF AUTHORITIES

Cases **Page**

City of Boerne v. *Flores*,
521 U.S. 507 (1997) 2

Dale v. *Boy Scouts of America*,
734 A. 2d 1192 (1999)..... 2

Employment Division, Dept. of Human Resources of Oregon v. *Smith*,
494 U.S. 872 (1990) 2,3

Gay Rights Coalition v. *Georgetown University Law Center*,
536 A.2d 1 (D.C. App. 1987)..... 3

Hurley v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*,
515 U.S. 557 (1995)..... 4

Roberts v. *United States Jaycees*,
468 U.S. 609 (1984)..... 4

Thomas v. *Anchorage Equal Rights Commission*,
165 F.3d 692 (9th Cir. 1999)..... 4

Other Authorities

Jacobson, *A Coalition With a Liberal-Leave Policy*,
The National Journal (Oct. 30, 1999) 3

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BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE *AMICUS CURIAE*

Agudath Israel of America is a national Orthodox Jewish organization with constituents, and constituent religious bodies, across the United States. Many of Agudath Israel's

constituent congregations and other Orthodox Jewish religious bodies, as well as Agudath Israel itself, sponsor youth programs. Some of these programs are religious in nature, some are social, some educational, some recreational – but all of them are under control of a religious denomination whose attitude toward homosexual conduct is shaped by the biblical description of such conduct as "*to'eivah*", an abomination (*Leviticus* 20:13). Further, all of them would regard a homosexual activist as an inappropriate role model for children under his leadership and care.

Our interest in this case is substantial – for while this particular dispute may not involve a "bona fide religious or sectarian institution," 734 A. 2d at 1217,* it could well be that the long term impact of the decision below, if it is allowed to stand, will be felt most acutely in traditional religious communities like ours. We respectfully make this *amicus curiae* presentation, upon the consent of the parties, to expand upon why this is so.

The starting point of our concern is the current state of free exercise jurisprudence. In the aftermath of this Court's rulings in *Employment Division, Department of Human Resources of Oregon* v. *Smith,* 494 U.S. 872 (1990) (positing that a religious practice that is indirectly burdened by government enjoys no First Amendment free exercise protection), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act, Congress' effort to respond to *Smith* by establishing a statutory compelling interest standard for indirect burdens on religious exercise), religious practitioners are especially vulnerable to anti-discrimination provisions that conflict with their religious tenets. Civil rights laws are, after all, laws of general applicability, and the burdens they may impose on religious

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* All citations to the decision below are to *Dale* v. *Boy Scouts of America*, 734 A. 2d 1192 (N.J. 1999).

individuals or organizations are only indirect. The free exercise clause thus offers scant comfort to the person or entity whose faith demands that he or it engage in conduct that in the eyes of secular law constitutes unlawful discrimination.

Comfort, if it is to be had, will often come in the form of legislation expressly exempting certain types of religious practitioners from generally applicable anti-discrimination provisions. *See Employment Division* v. *Smith, supra,* 494 U.S. at 890. However, such exemption provisions are by no means universal features of all anti-discrimination laws; *see, e.g., Gay Rights Coalition* v. *Georgetown University Law Center*, 536 A.2d 1 (D.C. App. 1987). Some legislative bodies, apparently, are not prepared to grant religious entities the authority to practice their faith in a manner that would infringe on the civil rights of others. Indeed, current congressional efforts to enact the Religious Liberty Protection Act, a federal statute designed to restore the free exercise compelling interest test in a manner consistent with this Court's decisions in *City of Boerne, supra,* are now enmeshed in fierce debate over whether the law should extend to conflicts that may arise between civil rights and religious practice. (*See* Jacobson, *A Coalition With a Liberal-Leave Policy*, The National Journal (Oct. 30, 1999).)

Moreover, even where a legislature does deem it appropriate to exempt religious bodies from anti-discrimination laws, the exemption is often narrowly drawn and narrowly construed. The instant case is a good example. New Jersey's Law Against Discrimination exempts "educational facilit[ies] operated or maintained by a bona fide religious or sectarian institution." N.J.S.A. 10:5-5l. As determined by the court below, 734 A.2d at 1217 & n.10, Boy Scouts of America does not fit the category of an "educational facility" – despite the Boy Scouts' close affiliation with public schools and school-affiliated groups, described in detail at 734 A.2d at 1212-13; and despite the organization's express

purpose of "teach[ing]" its members "patriotism, courage, self-reliance and kindred virtues", *id.* at 1202. Nor does it fit the category of a "bona fide religious or sectarian institution" – despite a scout's Oath "to do [his] duty to G-d" and the Scout Law that requires a scout to be "reverent toward G-d [and] faithful in his religious duties." *Id.* The court's back-of-the-hand, "deserves little discussion," rejection of the Boy Scouts' efforts to claim the statutory religious educational facility exemption, *id.* at 1217, would appear to flow directly from the court's rule of statutory construction that "exemptions from remedial statutes should generally be narrowly construed." *Id.* at 1213.

There is no statutory refuge, therefore, for religiously inspired or affiliated entities in New Jersey deemed to fall beyond the narrowly construed confines of the exemption statute – or for religious institutions across the country in jurisdictions where there is no statutory exemption altogether.

However, there still may be *constitutional* refuge: the First Amendment's freedom of speech and freedom of association provisions, whether viewed independently or "in conjunction" with a free exercise claim under the *Smith* Court's "hybrid situation" doctrine, 494 U.S. at 881-82. (*See, e.g., Thomas* v. *Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999).) Like-minded religious practitioners are entitled to band together "for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618 (1984). And their freedom of speech includes "the autonomy to choose the content of [their] own message," including "what not to say." *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). If the decision of the court below is allowed to stand, though, these avenues of potential protection against efforts to compel a religious group's compliance with

religiously objectionable anti-discrimination provisions may also be foreclosed.

Several aspects of the constitutional analysis below portend jeopardy for religious groups that sponsor youth programs like those described in the first paragraph of this brief: the court's refusal to accept Boy Scouts' own interpretation of its own requirement that scouts be "morally straight" and "clean", *see* 734 A.2d at 1224 & n.12; the court's scornful disdain and legal rejection of the traditional view that homosexual conduct is immoral (*id.* at 1226-28; see also, and especially, Justice Handler's concurring opinion, *id.* at 1242-45); the court's bald conclusion that Boy Scouts' acceptance of a prominent homosexual activist in a role model position of scout leadership would not be "symbolic of Boy Scouts' endorsement of homosexuality", and that compelling Boy Scouts to do so does not constitute "forced speech". *Id.* at 1229.

These conclusions might well apply with equal force were a religiously-affiliated summer camping program to refuse to hire as a counselor, or a synagogue-sponsored youth group to refuse to engage as a leader, a person whose individual lifestyle may conform to contemporary notions of personal morality but flies in the face of the religious teachings of the sponsoring faith group. The camp and the youth program would likely have a hard time persuading a court following the New Jersey Supreme Court's lead that the purpose of their members' association is to disseminate messages about the religious propriety or impropriety of any given lifestyle. They would likely have a similarly hard time pointing to any specific language in their bylaws that speaks about such lifestyles. They would, in short, face legal hurdles substantially identical to the ones the Boy Scouts faced here.

Stated simply, the dangers of disallowing private entities like Boy Scouts of America from embracing their own

notions of moral propriety and role model fitness could have ramifications, especially in this era of limited free exercise protection, that threaten the religious independence of countless programs and institutions across the country.

Indeed, if current social trends are any indication, there may come a time when groups like the Boy Scouts may alter their perspective on the morality of homosexual conduct. Religious denominations like Orthodox Judaism, though – and the numerous other faith groups across this nation that do not regard *Leviticus* as irrelevant – are likely to remain stubborn holdouts. Our stake in an America that allows orthodox faiths to dissent from secular orthodoxies of the day is substantial and enduring, and leads us to raise our voice in support of the Boy Scouts' petition.

ARGUMENT

The petitioner's brief amply demonstrates that the decision below departs from this Court's established precedent and is in tension, if not outright conflict, with decisions of other lower courts.

If the Court grants the petition, *amicus curiae* Agudath Israel will offer its own independent analysis of the relevant case law. For now, though, mindful of the burden *amicus curiae* briefs impose on the Court, particularly at the petition stage of a proceeding, we simply adopt petitioner's argument as our own.

CONCLUSION

> "One particular stereotype we renounce today is that homosexuals are inherently immoral. That myth is repudiated by decades of social science data that convincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in

> and contribute responsibly and positively to society... In short, a lesbian or gay person, merely because he or she is a homosexual, is no more or less likely to be moral that a person who is a heterosexual." 747 A. 2d at 1242-43 (Handler, J., concurring).

Were Justice Handler's morality lecture directed at those who regard persons with a homosexual *orientation* as inherently immoral, it would hardly be worthy of note. But it appears that His Honor has more on his mind, offering his comments in a case involving a sexually active homosexual for whom orientation is a license for conduct. Justice Handler's "renunciation" notwithstanding, millions of Americans still cling to the "myth" that sexual activity between two persons of the same gender is immoral, and that persons who engage in such conduct are not proper role models for youngsters. At stake here, in a fundamental sense, is whether our society still allows people to embrace such "mythology". The issue is important, and worthy of the Court's consideration.

For the reasons set forth in the Boy Scouts' petition, and as elaborated herein, *amicus curiae* Agudath Israel of America respectfully urges the Court to grant the petition and accept certiorari.

Respectfully submitted,

ABBA COHEN
AGUDATH ISRAEL OF AMERICA
1730 Rhode Island Ave., NW
Washington, D.C. 20036
(202) 835-0414

DAVID ZWIEBEL*
MORTON M. AVIGDOR
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, NY 10038
(212) 797-9000

Attorneys for Amicus Curiae
Agudath Israel of America

* Counsel of Record

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On Petition for a Writ of Certiorari to the
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AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

PETER J. FERRARA
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
1220 Rosecrans St.
#325
San Diego, CA 92106
619) 222-0770
(703) 917-4247

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THIS CASE PRESENTS CRITICALLY IMPORTANT ISSUES REGARDING CONSTITUIONALLY PROTECTED PERSONAL LIBERTY 4

II. THE DECISION BELOW VIOLATES THE FREEDOM OF SPEECH AND ASSOCIATION OF THE BOY SCOUTS IN CONFLICT WITH ESTABLISHED PRECEDENTS OF THIS COURT 9

III. THE DECISION OF THE COURT BELOW CREATES A CONFLICT WITH THE DECISIONS OF OTHER COURTS THAT THIS COURT NEEDS TO RESOLVE 12

CONCLUSION 14

TABLE OF AUTHQRITIES

Page

CASES:

Board of Dir. Of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 10

Boyd v. Harding Academy of Memphis, Inc. 88 F.3d 410 (CA6 1996) 9

Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (CA8 1987) 9

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 952 P.2d 218 (1998) 4,13

Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981) 9

Harvey v. YWCA, 533 F. Supp. 949 (W.D.N.C. 1982) 9

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) 9,11-12

McConnell v. Anderson, 451 F.2d 193 (CA81971) 9

Minnesota State Bd. For Community Colleges v. Knight, 465 U.S. 271 (1984) 10

TABLE OF AUTHORITIES

Page

CASES:

NAACP v. Alabama ex rel. Patterson,.357 U.S. 449 (1958) 10

New York State Club Ass'n v. City of New York, 487 U.S.1(1988) 10

Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights and & Opportunities, 204 Conn. 287, 528 A.2d 352(1987) 13

Randall v. Orange County Council, Boy Scouts of America, 17 Cal. 4th 736, 952 P.2d 261 (1998) 13

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 6,9-10

Schwenk v. Boy Scouts of America, 275 Or. 327, 551 P,2d 465 (1976) 13

Seabourn v. Coronado Area Council, Boy Scouts of America, 257 Kan. 178, 891 P.2d 385 (1995)..... 13

Welsh v. Boy Scouts of America, 787 F. Supp. 1511 (N.D. Ill. 1992), aff'd, 993 F.2d1267 (CA7), cert. Denied, 510 U.S. 1012 (1993)..... 12-13

INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Director of the U.S. Commission on Civil Rights Linda Chavez, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Editor-in-Chief of the Reader's Digest and former Director of the Voice of America Kenneth Y. Tomlinson, and nationally syndicated columnist Joseph Perkins.

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about protecting those whose rights and liberties may be overlooked or infringed due to political correctness or other political bias. In this case, we are particularly concerned that the liberty interests of the Boy Scouts to promote their traditional moral

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief has been granted by the parties. Their letters of consent are enclosed with this brief.

values is properly understood.

SUMMARY OF ARGUMENT

This case present critically important issues of personal liberty and constitutional protections for that liberty that warrant granting the petitioners requested writ of certiorari. The decision of the New jersey Supreme Court below would suppress the freedom of citizens to form private, voluntary organizations to advance the moral principles in which they believe. It would constrain them instead towards advancing only the moral principles approved by the state.

The Boy Scouts of America is a large national organization with millions of members, and its freedom of speech and freedom of association is important enough alone for the Court to take this case. But, more broadly, we think this case raises crucial questions regarding the freedom of private, voluntary organizations to advance and teach traditional moral values which may be politically incorrect and even formally disapproved by the state. Most broadly, we think this case implicates the freedom of everyone to organize groups to advance views and values of which the state may disapprove.

The decision of the New Jersey Supreme Court below violates the U.S. Constitution in at least three ways, in direct conflict with established precedents of this Court. First, the ruling violates the freedom of speech of the Boy Scouts. Second, the decision violates the right to expressive association by the Boy Scouts. Third, the decision violates the Boy Scouts' right to intimate association.

Respondent James Dale has no interest in serving as a Boy Scout leader that would remotely come close to outweighing these benefits. The Boy Scout organization is for the boys, not for the Scout leaders. It is not a vehicle for the Scout leaders to advance their personal interests or agendas, or to pursue commercial or business interests or activities. Indeed, the only interest Dale has asserted in seeking to force his acceptance as a Scout leader is his desire to impose his own, differing values on the organization. He says that through his forced leadership he wants to point out to the organization "how bad and wrong" their policy regarding homosexuality is. That is not a valid, legitimate interest to outwiegh the liberty interests of the Boy Scouts discussed above.

Finally, the decision of the court below creates an effective, highly troubling conflict with prior decisions of four state Supreme Courts and one Federal court of appeals, all of which ruled against parties claiming that public accommodation statutes require the Boy Scouts to admit members or leaders that the organization denied as not complying with its standards for membership or leadership. The guidance of this Court is urgently needed to avoid an avalanche of lawsuits over these issues and further conflict in the law.

ARGUMENT

I. THIS CASE PRESENTS CRITICALLY IMPORTANT ISSUES REGARDING CONSTITUIONALLY PROTECTED PERSONAL LIBERTIES

The ACRU joins in asking the Court to grant the petition for a writ of certiorari in this case because we believe it presents critically important issues of personal liberty and constitutional protections for that liberty. The decision of the New Jersey Supreme Court below would suppress the freedom of citizens to form private voluntary organizations to advance the moral principles in which they believe. It would constrain them instead towards advancing only the moral principles approved by the state.

Throughout this century, millions and millions of American boys have participated in the Boy Scout program. That program is not primarily social or recreational. The point of the program is to teach the boys sound moral values. Its various activities are all geared to reinforcing that central goal. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 697, 952 P.2d 218, 236 (1998) (The Boy Scouts is a "charitable, expressive, and social organization" whose "primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose.")

The Boy Scout program advances traditional virtues such as honesty, courage, reverence, hard work, patriotism, thriftiness and others. This also includes traditional family

values, emphasizing marriage and fatherhood for the boys. As a result, the boys are taught that heterosexual sex before marriage, adultery, and heterosexual promiscuity are all wrong. Concomitantly, they are taught that homosexual activity is morally wrong as well.

The Boy Scouts of America is not just a group of outsiders to the boy. Parents, particularly fathers, are also involved in the program and its various activities, often volunteering to serve as the local leaders. Neighbors and fellow church members generally fill out the rest of the local leadership pool.

Have we reached the point in America where parents and socially minded citizens cannot join together to form an organization to teach boys traditional moral values, including that they should not engage in homosexual activity and that it would be morally wrong for them to do so? That is the result of the decision of the New Jersey Supreme Court below. As Co-President of the Rutgers University Lesbian/Gay Alliance, Dale is leading a high profile public campaign propounding the opposite of the view of the Boy Scouts regarding homosexual conduct. (A.3371-A.3374; A.3384).[2] He states publicly that he disagrees with the Boy Scout position on this issue, that he personally engages in homosexual conduct, and that he owes it to the Boy Scouts "to point out to them how bad and wrong" their position on homosexuality is. (14a; 110a; A.3384).

Consequently, for the Boy Scouts to accept Dale as a

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[2] Numbers preceded by "A." refer to pages in the record before the New Jersey Supreme Court. Numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition for Writ of Certiorari.

leader in their organization would completely nullify their position regarding homosexual conduct. Surely it would send a clear signal to all of the boys that Boy Scout teaching regarding homosexual conduct is not to be taken seriously. And if nonmarital homosexual conduct is acceptable, then how can premarital heterosexual conduct not be? Indeed, if Boy Scout leaders can be active homosexuals publicly advocating that lifestyle, how can the Boy Scouts effectively maintain teachings regarding marriage and fatherhood? Certainly these leaders could not propound that message and their presence in the organization would directly contradict it. As a result, the entire Boy Scout doctrine regarding family life and sexual activity would break down.

Mr. Dale may engage in whatever personal conduct he desires. He may publicly advocate the views and values in which he believes. He may openly criticize the Boy Scouts and the values they espouse. What he may not do is impose his own views and values on the Boy Scouts by forcing them to accept him as a leader, despite his openly expressed views and conduct directly contradicting the values the organization seeks to teach. *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)("There can be no clearer example of an intrusion into the internal structure or affairs of an organization than a regulation that forces the group to accept members it does not desire."). Yet, that is the result of the decision of the New Jersey Supreme Court below.

That decision was clearly and openly grounded in animus towards the very values the Boy Scouts seek to advance. The court actually stated that in its view the position of the Boy Scouts on homosexuality is "based on little more than prejudice" and denounced it as "bigotry". (59a;61a). In a concurring opinion, Justice Handler stated that it is "untenable" for the Boy Scouts to remain "entrenched in the social mores that existed at the time of its inception" (100a) which the court effectively ruled are now outdated and socially unacceptable, if not outright illegal.

The New Jersey court is apparently socially unaware that tens of millions of Americans believe in the moral values espoused by the Boy Scouts, including the values regarding homosexuality. Millions and millions believe as well that these views regarding homosexual conduct are directly derived from the words of the Bible and Judeo-Christian doctrines. Major religious denominations support this position. To rule that this is simply stupid bigotry is to pit the power of the state against these traditional, religiously based beliefs.

If this precedent is allowed to stand today, then where will such legal doctrines lead in the future? It would seem that the very freedom of citizens to join together with private voluntary organizations to advance traditional moral values would ultimately be threatened. If the values the group seeks to promote are politically incorrect or otherwise disapproved by the state, we seem to be approaching the point where the state can force the group to accept as members, or perhaps even leaders, others who disagree with the group's values and will insist it promote the politically correct view. If these traditional values can be legally styled as simple bigotry and prejudice, then how long will it be before actions undertaken to promote them are found to constitute illegal discrimination or even hate crimes? How long before organized efforts to

teach these supposedly bigoted, prejudiced values to children are themselves condemned as illegal discrimination or even child abuse?

More broadly, such doctrines threaten the rights of everyone. For if groups advancing traditional moral values can ultimately be restricted to promoting only the values approved by the state, this will be true for every other group as well, including groups of antiwar activists, draft protesters, antitax agitators, and even gay and lesbian groups. If today the Boy Scouts can be forced to accept a homosexual activist as a leader, then under a different political climate a gay/lesbian group officially recognized by a public university may be forced to accept as members or even leaders fundamentalist Christians who want to use the group to urge homosexuals to abandon their sexual practices.

All of this raises critical issues of constitutionally protected freedom of speech and freedom of association which this Court should decide. The Boy Scouts of America is a large national organization with millions of members, and its freedom of speech and of association is important enough alone for the Court to take this case. But, more broadly, we think this case raises crucial questions regarding the freedom of private voluntary organizations to advance and teach traditional moral values which may be politically incorrect and even formally disapproved by the state. Most broadly, we think this case implicates the freedom of everyone to organize groups to advance views and values of which the state disapproves.

II. THE DECISION BELOW VIOLATES THE FREEDOM OF SPEECH AND OF ASSOCIATION OF THE BOY SCOUTS, IN CONFLICT WITH ESTABLISHED PRECEDENTS OF THIS COURT.

We agree with Petitioners that the decision of the New Jersey Supreme Court violates the U.S. Constitution in at least three ways. First, the ruling of the court violates the freedom of speech of the Boy Scouts. As discussed above, forcing the Boy Scouts to accept Dale as a scout leader when he openly challenges, by word and by deed, values the organization is trying to communicate to boy scouts cripples the ability of the organization to send its message. Rather, it forces the organization to send the contrary messages Dale wants to send. See, e.g., *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *Boyd v. Harding Academy of Memphis, Inc.* 88 F.3d 410 (CA6 1996); *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (CA8 1987); *McConnell v. Anderson*, 451 F.2d 193(CA8 1971); *Harvey v. YWCA*, 533 F.Supp. 949 (W.D.N.C. 1982).

Secondly, the decision below violates the right to expressive association by the Boy Scouts. As discussed above, the purpose of the Boy Scouts is to teach the boys sound moral values, including the traditional values regarding marriage, fatherhood, and sex. To force the Boy Scouts to accept Dale as a leader violates the group's right to associate with who they want, in order to send the messages they want. *Hurley; Democratic Party of United States v. Wisconsin ex. rel. LaFollete*, 450 U.S. 107, 122 (1981); *Roberts*, 468

U.S. at 623, 633-636 (O'Connor J., concurring); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958); *Board of Directors of Rotary International v. Rotary Club of Duarte,* 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York,* 487 U.S. 1 (1988). *See also Minnesota State Bd. For Community Colleges v. Knight, 465 U.S. 271 (1984).*

Thirdly, the decision violates the Boy Scouts' right to intimate association. Boy Scout activities involve utterly private, intimate associations between family, friends and neighbors. Scout troops take private hikes and camp out together in remote areas. Scouts and their leaders engage in personal communications on moral and intimate subjects. Their meetings are closed to outsiders except during periods when prospective recruits and their parents may attend. No commercial or business activities are involved. Even membership by the boys is not automatically open to all comers, but is subject to the discretion and choice of the leaders.

Outsiders should have no right to force their way into such a private, intimate group. Doing so by force of the state violates a basic constitutional right of citizens and groups to choose their own intimate associations. We agree with petitioners that if the Boy Scouts do not qualify for constitutional protection as a private, intimate group, then no group other than a family would.

Finally, Dale has no interest in serving as a Boy Scout leader that would remotely come close to outweighing these rights of the Boy Scouts. The Boy Scout organization is for the boys, not for the Scout leaders. The point of the organization is to teach the boys sound moral values, help them develop bonds with friends, neighbors, and their community,

and foster enjoyable experiences for them such as camping trips and other activities. The organization is not a vehicle for advancing the personal interests of Scout leaders. Parents may enjoy serving as Scout leaders for their children, but that is not an interest for Dale. Neighbors may enjoy serving as Scout leaders to provide service for their local community and its children, but that pales to insignificance compared to the core liberty interests of the Boy Scouts discussed above. Moreover, Dale has many other avenues for serving his local community.

In fact, the only interest Dale has asserted in forcing his acceptance as a Scout leader is his desire to impose his own, differing values on the organization. He says that through his forced leadership role he wants to point out to the organization "how bad and wrong" their policy regarding homosexuality is. That is not a valid, legitimate interest to outwiegh the liberty interests of the Boy Scouts discussed above.

This all should have been made clear by this Court's decision in *Hurley*, which is directly contradicted by the decision of the New Jersey Supreme Court below. In that case, this Court held unanimously that forcing private organizers of a St. Patrick's Day parade to include the Gay, Lesbian and Bisexual Group of Boston (GLIB) under a state antidiscrimination statute was unconstitutional. Such forced participation by GLIB, the Court said, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," which includes the right to decide "what not to say." 515 U.S. at 573. The Court recognized that GLIB

wanted to force its way into the parade to send its own message, but the organizers of the parade had a constitutionally protected right to decide that they didn't want to send that message in their parade.

Quite similarly, forcing the Boy Scouts to accept Dale as a leader would violate the group's free speech right to choose the content of their own message. For as discussed above, if the Boy Scouts must include gay activists such as Dale as leaders, then their message regarding homosexual activity and, indeed, their entire doctrine regarding family life and sexual conduct would break down. Moreover, just as with GLIB in *Hurley*, Dale wants to force his way into the Boy Scouts as a leader to send his own message regarding homosexual activity, directly contrary to the Boy Scouts' message. Even more clearly than for the parade organizers in *Hurley*, who had no position on homosexuality, the Boy Scouts have a constitutionally protected right to decide that they don't want to send Dale's message directly contradicting their own.

III. THE DECISION OF THE COURT BELOW CREATES A CONFLICT WITH THE DECISIONS OF OTHER COURTS THAT THIS COURT NEEDS TO RESOLVE

Four state supreme courts and one Federal court of appeals have ruled against parties claiming that public accommodation statutes require the Boy Scouts to admit members or leaders that the organization denied as not complying with its standards for membership or leadership. *Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992),

aff'd, 993 F.2d 1267 (CA7), *cert. Denied*, 510 U.S. 1012 (1993); *Curran; Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998); *Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976).

In these cases, the courts reached their results by interpreting the statute as not applying to the Boy Scouts because it is a private expressive organization. Consequently, they did not explicitly rule that the Scouts have constitutional protection against forced membership or leadership.

Nevertheless, we agree with petitioners that the decision of the New Jersey Supreme Court effectively contradicts these decisions. Courts who believe that the constitutional protections do apply to the Scouts are quite likely to construe the statute before them as not applying to the Scouts. Only courts who believe as the New Jersey Surpeme Court below who believe that the Scouts are not constitutionally protected will reach the constitutional question directly. As a result, there will probably never be a more direct conflict than we have now. Yet, we do have an effective and practical conflict between the majority of courts who believe the Scouts are constitutionally protected from public accommodation laws and those who believe they are not. This Court needs to resolve this issue to avoid an avalanche of litigation imposed on the Boy Scouts and to prevent still further conflicts from developing as a result.

CONCLUSION

For all of the above reasons, we urge the Court to grant the requested *writ of certiorari*.

Respectfully submitted,

Peter J. Ferrara
Counsel of Record
American Civil Rights Union
1220 Rosecrans St.
#325
San Diego, CA 92106
(619) 222-0770
(703) 917-4247

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IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF FOR PETITIONERS

MICHAEL W. McCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

SANFORD D. BROWN
CERRATO, DAWES, COLLINS, SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a state law requiring a Boy Scout Troop to appoint an avowed homosexual and gay rights activist as an Assistant Scoutmaster responsible for communicating Boy Scouting's moral values to youth members abridges First Amendment rights of freedom of speech and freedom of association.

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America.

2. Respondent James Dale.

Boy Scouts of America and Monmouth Council, Boy Scouts of America are not-for-profit corporations without stockholders. The only affiliate of Boy Scouts of America is Learning for Life, a not-for-profit corporation. Boy Scouts of America charters approximately 318 not-for-profit corporations as local Councils such as Monmouth Council to support Boy Scouting and other Scouting programs in particular geographic areas, and charters numerous churches, synagogues and other community groups in localities throughout the country to operate Boy Scout Troops and other Scout units.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
Boy Scouts of America	2
State Public Accommodations Laws	6
Respondent James Dale	8
The Superior Court of New Jersey, Chancery Division	10
The Superior Court of New Jersey, Appellate Division	12
The Supreme Court of New Jersey	15
SUMMARY OF ARGUMENT	18
ARGUMENT	20
REQUIRING A BOY SCOUT TROOP TO APPOINT AN AVOWED HOMOSEXUAL AND GAY RIGHTS ACTIVIST AS AN ASSISTANT SCOUTMASTER UNCONSTITUTIONALLY ABRIDGES FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION	20

TABLE OF CONTENTS—Continued

A. Requiring a Boy Scout Troop to Appoint an Adult Leader Who Opposes the Organization's Moral Code Violates Freedom of Speech 20

1. *Hurley* Controls This Case 22

2. The New Jersey Supreme Court's Reasons for Refusing First Amendment Protection to Boy Scouting Are Insupportable 24

a. Boy Scouting's Beliefs About Homosexual Conduct 25

b. The Expressive Impact of Dale's Participation As an Openly Gay Uniformed Adult Leader 28

B. The Decision Below Also Violates Boy Scouting's Freedom of Expressive Association 30

1. Private Expressive Associations Have the Right to Choose Their Own Members 30

2. Private Expressive Associations Have the Unqualified Right to Choose Their Leaders 32

3. Boy Scouting's Expressive Association Claim Is Supported by the *Roberts* Trilogy 34

a. As a Non-Commercial Expressive Association, Boy Scouting Enjoys Full Protection of the Freedom of Association 34

b. The Exclusion of Dale Is Related to Boy Scouting's Moral Beliefs 35

4. The New Jersey Supreme Court's Expansive Interpretation of the Public Accommodations Law Conflicts with Core First Amendment Principles 37

TABLE OF CONTENTS—Continued

C. As Intimate Associations, Boy Scout Troops Have the Constitutional Right to Decide for Themselves Whom to Select to Supervise Other People's Children 39

1. Boy Scout Troops Are Intimate Associations 39

2. As Associations Formed Principally of Parents to Provide Moral Education to Their Sons, Boy Scout Troops Enjoy Enhanced Constitutional Protection 42

D. No State Interest Justifies These Infringements of First Amendment Rights 44

CONCLUSION 47

STATUTORY APPENDIX

N.J. Stat. Ann. §§ 10:5-4, 10:5-5(*l*), 10:5-5(hh), & 10:5-12(f)(1) xii

TABLE OF AUTHORITIES

Page

CASES

Bishop Leonard Regional Catholic School v. Unemployment Compensation Board of Review, 140 Pa. Commw. 428, 593 A.2d 28 (Pa. Commw. Ct. 1991) 33

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) ..... *passim*

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Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (CA6 1996) 33

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Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (CA8 1987) 33

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TABLE OF AUTHORITIES—Continued

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Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) 19,32

Gellington v. Christian Methodist Episcopal Church, Inc., No. 99-10603, 2000 WL 192100 (CA11 Feb. 17, 2000) 32

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) 37

Gosche v. Calvert High School, 997 F. Supp. 867 (N.D. Ohio 1998) 33

Harvey v. YWCA, 533 F. Supp. 949 (W.D.N.C. 1982) 33

TABLE OF AUTHORITIES—Continued

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) ..... *passim*

Little v. Wuerl, 929 F.2d 944 (CA3 1991) 33

Maguire v. Marquette University, 814 F.2d 1213 (CA7 1987) 33

McClure v. Salvation Army, 460 F.2d 553 (CA5 1972) 32

Meyer v. Nebraska, 262 U.S. 390 (1923) 42,43

Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984) 31

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 19,31

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 44

New York State Club Association v. City of New York, 487 U.S. 1 (1988) 31,34,35,36

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Pool v. Boy Scouts of America, Nos. 93-030-PA, 93-031-PA (D.C. Dep't of Human Rights & Minority Business Dev.) (post-hearing briefing concluded May 18, 1998), *sub judice* 8

Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities, 204 Conn. 287, 528 A.2d 352 (1987) 7

Randall v. Orange County Council, Boy Scouts of America, 17 Cal. 4th 736, 952 P.2d 261 (1998) 7,42

TABLE OF AUTHORITIES—Continued

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Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360 (CA8 1991) 32

Schwenk v. Boy Scouts of America, 275 Or. 327, 551 P.2d 465 (1976) 7

Seabourn v. Coronado Area Council, Boy Scouts of America, 257 Kan. 178, 891 P.2d 385 (1995) 7

Shelton v. Tucker, 364 U.S. 479 (1960) 31

United States v. O'Brien, 391 U.S. 367 (1968) 44

United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973) 43

Welsh v. Boy Scouts of America, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993) 7

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CONSTITUTION AND STATUTES

U.S. Const. amend. I 1

TABLE OF AUTHORITIES—Continued

U.S. Const. amend. XIV, § 1 1

8 U.S.C. § 1182(a)(4) (repealed 1990) 5

28 U.S.C. § 1257(a) 1

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey, 1a-101a,[1] is reported at 160 N.J. 562, 734 A.2d 1196 (1999). The opinion of the Superior Court of New Jersey, Appellate Division, 102a-154a, is reported at 308 N.J. Super. 516, 706 A.2d 270 (1998). The opinion of the Superior Court of New Jersey, Chancery Division, 155a-224a, is unreported.

JURISDICTION

The decision of the Supreme Court of New Jersey was entered on August 4, 1999. 1a. The Writ of Certiorari was granted by this Court on January 14, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First and Fourteenth Amendments to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ; or the right of the people peaceably to assemble . . . ." U.S. Const. amend. I.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

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1. Numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition for Writ of Certiorari. Numbers preceded by "JA" refer to pages in the bound Joint Appendix. Numbers preceded by "R" refer to pages in the joint appendix submitted below. Numbers preceded by "L" refer to pages in the bound Joint Lodging Materials.

The pertinent New Jersey statutes, New Jersey Statutes Annotated, title 10, chapter 5, sections 10:5-4, 10:5-5(*l*), 10:5-5(hh) and 10:5-12(f)(1), are reprinted *infra* at pp. xii-xv.

STATEMENT OF THE CASE

Boy Scouts of America

Petitioner Boy Scouts of America is a private, non-profit organization. Its mission is to instill the values of the Scout Oath and Law in youth:

> It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.
>
> The values we strive to instill are based on those found in the Scout Oath and Law:

Scout Oath

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

Scout Law

A Scout is . . .

Trustworthy	Obedient
Loyal	Cheerful
Helpful	Thrifty
Friendly	Brave
Courteous	Clean
Kind	Reverent

JA 184. At virtually every meeting and ceremony, Boy Scouts and their adult leaders recite the Oath and Law in unison. JA 175-176, JA 274-288, JA 464. The Oath and Law provide a positive moral code for living; they are a list of "do's" rather than "don'ts," setting forth affirmative character traits. JA 187-189, JA 215-226. Through the Boy Scouting program, boys learn how to live by this moral code. JA 450.

Boy Scouting takes place primarily in Troops, small units typically consisting of 15 to 30 boys led by a uniformed Scoutmaster and Assistant Scoutmasters. JA 172. Almost 65 percent of Boy Scout Troops are sponsored by churches or synagogues, more than 25 percent are chartered to private community organizations, and fewer than 10 percent are chartered to public institutions. JA 159. Boy Scouting is an integral part of many church youth programs. JA 155-161, JA 722-723 (Catholic), JA 707-709 (United Methodist), JA 710-713 (Conservative Jewish), JA 714-718 (Lutheran-Missouri Synod), JA 719-721 (Latter-day Saints), JA 724-726 (Southern Baptist), JA 727-730 (Presbyterian).

Responsibility for inculcating Boy Scouting's values is entrusted to the volunteer Scoutmaster and Assistant Scoutmasters. JA 180-181, JA 232-233, JA 244, JA 246, JA 261, JA 299-300, JA 303. If a boy is in doubt about how to conduct himself, the *Boy Scout Handbook* tells him that he may look to his Scoutmaster, "a wise friend to whom you can always turn for advice." R 2539. "If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your . . . Scoutmaster." JA 211. In turn, the *Scoutmaster Handbook* advises adult leaders to be responsive: "Be accepting of their concerns about sex. Be very open and clear when talking with them." JA 249.

Because Boy Scouts and their leaders are together 24 hours a day on weekend campouts and in summer camp, JA 173-174, the Scoutmaster and Assistant Scoutmasters necessarily teach by

example as much or more than they teach by proscription. Boy Scouts do not simply see one aspect of an adult leader's character; they see it all. The *Scoutmaster Handbook* tells leaders: "Your Scouts need to rely on you to be consistent in your behavior and beliefs. Your actions also demonstrate what you expect of them." "[P]ractice what you preach. . . . The most destructive influence on boys is adult inconsistency and hypocrisy." JA 257.

Given these responsibilities, Boy Scouting seeks to appoint leaders who will represent Boy Scouting's "[h]igh moral standards." JA 300. No adult leader can be appointed without approval of the sponsoring institution, the local Council (such as petitioner Monmouth Council) that oversees Scouting in the geographical area in question, and Boy Scouts of America. JA 359, JA 387, JA 392. As noted by the New Jersey Supreme Court, adult volunteers must not only commit to the Scout Oath and Law and the Declaration of Religious Principle, but must pass muster under a number of "informal criteria designed to select only individuals capable of accepting responsibility for the moral education and care of other people's children in accordance with scouting values." 38a, JA 182-183, JA 299-303. Adults have been denied leadership positions in Scouting for various views and behaviors which Boy Scouts of America deems inconsistent with the Scout Oath and Scout Law, from openly adulterous behavior to the bringing of alcohol to Scouting events to known substance abuse outside of Scouting. JA 694-695, JA 751-752, JA 760.

With respect to sexual behavior, Boy Scouting "espouses family values" based on marriage and fatherhood. JA 457-459, JA 697. The *Boy Scout Handbook* describes how a young man attains "[t]rue manliness" by accepting his "responsibility to women," his "responsibility to children" when he marries and has a family, his responsibility to his religious beliefs, and his

responsibility to himself. JA 210-211. "Abstinence until marriage," the *Handbook* counsels, "is a very wise course of action." JA 210.

Official Scouting materials addressed to the boys do not refer to homosexuality or inveigh against homosexual conduct; rather, they teach family-oriented values and tolerance of all persons. JA 203-208, JA 221-222. In keeping with the view that boys learn best by positive example, rather than by "thou shalt nots," the handbooks for boys do not catalog immoral behavior for Boy Scouts. It cannot be inferred that unmentioned misconduct is consistent with Scouting's moral code.

For most of Scouting's history, no one could have had any doubt about the organization's view on homosexuality. *See Boy Scouts of America v. Teal*, 374 F. Supp. 1276, 1277 (E.D. Pa. 1974) (Higginbotham, J.). Indeed, homosexual sodomy was a criminal offense in New Jersey until 1979, N.J. Stat. Ann. § 2A:143-1 (repealed 1979), and homosexuals were barred from immigration until 1990, 8 U.S.C. § 1182(a)(4) (repealed 1990). After 1981, when an openly gay man sought to become a leader in a California Boy Scout Troop, *see Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998),[2] Boy Scouts of America promulgated a series of position statements for Scout officials who might be asked to articulate Boy Scouting's position. One such statement promulgated on February 15, 1991 — prior to the institution of the suit at

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2. Curran affirmatively alleged that members of Boy Scouting "'must hold to the Judeo-Christian belief that to be a homosexual is to be immoral per se,'" claiming that this requirement violated California's public accommodation law. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 48 Cal. App. 4th 670, 678, 29 Cal. Rptr. 2d 580, 588 (1994) (quoting Curran's Complaint), *review granted and opinion superseded by* 17 Cal. 4th 670, 952 P.2d 218 (1998).

issue and prior to the amendment of New Jersey law to cover sexual orientation — declared:

> We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed . . . .

and explained that not accepting homosexual members as leaders was based "solely upon our desire to provide the appropriate environment and role models which reflect Scouting's values and beliefs." JA 458. Other official statements, to similar effect, are dated March 1978, June 1991, May 1992, and January 1993. JA 453-461. Nine current and former Scout leaders or officials testified by certification or deposition that the organization regards homosexual conduct as inconsistent with the Scout Oath and Law. JA 160-161, JA 183, JA 312, JA 444, JA 451, JA 465, JA 692-693, JA 746, R 3254.

Boy Scouting makes no effort to discover the sexual orientation of any person. JA 460. Its expressive purpose is not implicated unless a prospective leader presents himself as a role model inconsistent with Boy Scouting's understanding of the Scout Oath and Law. Boy Scouting does not have an "anti-gay" policy, it has a morally straight policy.

State Public Accommodations Laws

The New Jersey public accommodations law forbids discrimination on the basis of race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, or nationality. N.J. Stat. Ann. § 10:5-12(f)(1) (West 1993). *See infra* at pp. xiv-xv. "Affectional or sexual orientation" is defined as "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation."

N.J. Stat. Ann. § 10:5-5(hh). *See infra* at p. xiii. Scouting programs "discriminate" on the basis of sex, age and creed. In jurisdictions where substance or alcohol abuse is treated as a disability, Scouting "discriminates" on that ground as well.

The vast majority of states in the Union, many cities and counties, and the federal government have laws prohibiting places of public accommodation from discriminating on the basis of various criteria. Most states attempt to avoid obvious freedom of association problems with such statutes by confining their reach through statutory exclusions. The New Jersey statute excludes: (1) any institution or club "which is in its nature distinctly private," (2) any "educational facility operated or maintained by a bona fide religious or sectarian institution," and (3) "the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control." N.J. Stat. Ann. § 10:5-5(*l*). *See infra* at pp. xii-xiii.

Numerous suits have been brought against Scouting on behalf of girls, atheists, and avowed homosexuals who have not been permitted to participate in the organization. Four state supreme courts and the U.S. Court of Appeals for the Seventh Circuit have ruled that Scouting is not a place of public accommodation.[3] Other cases remain pending.[4]

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3. *See, e.g., Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998); *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998); *Quinnipiac Council, Boy Scouts of America, Inc. v. Comm'n on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976).

4. *See, e.g., Broward County Human Rights Board v. Boy Scouts of America*, No. PA-754-11-99 (Broward County Human Rights Div.) (complaint filed Nov. 12, 1999) (Board alleges discrimination against

Respondent James Dale

James Dale had been a prominent Boy Scout in Monmouth Council and achieved the rank of Eagle Scout. Dale ceased to be a Boy Scout at the age of 18, when youth membership automatically ends. JA 14-16, JA 180. As is not uncommon, Dale registered as an Assistant Scoutmaster for his Troop after his youth membership expired. JA 16. Since he had gone away to college; however, Dale had very little involvement with Boy Scouting or the Troop as an adult leader. JA 465, JA 632-633, R 3346-3350.

After going to college, Dale came to regard himself as homosexual, came to believe that homosexual conduct "is not immoral," and "became deeply involved in gay rights issues and maintained a high profile on campus." JA 126-127, JA 495, JA 503, JA 526-527. He became Co-President of the Rutgers University Lesbian/Gay Alliance in his sophomore year. JA 126, L 10. On July 8, 1990, the Newark *Star-Ledger* published a picture of Dale and an interview with Dale as a gay activist describing the needs of homosexual teens for gay role models. L 10.

Adult leaders "throughout Monmouth Council" saw the *Star-Ledger* article and forwarded it to Council headquarters. JA 753, R 3576. As a result, Dale's registration as an adult

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agnostics and homosexuals); *Richardson v. Chicago Area Council of Boy Scouts of America*, No. CCHR 92-E-80 (Chicago Comm'n on Human Relations 1996), *aff'd in rel. part*, No. 96 CH 3266 (Ill. Cir. Ct. Aug. 12, 1999), *appeal docketed*, No. 99-3018 (Ill. App. Ct. Aug. 23, 1999) (gay activist seeking to be uniformed professional); *Downey-Schottmiller v. Chester County Council of the Boy Scouts of America*, No. P-3986 (Pa. Human Relations Comm'n July 27, 1999), *appeal docketed*, No. 2291 CD 1999 (Pa. Commw. Ct. Aug. 27, 1999) (atheist activist seeking to be volunteer leader); *Pool v. Boy Scouts of America*, Nos. 93-030-PA, 93-031-PA (D.C. Dep't of Human Rights & Minority Bus. Dev.) (post-hearing briefing concluded May 18, 1998) (openly gay men seeking to be volunteer leaders), *sub judice*.

volunteer Boy Scout leader was revoked. JA 753, JA 135. Upon request for review, Dale was informed by higher Scouting authorities that he was ineligible to serve as Scout leader because "Boy Scouts of America does not admit avowed homosexuals to membership in the organization." JA 138. At that time, public accommodations law in New Jersey did not extend to sexual orientation.

About 18 months later, the legislature amended New Jersey's public accommodations law to extend to "sexual orientation." N.J. Stat. Ann. §§ 10:5-5(*l*), 10:5-5(hh), 10:5-12(f)(1). *See infra* at pp. xii-xv. Eleven days later, Dale sued petitioners, seeking reinstatement as an Assistant Scoutmaster and compensatory and punitive damages, and alleging that volunteer service as an Assistant Scoutmaster was one of the "advantages" of "a place of public accommodation." JA 10-28. In his Complaint, Dale alleged that "the only gay Scouts singled out for exclusion are those, such as James Dale, who, in part as a result of Boy Scout training, become leaders in their community and are open and honest about their sexual orientation." JA 11.

Upon filing the Complaint, Dale stated in an interview published in *The New York Times*:

> I owe it to the organization to point out to them how bad and wrong this policy is. . . .
>
> Being proud about who I am is something the Boy Scouts taught me. They taught me to stand up for what I believe in.

JA 513. After filing his law suit, Dale proclaimed on television:

> . . . [Y]es, I am gay, and I'm very proud of who I am . . . . I have pride, I stand up for what I believe in, I mean, what you see is what you

> get. I'm not hiding anything. But the Boy Scouts don't like that.

JA 470.

The Superior Court of New Jersey, Chancery Division

All parties moved for summary judgment. The Superior Court of New Jersey, Chancery Division, granted petitioners' motion, 224a, ruling that Boy Scouting is not a place of public accommodation and in any event is a "distinctly private" group exempted from coverage under the public accommodations law.

The Chancery Court also held that it would be unconstitutional to force a Troop to accept respondent as a volunteer leader. The court described the expressive character of Boy Scouting:

> Youth membership in scouting is restricted to boys between 11 and 18. To become a member, each must submit a completed Boy Scout application and health history signed by his parents; each must repeat the Pledge of Allegiance; demonstrate the Scout salute, the Scout sign and handclasp and how to tie a square knot. Each, with his parents, must complete a child protection program; participate in a Scoutmaster conference and pay the national dues. Each must understand and agree to live by the Scout Oath, Law, motto, slogan and Outdoor Code.
>
> Similarly, Adult Leadership is not open to the public. One must be . . . over the age of 21 (except, for assistant scoutmasters, over 18). He must possess the moral, educational and emotional qualities deemed necessary by BSA

> for leadership before he will be commissioned. He must be recommended by the Scout Executive and approved by the Local Council executive board. He must subscribe to the Statement of Religious Principle, the Scout Oath and the Scout Law.
>
> Each troop meeting begins with the recitation of the Scout Oath and Law. On a regular basis there then follows a group discussion of various parts of the Oath and Law stimulated by the Scoutmaster or troop leader. Before the close of each meeting, it is the usual practice that the Scoutmaster offer the boys a moral lesson, known as the Scoutmaster's Minute.
>
> At each level of advancement, the individual boy describes to his Scoutmaster or review board of adult leaders how he is living his life in accordance with the Scout Oath and Law.

222a-223a. The Chancery Court found that "[s]ince its inception Scouting has sincerely and unswervingly held to the view that an 'avowed,' sexually-active homosexual is engaging in immoral behavior which violates the Scout Oath (in which the person promises to be 'morally straight') and the Scout Law (whereby the person promises to keep himself 'clean')." 223a. Relying on Justice O'Connor's concurring opinion in *Roberts v. United States Jaycees,* 468 U.S. 609, 631 (1984), 212a-215a, the Chancery Court held that petitioners "have First Amendment freedom of expressive association rights preventing government from forcing them to accept Dale as an adult leader-member." 212a-214a, 224a.

The Superior Court of New Jersey, Appellate Division

The Appellate Division reversed by a 2-1 vote, holding that Boy Scouting was a public accommodation and that Boy Scouting had no First Amendment right to exclude Dale because of his "statements as a 'gay activist,'" "his 'message,'" or "his avowed homosexuality." 139a. The majority noted much evidence with respect to Boy Scouting's expression, including the following:

> 1) Dale's 1972 *Scoutmaster's Handbook* advised leaders:
>
> > 'You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons.
> >
> > * * * *
> >
> > What you are speaks louder than what you say. This ranges from simple things like wearing a uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.' 108a, JA 543.
>
> 2) In 1978, Boy Scouts of America prepared a policy statement providing 'that an individual *who openly declares* himself to be a homosexual would not be selected to be a volunteer [S]cout leader, be registered as a unit member, or be employed [by the Boy Scouts of America] as a professional. . . .' Later position statements affirmed that stance. 109a, JA 453-461 (emphasis added).

The majority first dispensed with the freedom of intimate association claim, focusing on the national membership numbers of Boy Scouts of America rather than on the

relationships in individual Troops, 131a, as this Court's decisions in *Roberts*, 468 U.S. at 619-620, and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 546-547 (1987), require.

While not disputing that Boy Scouting is an expressive association, the majority concluded that enforcement of the New Jersey law would not "significantly impair" its ability to "express its fundamental tenets" because an "anti-gay" view was not "what 'brought [the original members] together.'" 135a-136a (quoting *Roberts*, 468 U.S. at 623). Boy Scouting does not exist to "provide a public forum for its members to espouse the benefits of heterosexuality and the 'evils' of the homosexual lifestyle." 135a. The majority concluded that the official statements issued by Scouting on the subject of homosexuality from 1978 to 1993 did not represent the "beliefs that brought the boy scouts together" because the latest one had been issued 76 years after the founding of Boy Scouts of America. 141a.

The majority rejected application of *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), as a "pure speech" case. 147a-148a. It distinguished parades from Boy Scouting because parades involve "people marching in costumes and uniforms, carrying flags and banners with all sorts of messages" and constitute "'public dramas of social relations'" in which the protected expression extends beyond banners and songs to "its communicated symbolism as well." 145a (quoting 515 U.S. at 568-569). The majority concluded that Scouting could claim no constitutional "privilege" to exclude Dale "when the sole basis for the exclusion is the gay's exercise of his own First Amendment right to speak honestly about himself." 149a.

Judge Landau dissented on the First Amendment issue. He noted that what had "been lost in the majority's opinion"

was that Dale "has been prominently publicized as an avowed, practicing homosexual and also as a leader in organizational activities given to the promotion of the interests of gay and lesbian students." 150a-151a. Judge Landau stated that although Scouting must be aware that statistically some of its leaders are likely to have been homosexuals and "[t]here obviously has been no anti-gay witch hunt in the Boy Scout movement," Scouting "condemns homosexual practice as morally unacceptable and so acts negatively with respect to its open avowal because it is inconsistent with one of the expressed moral policies of the organization." 152a. Citing *Hurley*, 515 U.S. at 581, Judge Landau wrote:

> We may not compel the Boy Scouts to alter a message which they wish to convey by including messages more acceptable to others. This principle is not changed merely because the altered message is implicitly, but no less strongly, conveyed by example rather than by verbal articulation or by signs.

153a.

As for the majority's questioning the "fundamental nature" of Scouting's view of homosexual conduct, Judge Landau responded that "it is not for this court to tell the Boy Scouts what to believe or what to profess." Boy Scouts of America's "consistent litigation stand . . . and the representations of [its] governing officials are enough for me." He also responded that "whether or not the Boy Scouts' stand on homosexuality is fundamental to that organization's creation is entirely irrelevant." 153a-154a.[5]

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5. Judge Landau opined that Dale might remain a member without holding a leadership position. 151a, 154a. However, there are no roles for adult "members" beyond serving as volunteer leaders for youth.

The Supreme Court of New Jersey

The Supreme Court of New Jersey affirmed. It held that Boy Scouting is a place of public accommodation, that the statutory exemptions are inapplicable, and that the First Amendment provides no defense.

The Statutory Question. The court ruled that Boy Scouting was a public accommodation on the basis of "various factors." Scouting publicly solicited members through, among other things, "the symbolism of a Boy Scout uniform" worn in public places. Furthermore, Scouting received several benefits from government, including a federal charter, the support of Presidents and members of Congress, access to some military facilities and equipment, use of public buildings and spaces for meetings, and sponsorship of some Troops by government entities. 24a-30a.

The court refused to apply several exceptions to the public accommodations law. First, the court held that Boy Scout Troops are not "distinctly private" within the meaning of the law. 31a-39a. It held that "the principal determinant of 'distinctly private' status" is the organization's "selectivity." 32a-33a. The court found that Boy Scouting encouraged local Councils and Troops "to see that *all* eligible youth have the opportunity" to join. 35a. Even though members must "comply with the Scout Oath and Law," the Scout Oath and Law did not operate as "genuine selectivity criteria" because the record disclosed "few instances in which the Oath and Law have been used to exclude a prospective member." 37a. "Here, there is no evidence that Boy Scouts does anything but accept at face value a scout's affirmation of the Oath and Law." *Id.* The court found it "[m]ost important" that Boy Scouting "does not limit its membership to individuals who belong to a particular religion *or subscribe to a specific set of moral beliefs*." 37a-38a (emphasis added). *But see* 53a (Boy Scouting "expresses a belief in moral values and . . .

encourage[s] the moral development of its members."). While adult leadership standards were more restrictive than youth membership, Boy Scouting could not be held to be private only with respect to leaders, "a small subset of the larger group." 38a.

Second, Boy Scouting could not qualify as an "'educational facility operated or maintained by a bona fide religious or sectarian institution,'" 39a (quoting N.J. Stat. Ann. § 10:5-5(*l*)), because Scouting was "nonsectarian." 40a. Repeated expression of belief in God through recitation of the Scout Oath did not qualify Boy Scouting as a religious institution; its commitment to education did not qualify it as an educational facility. 39a-40a & n.10.

Third, despite the close relationships between adult leaders and Boy Scouts, JA 250, the responsibility of adult leaders to act as role models of Scouting values, JA 446, and the round-the-clock supervisory role of adult leaders on camp-outs and other outings, JA 741, the court concluded that Boy Scouting did not act in loco parentis because a Boy Scout leader does not "'maintain, rear and educate'" children in the place of the parent. 40a-41a (quoting *Miller v. Miller*, 97 N.J. 154, 162 (1984)).

The First Amendment. The court rejected petitioners' assertion of First Amendment freedoms of intimate association, expressive association, and speech. It held that Boy Scouting is not "'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." 48a (quoting *Rotary*, 481 U.S. at 546). Although a Troop is typically composed of 15 to 30 boys and their adult leaders, the court relied on *Rotary*, 481 U.S. at 546, for the proposition that "a local club with as few as twenty members did not qualify as [an intimate association]." 48a-49a. Other factors included Scouting's attempts at inclusiveness, and its practice of inviting "nonmembers" to

attend recruiting meetings and award ceremonies. 49a-50a. Moreover, the court added, an adult leader does not "have private or intimate relationships with troop members." 49a.

The court rejected the expressive association defense by rejecting Boy Scouting's statements of its moral values and substituting the court's own definition of Scouting's moral messages. 52a. Furthermore, the court held that the statute satisfied the compelling state interest in eliminating sexual orientation discrimination "without regard to an organization's viewpoint." 63a.

The court acknowledged that Scouting engaged in expressive activity "designed to build character and instill moral principles." 64a. "We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." 53a. However, the court found that it was not a "'shared goal[]'" or "single view" of Scouting's members to "associate in order to preserve the view that homosexuality is immoral." 53a (quoting *Roberts*, 468 U.S. at 622), 56a. "The words 'morally straight' and 'clean' do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral." 55a. The court noted the absence of reference to homosexual conduct in the youth material, but failed to note the references in the *Boy Scout Handbook* to sexual responsibility, marriage, and fatherhood. It dismissed Boy Scouting's 1978 Position Statement as "[un]disseminated" and four later position statements as "self-serving." 54a. Having essentially agreed with the Appellate Division that Scouting was not sufficiently "anti-gay" to receive First Amendment protection for its views, the court nevertheless labeled Scouting's stated position on homosexual conduct as "prejudice," "bigotry," "assumptions in respect of status," and "invocation of stereotypes." 56a, 59a, 61a.

With respect to freedom of speech, the court distinguished *Hurley* because in the court's view Dale did not "come to Boy Scout meetings 'carrying a banner'" and his "status as a scout leader [was] not equivalent to a group marching in a parade" since there was "no indication that Dale intends to actively 'teach' anything whatsoever about homosexuality as a scout leader." 65a-66a.

In a concurring opinion, Justice Handler concluded that only an organization with "a core purpose," "a unifying purpose that motivates its members to join together as an association," could support an exclusion of a person whose views are incompatible: "The critical point is that a 'specific expressive purpose' must be clear, particular, and consistent." 82a-83a. In Justice Handler's interpretation of Scouting values, Scouting accepted diverse "individual morality." 92a-93a. Reciting New Jersey's 1979 "repudiation" of its own sodomy laws, he insisted that Scouting's views must have changed with "contemporary times": It is "untenable to conclude, in the absence of a clear, particular, and consistent message to the contrary, that Boy Scouts . . . remains entrenched in the social mores that existed at the time of its inception." 99a-100a. Boy Scouting must accept "Dale's open avowal of his homosexuality." 101a.

SUMMARY OF ARGUMENT

This case involves constitutional rights at the heart of our free society: the freedom of a private, voluntary, non-commercial organization to create and interpret its own moral code, and to choose leaders and define membership criteria accordingly. This Court has called it "beyond debate" that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth

Amendment, which embraces freedom of speech." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

First, the New Jersey Supreme Court's decision that a Boy Scout Troop must appoint an open homosexual and gay rights activist as Assistant Scoutmaster violates Scouting's freedom of speech. An organization cannot speak except through its agents. The adult Troop leader is the embodiment of the ideals of Boy Scouting. In light of the roles of uniformed adult leaders and their symbolic position in Scouting, JA 180-181, JA 232, JA 244, JA 250, JA 257-258, JA 299-300, JA 446, JA 543, JA 741, to force Scouting to appoint persons who intend to be "open" and "honest" about their homosexuality, JA 133, would violate the organization's right to control its own message and to avoid association with a message with which it does not agree. On this point, this case is controlled by the Court's recent, unanimous decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

Second, the criteria for membership, leadership or other representative roles in an expressive association are themselves expressive, and constitutive of the identity of the organization. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 229-230 (1989). As Justice O'Connor has explained: "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." *Roberts v. United States Jaycees*, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring). Without First Amendment protection against intrusion of public accommodations laws into the voluntary sector – where many organizations consist of members of or provide services to a single sex, ethnicity or religion – American society would be fundamentally transformed. A society in which each and every organization

must be equally diverse is a society which has destroyed diversity.

Third, the decision below violates Boy Scouting's freedom of intimate association. The Court has explained that "certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State." *Roberts*, 468 U.S. at 618-619. The relationship of members and leaders is one of trust and friendship, which cannot be forced or compelled by the state.

ARGUMENT

REQUIRING A BOY SCOUT TROOP TO APPOINT AN AVOWED HOMOSEXUAL AND GAY RIGHTS ACTIVIST AS AN ASSISTANT SCOUTMASTER UNCONSTITUTIONALLY ABRIDGES FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION

A. Requiring a Boy Scout Troop to Appoint an Adult Leader Who Opposes the Organization's Moral Code Violates Freedom of Speech

Boy Scouts of America has certain moral beliefs and values that it wishes to convey to its members. Dale has moral beliefs and values that are, in at least one important respect, contradictory to those of Scouting. Under the First Amendment, private expressive associations have the right to choose leaders and spokespersons who are willing to communicate the organizations' chosen messages and inculcate their chosen values, and the right to decline the services of persons who would – either explicitly through speech or implicitly through public identity and conduct – communicate beliefs with which the organizations do not wish to be associated.

That fundamental principle of freedom of speech applies to all expressive groups, whether the state finds their beliefs admirable or objectionable.

The freedom at issue here has both affirmative and negative aspects. The affirmative aspect is the right of the expressive association to select leaders who will communicate the organization's beliefs. For Boy Scouts of America, the values of the Scout Oath and Law are communicated to youth members and to all by uniformed leaders. In a variety of ways in Boy Scouting – through the formal "Scoutmaster's Minute" at each Troop meeting when Scoutmasters discuss parts of the Oath and Law with the assembled Scouts, JA 175; through Boards of Review with the boys at times of rank advancement, when the boys explain to adult Troop leaders how they are attempting to live out the Oath and Law, JA 178-179, R 2562; in innumerable informal conversations on the trail, around the campfire, or in times of stress and confusion, when an adult leader's guidance is especially important, JA 445; and perhaps most of all, through personal character and example, JA 253, JA 257 – Troop leaders are entrusted with conveying Scouting values to boys. To require a Troop to appoint leaders who would not convey those principles deprives Scouting of its right to speak.

The negative aspect is the right *not* to be associated with ideas and beliefs the organization does not wish to endorse. The right to control its own message includes the organization's right to be silent about issues if it so chooses. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573-575 (1995). Boy Scouting does not convey an explicit "anti-gay" message to the boys under its care; but it does not wish to convey approval of homosexual conduct either. Dale, on the other hand, believes teenage boys need positive gay role models, JA 549, L 10, says that Boy Scout leaders should be able to be "open and honest

about their sexual orientation," JA 133, and wishes to use the bully pulpit of the Scoutmaster's position to communicate "how bad and wrong" Boy Scouting's policy is. JA 513. Dale cannot force Boy Scouting to grant him a platform upon which to expound those beliefs, or to garb him in the uniform of a Scoutmaster when he does so.

1. *Hurley* Controls This Case

This case follows *a fortiori* from this Court's unanimous decision in *Hurley*. In *Hurley*, this Court held that application of a state public accommodations law to force private organizers of a St. Patrick's Day parade to include the Gay, Lesbian, and Bisexual Group of Boston ("GLIB") was unconstitutional. 515 U.S. at 566. In a decision almost identical in its reasoning to that of the court below, the Massachusetts Supreme Judicial Court had held that the parade was a "public accommodation" under state law, that exclusion of GLIB from the parade constituted discrimination on the basis of sexual orientation, and that requiring the parade organizers to allow GLIB to march would not violate the organizers' First Amendment rights. *Id.* at 563-564. The Massachusetts court rejected the organizers' First Amendment claim on the rationale that the parade lacked any "'specific expressive purpose'" that would be threatened by the presence of the marchers. *Id.*

This Court unanimously reversed. The Court specifically rejected the lower court's argument that "a narrow, succinctly articulable message is . . . a condition of constitutional protection." *Id.* at 569. Moreover, the relative nonselectivity of the parade organizers in choosing participants did not deprive the group of the right to exercise selectivity when it chose to do so. "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-570.

This Court found that GLIB's participation in the parade was "equally expressive." *Id.* at 570. Notwithstanding the fact that GLIB sought only to display its own name, and not to make any other political or moral statement, the Court recognized that self-identification of the group would serve the purpose of "celebrat[ing] its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade." *Id.*

The Court held that requiring the parade organizers to include GLIB in their parade "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 573. This includes the right to decide "what not to say." *Id.* The organizing committee "clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another." *Id.* at 574. The Court noted that the "message it disfavored" was GLIB's message "bear[ing] witness to the fact that some Irish are gay, lesbian, or bisexual," and its "view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals." *Id.*

To the extent there are any differences between this case and *Hurley*, this case presents an even stronger case for constitutional protection. The parade's intended message was not readily apparent; the Scout Oath and Law embody a distinct moral message. JA 170-172. Even the court below concedes: "We agree that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." 53a. Likewise, Dale's intended participation in Scouting is "equally expressive." *Hurley*, 515

U.S. at 570. By donning the uniform of an adult leader in Scouting, he would "celebrate [his] identity" as an openly gay Scout leader in precisely the same way that the GLIB marchers wished to conscript the parade to celebrate their identity as gay descendants of Irish immigrants, and to "bear witness" to his "view that people of [his] sexual orientation[] have as much claim–to unqualified social acceptance as heterosexuals." *See id.* at 570, 574.

Just as including the GLIB group in the St. Patrick's Day parade would "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," *id.* at 573, putting Dale in an adult leader's uniform would interfere with Boy Scouting's ability to control the content of *its* message. Indeed, the very service of an openly gay person as a role model would convey a message with which Boy Scouting does not wish to be associated.

2. The New Jersey Supreme Court's Reasons for Refusing First Amendment Protection to Boy Scouting Are Insupportable

The New Jersey Supreme Court held that "Dale's expulsion is not justified by the need to preserve the organization's expressive rights," 59a, for two reasons: (1) Boy Scouting does not hold a moral position regarding homosexuality, 53a-59a, 64a, and (2) Dale's presence as an openly gay leader would not communicate any message regarding the morality of homosexuality. 65a-67a. These arguments fail both legally and factually.

As an initial matter, the decision below was based on characterizations of the facts of the case that contradict the findings of the trial court and are utterly indefensible on the record. In *Hurley*, this Court observed that it has a "constitutional duty to conduct an independent examination of the

record as a whole," and is not bound by "the state court's conclusion that the factual characteristics of petitioners' activity place it within the vast realm of nonexpressive conduct." 515 U.S. at 567.[6] The Court is therefore "obliged to make a fresh examination of crucial facts." *Id.* Those include the nature of Boy Scouting's beliefs and the expressive quality of Dale's participation as an openly gay Assistant Scoutmaster.

a. Boy Scouting's Beliefs About Homosexual Conduct

The New Jersey Court's assumption that Boy Scouting does not have a purpose "to promote the view that homosexuality is immoral," 64a, is wrong for three reasons.

First, it is not the role of government to decide what a private organization's message is. The New Jersey Supreme Court may think that Boy Scouts of America should interpret its Oath and Law as expressing nothing about sexuality, or as endorsing the morality of homosexuality. *See* 55a (Oath and Law "do not on their face, express anything about sexuality"), 59a (Boy Scouts of America's "stance on homosexuality appears antithetical to the organization's goals and philosophy"). But Boy Scouts of America thinks otherwise, and the Constitution protects its ability to control its own message. "[T]he point of all speech protection," this Court has said, "is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley*, 515 U.S. at 574. *The very argument that the government may impose its own interpre-*

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6. Here again, this is a more extreme case than *Hurley*. In *Hurley*, the factual characterizations of the lower court were in the form of actual factual findings based on a trial. 515 U.S. at 561-563. The factual characterizations of the New Jersey Supreme Court were imposed without benefit of a trial, and directly contradicted the Chancery Court's findings on cross-motions for summary judgment.

tation on an organization's moral message raises First Amendment concerns of the highest order.

At a minimum, a reviewing court must give deference to an expressive organization's characterization of its own beliefs. The court below, however, gave no credence to either formal position statements or the testimony of Scouting officials. 54a. Indeed, it is evident that the court allowed its own strong disagreement with Scouting's position to color its judgment. *See* 59a-64a (denouncing "stereotypes," "prejudice," and "bigotry").[7]

Second, the court below misapprehended the legal standards for evaluating the content of an association's beliefs. According to the New Jersey Supreme Court,

> Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts include sponsors and members who subscribe to different views in respect of homosexuality.

52a (emphasis in original).

None of this would be legally relevant even if true. The South Boston Allied War Veterans Council in *Hurley* did not "associate for the purpose of disseminating the belief that homosexuality is immoral," 52a, but it nonetheless had the right to exclude those who wished to make their own message "part of the existing parade." 515 U.S. at 570. And even if it

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7. Most Americans are members of religions which regard homosexual conduct as sinful. JA 722-723 (Roman Catholic-28% of the population), JA 725-726 (Southern Baptist-10%), JA 714-715, (Lutheran-8%), JA 728 (Presbyterian-7%), JA 708-709 (United Methodist-4%), JA 711-712 (Orthodox and Conservative Jewish), JA 720 (Latter-day Saints). R 4771-4773.

were true that Scouting discourages leaders from discussing sexual issues, which it is not, *Hurley* established that the organization has the right to exclude those who wish to proclaim their sexual identity as part of the organization's message.

The government may not use a group's "multifarious voices" as a justification for intervention. *Hurley*, 515 U.S. at 569. It is not uncommon for groups to have members who "subscribe to different views," 52a, on some issues. Associations have the right to resolve such internal disagreements for themselves through their internal processes of governance. And even if it were true that Boy Scouts of America had never articulated moral disapproval of homosexuality until now, that would be completely irrelevant. A private organization has the right to decide for itself what it believes, and to change those beliefs when it sees fit.

Third, the lower court's characterization of Scouting's beliefs is simply incorrect. Five official position statements of the organization, JA 453-461, and nine current and former Scout officials and volunteers attested to Boy Scouts of America's moral view, JA 160-161, JA 183, JA 312, JA 451, JA 465, R 3254, JA 444, JA 746, JA 692-693, JA 761, and its expert attested to the fact that the "presence of avowed homosexuals in Scouting would interfere with transmitting the value that homosexual conduct is not morally straight or clean." JA 742. The National Director of Boy Scouting certified:

> Boy Scouts believes that homosexual conduct is not 'morally straight' under the Scout Oath and not 'clean' under Scout Law. Consequently, known or avowed homosexual persons or any persons who advocate to Scouting youth that homosexual conduct is 'morally straight' under the Scout Oath, or 'clean' under the Scout Law will not be registered as adult leaders.

JA 746. While respondent introduced affidavits by a number of individuals connected to Scouting that they were unaware of this belief or did not agree with it, respondent presented no evidence that the organization had ever taken the position that homosexual conduct *is consistent* with the Scout Oath and Law.

The court below had no basis in fact or law for second-guessing Boy Scouts of America's statement of its own beliefs.

b. The Expressive Impact of Dale's Participation As an Openly Gay Uniformed Adult Leader

The New Jersey Supreme Court also rested its decision on the assertion that Dale's presence as a uniformed Assistant Scoutmaster would not interfere with Scouting's message because Dale would simply do his job and would not "'teach' anything whatsoever about homosexuality as a scout leader." 66a. There are three reasons to reject that argument.

First, even if it were true that Dale would not participate in Scouting "'to make a point'" about sexuality, 66a, his very presence as an openly gay uniformed Boy Scout leader would inevitably make such a point. Boy Scout leadership is inherently expressive: "Adult leaders set a positive example for the boys by living the Scout Oath and Scout Law themselves." JA 181; *see* JA 543. If Boy Scouting were required to accept a known Ku Klux Klansman as a leader, this would interfere with the organization's message of racial harmony even if he never uttered a word on the subject of race while in Scout leader uniform. *See Curran v. Mount Diablo Council of the Boy Scouts of America,* 17 Cal. 4th 670, 729, 952 P.2d 218, 257 (1998) (Kennard, J., concurring) ("Could the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-Semite?"). Whether he intends it or not, Dale's

presence as an openly gay Scoutmaster would convey the message that homosexuality is consistent with Scouting ideals and values.

The New Jersey Supreme Court implicitly recognized that placing an individual in the uniform of a Scout leader constituted symbolic speech when it noted "the symbolism of the Boy Scout uniform" when worn in public. 26a-27a. Yet the court failed to recognize the symbolism of allowing those who disagree with Scouting's message to don the Scout leader's uniform. Wearing the uniform of Boy Scouts of America is a "medium[] of expression" that Boy Scouts of America has the right to control. *See Hurley*, 515 U.S. at 569.

Second, the court misconstrued respondent's claim. Dale has never sought the right to serve as a silent Boy Scout leader, keeping his sexuality to himself; nor has he claimed that Boy Scouts of America would deny him a position on those terms. By his own allegations, "the only gay Scouts singled out for exclusion are those, such as [Dale], who . . . become leaders in their community and are open and honest about their sexual orientation." JA 11, JA 133. Dale's expressions to the media of pride in being gay cannot be put back in the bottle, and it is undisputed that he has no interest in doing so. JA 470 ("[Y]es, I am gay, and I'm very proud of who I am"; "Being proud about who I am is something the Boy Scouts taught me."), JA 513. Dale first came to the attention of Monmouth Council officials as a result of a speech regarding teenagers' need for gay role models, JA 753, L 10, and he explained that his quest for a leadership position in Scouting is "about giving adolescent boys a role model." JA 549.

Third, apart from the actual effect of appointing Dale as a leader, private organizations have the right to make leadership decisions for themselves, without threat of lawsuits, damages, punitive damages, and injunctions. The prospect of such suits

has a severe chilling effect on the exercise of First Amendment rights. *See Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343-44 (1987) (Brennan, J., concurring). Each time an adult presents himself to a Boy Scout Troop as a potential leader, it is the responsibility of the Troop Committee, and ultimately of Boy Scouts of America, to evaluate his potential as a moral exemplar for the boys of the Troop. JA 299-303. To serve as an adult leader, a person must, *in Scouting's opinion*, "possess the moral . . . qualities deemed necessary . . . for leadership." 222a, JA 359. To subject such decisions to second-guessing by the government, armed with punitive sanctions, is a denial of that autonomy. *See Hurley*, 515 U.S. at 575 ("the choice of a speaker . . . is presumed to lie beyond the government's power to control").

B. The Decision Below Also Violates Boy Scouting's Freedom of Expressive Association

1. Private Expressive Associations Have the Right to Choose Their Own Members

As Tocqueville long ago observed, voluntary associations are at the heart of American civic life:

> Americans of all ages, all stations in life, and all types of disposition are forever forming associations.
>
> * * * *
>
> Better use has been made of association and this powerful instrument of action has been applied to more varied aims in America than anywhere else in the world.

Alexis de Tocqueville, Democracy in America 513, 189 (J.P. Mayer ed. & George Lawrence trans., Harper-Perennial 1969) (1835).

This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Freedom of association is "a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

Part of the freedom of association is "the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). *See Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984) (First Amendment guarantees appellees' "freedom to associate or not to associate with whom they please"). Without the freedom to exclude those who disagree with the association's beliefs, the freedom of expressive association would be an "'empty guarantee.'" *Id.* at 122 n.22. (quoting Lawrence Tribe, American Constitutional Law 791 (1978)). As this Court stated in *Roberts*:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. *Freedom of association therefore plainly presupposes a freedom not to associate.*

468 U.S. at 623 (emphasis added). *See New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988). Freedom of expressive association protects the right of any group,

whether expressing minority or majority views, or religious or secular views, to protect the strength of its "ideologies or philosophies" by limiting membership to those who accept them. *Roberts*, 468 U.S. at 627. *See Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

2. Private Expressive Associations Have the Unqualified Right to Choose Their Leaders

The freedom to select leaders is even more essential to freedom of association. The personality, character, ideas, and commitments of a leader often define the character of the group. This Court has recognized the right of political organizations to select their leaders free of state interference. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989) ("Freedom of association means . . . a right to 'identify the people who constitute the association' . . . and to select a 'standard bearer who best represents the party's ideologies and preferences.'") (internal citations omitted). Similarly, courts have recognized the right of churches and synagogues to choose their own ministers and rabbis.[8] Charitable youth organizations likewise have been afforded discretion to employ leadership representing their

8. *See, e.g., Gellington v. Christian Methodist Episcopal Church, Inc.*, No. 99-10603, 2000 WL 192100, at *6 (CA11 Feb. 17, 2000); *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 350 (CA5 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996); *Young v. Northern Ill. Conference of United Methodist Church*, 21 F.3d 184, 187-88 (CA7 1994); *Scharon v. St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 363 (CA8 1991); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164, 1168-69 (CA4 1985); *McClure v. Salvation Army*, 460 F.2d 553, 560 (CA5 1972). After *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), these decisions can best be explained as arising from freedom of expressive association.

value systems.[9] The selection of adult leaders in Scouting falls within this principle. As the California Supreme Court has noted:

> In any organization, *the leader occupies a sensitive role with respect to the articulation and transmittal of the group's values*. This is particularly true of the Boy Scouts. The Scouting program is organized around the principle that *the most effective way to teach the values of Scouting is through the leadership, counseling and example of the Scoutmaster.*

9. *See Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 703-705 (CA8 1987) (living by certain code of behavior constitutes bona fide occupational qualification for Girls Club counselors expected to act as role models); *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 414-415 (CA6 1996) (unmarried pregnant teacher dismissed for not setting Christian example); *Little v. Wuerl*, 929 F.2d 944, 951 (CA3 1991) (Catholic school permitted not to rehire divorced and remarried teacher because school could hire only those whose beliefs and conduct were consistent with its purposes); *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 (CA7 1987) (plaintiff's controversial beliefs regarding abortion would have prevented Catholic school from hiring plaintiff); *Harvey v. YWCA*, 533 F. Supp. 949, 954-955 (W.D.N.C. 1982) (unmarried pregnant woman who wished to model an alternative lifestyle to teenagers properly discharged because Christian sexual morality was bona fide occupational qualification for position of YWCA girls counselor); *Gosche v. Calvert High Sch.*, 997 F. Supp. 867, 871 (N.D. Ohio 1998) (Catholic school teacher properly dismissed because her sexual conduct was not fulfilling the legitimate expectation that she would "by word and example . . . reflect the values of the Catholic Church"); *Bishop Leonard Reg'l Catholic Sch. v. Unemployment Compensation Bd. of Review*, 140 Pa. Commw. 428, 436-437, 593 A.2d 28, 32 (Pa. Commw. Ct. 1991) (unemployment benefits denied to discharged teacher because her marriage to divorced man constituted violation of Catholic principles).

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 683, 952 P.2d 218, 226 (1998) (citations omitted) (emphasis added). We urge this Court to hold that private, non-commercial, expressive associations have the unqualified right to select their own leadership.

3. Boy Scouting's Expressive Association Claim Is Supported by the *Roberts* Trilogy

In a trilogy of cases, this Court held that the State could compel certain clubs to accept women as members. *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). These cases are distinguishable on two grounds. First, they involved quasi-commercial organizations. Second, the clubs did not have any moral code or philosophy that was logically related to their challenged membership criteria. In fact, the *Roberts* trilogy supports petitioners' expressive association claim.

a. As a Non-Commercial Expressive Association, Boy Scouting Enjoys Full Protection of the Freedom of Association

In *Roberts*, Justice O'Connor explained that, rather than apply a "compelling interest" standard indiscriminately to all private associations, the Court should distinguish between those that are "primarily engaged in protected expression" and those that are sufficiently "commercial" that they do not enjoy full rights of freedom of association. 468 U.S. at 633-636 (O'Connor, J., concurring). The Jaycees, which she pointedly noted are "otherwise known as the Junior Chamber of Commerce," are engaged in "the art of solicitation and management," which gives its members "an advantage in business." *Id.* at 639. Similarly, the purpose of the Rotary Clubs was to involve a "'cross section of the business and

professional life of the community.'" *Rotary*, 481 U.S. at 546 (citation omitted). Participation in such business and professional organizations is important to equality of opportunity in the commercial marketplace, and the First Amendment protection of their exclusionary practices is correspondingly lower.

Far from having commercial goals, Boy Scouting has goals exclusively related to personal, moral, and physical development. Adults do not participate in Scouting in order to gain "an advantage in business," but to help boys grow up to be morally straight young men. Indeed, in her *Roberts* concurrence, Justice O'Connor used Boy Scouting and Girl Scouting as illustrations of expressive associations enjoying full constitutional protection:

> Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.

468 U.S. at 636 & n.* (quoting Paul Fussell's observation that *The Official Boy Scout Handbook* is "another book about goodness").

b. The Exclusion of Dale Is Related to Boy Scouting's Moral Beliefs

The Court in the *Roberts* trilogy held that those organizations could be required to accept female members because there was no logical connection between the political or ideological positions taken by the organizations and exclusion of women. The Act "imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Roberts*, 468 U.S. at 627. *Accord New York State Club Ass'n*, 487 U.S. at 13; *Rotary*, 481 U.S. at 548-549. The Court acknowledged the possibility "that women might have a

different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations," but found this supposition "[un]supported by the record."[10] *Roberts*, 468 U.S. at 627-628. In cases where there is such a connection between membership criteria and the group's ideology, however, the *Roberts* trilogy makes clear that freedom of association protects the right of exclusion. Thus, in *Hurley*, this Court interpreted *New York State Club Association* as "recogniz[ing] that the State did not prohibit exclusion of those whose views were at odds with positions espoused by the general club memberships." 515 U.S. at 580. The dispositive question, therefore, is whether "compelled access" would "trespass on the organization's message." *Id.* at 580-581 (a "private club" may "exclude an applicant whose manifest views were at odds with a position taken by the club's existing members"); *New York State Club Ass'n*, 487 U.S. at 13 ("private" associational viewpoints protected).

As explained above, Dale's "manifest views" are that Boy Scouting's policy on homosexuality is "bad" and "wrong." JA 513. Accordingly, under *Hurley* and the *Roberts* trilogy, Boy Scouting is entitled to decline his offer of services as a volunteer leader. It is of no constitutional moment that Scouting has a broad message and is not focused on an "anti-gay" theme. *See* 53a, 135-136a, 153a. The First Amendment does not require that Scouting become an "anti-gay" organization to enjoy protection for its expression of what is "morally straight." As Justice O'Connor noted in *Roberts*, "protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young." 468 U.S. at 636 (citations omitted).

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10. The Court did not question the organization's own statements regarding its philosophy or beliefs. It merely questioned whether those beliefs were logically related to the exclusion of women.

4. The New Jersey Supreme Court's Expansive Interpretation of the Public Accommodations Law Conflicts with Core First Amendment Principles

The New Jersey Supreme Court's interpretation of its state public accommodations law is considerably more expansive than that of other state supreme courts or the federal courts, which uniformly have found that Boy Scouting is not a place of public accommodation. *See supra* note 3. The court extended New Jersey law to organizations – like Boy Scout Troops — that are neither public nor quasi-commercial. The decision below declares that any organization that publicly solicits members, uses public facilities or has connections to government officials, and is "similar" to organizations previously recognized as public accommodations is subject to the law. 24a.[11] This interpretation is so sweeping that almost any organization could find itself the target of a state's desire to enforce conformity to its ideas of desirable social change. The logic of the decision below does not stop with petitioners or respondent. New Jersey prohibits covered groups from using membership or leadership criteria based on a broad range of prohibited characteristics: race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation, or nationality. Thus, Boy Scout Troops would be forced to admit girls as members, Girl Scout Troops would be forced to admit boys, and a Croatian cultural society would be forced to admit Serbs. That would be an extraordinary limitation on freedom of association as it is commonly understood. *See Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974)

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11. Much of the conduct that the court used as a basis for declaring Boy Scouting a public accommodation – such as advertising in national media, 25a; wearing uniforms in public, 26a; meeting in public facilities, 29a-30a; and having members of Congress and military personnel as members, 28a; – is itself constitutionally protected.

("'The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.'") (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179-180 (1972) (Douglas, J., dissenting)).

The decision below subjects virtually all contested membership and leadership decisions of covered private organizations to the superintendence of governmental authorities.

Moreover, although the court below assures us that respondent has no intention to use leadership status to "'teach' anything whatsoever about homosexuality," 66a, it provides no guidance about what Boy Scouting may do if he does just that. What if, during a discussion of sexual morality, Dale interjects his own opinion? What if Dale brings his significant other to a Boy Scout banquet? What if Dale wears his Scouting uniform in a gay pride parade? At what point does Scouting have a right to sever its connection with Dale?

In the employment context, an employer's allowance of a "hostile environment" constitutes "discrimination." Employers must alter their speech (and police the speech of their workers) so as not to offend members of protected classes. New Jersey and several other jurisdictions have extended the logic of these decisions to public accommodations laws. *See* New Jersey Dep't of Law & Pub. Safety, *Sexual Harassment: Your Rights* (Jan. 1998) ("Sexual harassment . . . is against the law . . . when you try to enter or join an organization that solicits members from the general public"); New York City Comm'n on Human Rights, (visited Feb. 17, 1999) <http://www.ci.nyc.ny.us/nyclink/html/serdir/html/missions.html#CHR> (New York City Human Rights law bars public accommodations harassment "on the basis of race, color, creed, age, national

origin, alienage or citizenship status, gender, sexual orientation, disability, marital status . . . lawful occupation . . . and record of conviction or arrest").

The implications for First Amendment rights are profound. If Scouting were a place of public accommodation, and if it could not "discriminate" against openly gay applicants for leadership positions, how could it continue to teach that homosexual conduct is not morally straight?

C. As Intimate Associations, Boy Scout Troops Have the Constitutional Right to Decide for Themselves Whom to Select to Supervise Other People's Children

1. Boy Scout Troops Are Intimate Associations

The First Amendment also protects the "formation and preservation of certain kinds of highly personal relationships" from unjustified interference by the state. *Roberts*, 468 U.S. at 618. The relationships of the Scouts to their leaders "presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'" *Rotary*, 481 U.S. at 545 (quoting *Roberts*, 468 U.S. at 619-620). In determining whether a group is an intimate association, the relevant characteristics are the group's "size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Roberts*, 468 U.S. at 620. When the organization at issue has both a national entity and local groups, the focus is on the local groups, where the personal relationships actually occur. *See Rotary*, 481 U.S. at 546-547; *Roberts*, 468 U.S. at 621. *See also* Recent Cases, *Civil Rights — Public Accommodation Statutes — New Jersey Supreme Court Holds That Boy Scouts May Not Deny Membership to Homosexuals*, 113 Harv. L. Rev. 621, 624 (1999) ("a local [Boy Scouts of America] unit . . .

fosters close interpersonal and mentoring relationships that seem worthy of consideration"). All of the factors discussed in *Roberts* support Boy Scouting here.

Boy Scout Troops are small groups of boys and adults, JA 172; their functions are utterly non-commercial and unrelated to business opportunities; they engage in hiking and camp-outs far from the public gaze, JA 173, JA 741; they are involved in the transmission and cultivation of shared ideals and beliefs, JA 241, JA 446-447; they are an integral part of the youth programs of many churches and synagogues, JA 159, JA 707-730; and they discuss moral and intimate subjects, JA 209-214, JA 249.

A boy joining a Troop becomes a member of a Patrol, a subgroup composed of three to eight boys. JA 172. Scouting activities, such as camp-outs, are primarily conducted in Troops, with each Patrol camping together. JA 173, R 2536, R 2538. "The Troop and Patrol are organized for face-to-face interaction . . . ." JA 446. Each Patrol has its own name, meetings, and its own leader. "[B]oys in a Patrol participate together as a team." JA 172, JA 235-236. At Troop meetings, Boy Scouts wear their uniforms. "The uniform gives the boy a sense of identity with other Boy Scouts and with Boy Scout values, and reminds him that he is expected to live up to these values." JA 174, JA 270. Troops are incontrovertibly small, closely knit groups. A typical Troop is a group of only 15 to 30 boys. JA 172. By contrast, the Jaycees chapters at issue in *Roberts* had more than 400 members each, 468 U.S. at 621, and the Rotary chapters in *Rotary* ranged from 20 to more than 900. *Rotary*, 481 U.S. at 546.

Troops have a distinct mission and purpose: to instill the values of the Scout Oath and Law in youth members and to equip them to become responsible men, citizens, and family members. JA 170-171. Scouts and, even more so, Scout

leaders must commit themselves to these values. JA 172, JA 182-183.

The relationship between Boy Scout and Scoutmaster is also intimate within the meaning of *Roberts*. In addition to serving as a role model for Boy Scouting values, JA 446, the adult leader is expected to serve as a "wise friend" to whom the Boy Scout can turn for guidance on all kinds of problems and issues, including sex. JA 211, R 2539. Boys are encouraged to develop close personal relationships with leaders because "Boy Scouts believes that providing a close personal relationship with an adult outside the home helps boys in the difficult process of maturing to adulthood." JA 181. Indeed, even after they have grown up, former Troop members often return to consult their Scoutmaster and ask for "advice on a variety of important life decisions." JA 741-742. Since Boy Scout Troops take many overnight camping trips and typically spend a week together in summer camp, JA 173-174, there is a far greater degree of intimacy among members than would be the case in a group that met only for formal meetings. JA 181-182, JA 741-742. Indeed, a Scout leader may spend "more time actually interacting directly with a Scout than do his parents." JA 741. When an 11 year-old boy away from home for the first time becomes afraid at night, skins his knee, or forgets his sleeping bag, he looks to his Scoutmaster for support.

Given these responsibilities for the moral education and care of other people's children away from home, considerable selectivity is exercised in choosing adult leaders. Such a role cannot be treated as an "advantage" of a "place of public accommodation," open to all members of the public. To impose the "public accommodation" straitjacket on an intimate association violates the First Amendment by stripping it of its ability to be selective.

2. As Associations Formed Principally of Parents to Provide Moral Education to Their Sons, Boy Scout Troops Enjoy Enhanced Constitutional Protection

This Court has repeatedly recognized constitutional protection of the right of parents to control the education and upbringing of their children. Whether framed in terms of freedom of association under the First Amendment, as in *Roberts*, 468 U.S. at 619-620, or as a liberty protected by the Fourteenth Amendment, as in *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), or as an interest protected by the Free Exercise Clause of the First Amendment, as in *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972), parental direction of the moral education of their children has a high place in the hierarchy of constitutional values. Different parents have different ideas about upbringing, and seek out different organizations to assist them in the task of moral education. In a free society, organizations fail or flourish according to the private choices of innumerable families.

There can be no doubt that parents are "direct[ing] the upbringing and education," *Pierce*, 268 U.S. at 534-535, of their sons by placing them in Boy Scout Troops. Scouting's *Rules and Regulations* unequivocally state that "[e]ducation is the chief function of the Scouting movement." JA 411.

The fact that parents place their sons in the environment of a Boy Scout Troop in order to instill values in them strongly reinforces the claim for intimate associational protection. *See, e.g., Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 742, 952 P.2d 261, 265 (1998). This Court has repeatedly emphasized that it is not for the state to interfere with parental choices regarding the upbringing of their children with respect to religious and moral values. For example, in upholding the right of Old Order Amish not to send their children to high school "because [of] the values they teach," the Court held that

the state was not empowered to "save" children from their parents' choice of education in "moral standards, religious beliefs, and elements of good citizenship." *Yoder*, 406 U.S. at 210, 232-233. *See Pierce*, 268 U.S. at 534-535; *Meyer*, 262 U.S. at 399-400; *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 541 (1973) (Douglas, J. concurring).

As this Court recognized in *Roberts*, the instrumental aspect of freedom of association — expressive association — and the intrinsic aspect — intimate association — may coincide. *Roberts*, 468 U.S. at 618. The Boy Scout Troop is a perfect example of both aspects coming together in a single group. The state may not dictate who parents select as the "wise friend," R 2539, to undertake the moral education of their sons in Troops.

In a press interview, Dale was asked whether he would want a son of his to join Boy Scouting. His response is instructive:

> Assuming that the discriminatory policy's not there, I would definitely like the kid to be in the Scouts. But I would want to know who the people were that were influencing him – his Scoutmaster, the other Scouts. A kid can be highly impressionable, and I wouldn't want some narrow-minded person leading my son's troop. For all the hysteria around gays in the Boy Scouts, I think any parent who trusts just anybody with their child is crazy.

David Rakoff, *Camping Lessons*, N.Y. Times, Aug. 22, 1999, § 6 (Magazine), at 17. Putting aside any disagreement with Dale over what constitutes a good influence, he is exactly right. To say that public accommodations laws can apply to selection of Scoutmasters is to say that these positions must be open to all members of the general public – just like rooms

in hotels or seats on airplanes. That, in Dale's words, is "crazy." It also violates the First Amendment.

D. No State Interest Justifies These Infringements of First Amendment Rights

In *Roberts*, this Court held that even limited regulation of expressive associational activity could be justified only by a state interest that was both "unrelated to the suppression of ideas" and "compelling." 468 U.S. at 623. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 n.47 (1982); *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

Here, application of the public accommodations law is directly "[]related to the suppression of ideas" and, if permitted by this Court, would "hamper[] the organization's ability to express its views." *Roberts*, 468 U.S. at 623-624. When the New Jersey justices were not claiming that Scouting has no moral view on homosexuality, they were condemning Scouting's view as "prejudice" and "bigotry" and opining that the state has a vital interest in eradicating it. 59a, 61a. The concurring justice pronounced it "untenable" that Scouting "remain[ed] entrenched in the social mores that existed at the time of its inception." 100a. Dale himself admits that he seeks to wear the Scouting uniform because he wants "to point out to [Scouting] how bad and wrong this policy is." JA 513.

The court below wholly failed to identify a compelling interest that trumps Boy Scouting's First Amendment rights. The court made the same error here as did the Massachusetts court in *Hurley*: it failed to distinguish a compelling interest for existence of the statute *on its face* from the lack of a compelling interest for the statute *as applied*. *See Hurley*, 515 U.S. at 564-565. Whatever the State's interest in the public accommodations law in the abstract, the State has no legitimate interest in demanding that private associations open their doors to volunteer

leaders who do not share their philosophy. As Justice Souter observed in his opinion for the Court in *Hurley*, elimination of supposed bias is not a justification:

> It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. *Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective.*

Id. at 578-579 (emphasis added).

The "compelling state interest" discussion in the *Roberts* trilogy should not be cited to preclude an African-American big sisters organization from mentoring youth of one race and sex, a Jewish dating service from presenting singles with the opportunity to socialize with those of the same religion, or Second Generation, an Asian-American theater company in New York, from accepting only second generation Asian-Americans as participants. American pluralism thrives on difference. Private groups need not act like governments or public utilities, serving the entire population. Gay rights groups might wish to exclude Biblical fundamentalists, in violation of the prohibition on discrimination based on religion. Single-sex associations such as male Promise Keepers prayer groups and Women Anglers of Minnesota are obviously valuable to the participants as single-sex groups. The autonomy of such groups is vital to a diverse and free civil society. *See* William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three*

Sources of Liberal Thought, 40 Wm. & Mary L. Rev. 869, 875 (1999) ("[I]f we insist that each civil association mirror the principles of the overarching political community, meaningful differences among associations all but disappear, constitutional uniformity crushes social pluralism.").[12] Pluralism requires that we tolerate groups with which we disagree.

Tocqueville recognized the central role of the right of association to personal liberty:

> The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore the right of association seems to me by nature almost as inalienable as individual liberty. Short of attacking society itself, no lawgiver can wish to abolish it.

Alexis de Tocqueville, Democracy in America 193 (J.P. Mayer ed. & George Lawrence trans., Harper-Perennial 1969) (1835).

We recognize that the underlying question of the morality of homosexual conduct is controversial, and that many people of good will believe that Scouting's position on the matter is

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12. *See also* National Comm'n on Civil Renewal, *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It* (1999); Nancy L. Rosenblum, Membership & Morals: The Personal Uses of Pluralism in America (1998); Seedbeds of Virtue: Sources of Competence, Character, and Citizenship in American Society (Mary Ann Glendon & David Blankenhorn eds. 1995); Aviam Soifer, Law and the Company We Keep (1995); Stephen L. Carter, The Culture of Disbelief 37 (1993) ("Although the influence of many intermediate institutions (particularly political parties, civic clubs, and state governments) has weakened over time, the continued vitality of intermediaries is crucial to preventing the reduction of democracy to simple and tyrannical majoritarianism, in which every aspect of society is ordered as 51 percent of the citizens prefer.").

misguided. That is not the issue in this case. It is our belief that controversial questions of personal morality, often involving religious conviction, are best tested and resolved within the private marketplace of ideas, and not as the subject of government-imposed orthodoxy. We can respect the plea of many gay and lesbian Americans not to have the majority's morality imposed upon them. By the same token, we ask that a contrary morality not be forced upon private associations like Boy Scouts of America, at the expense of its First Amendment freedoms of speech and association.

CONCLUSION

The judgment of the New Jersey Supreme Court should be reversed and the case remanded with directions that judgment be entered for Petitioners.

Dated: February 28, 2000

Respectfully submitted,

MICHAEL W. MCCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

SANFORD D. BROWN
CERRATO, DAWES, COLLINS,
SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75038

Attorneys for Petitioners

STATUTORY APPENDIX

STATUTORY APPENDIX

NEW JERSEY STATUTES

10:5-4. Obtaining employment, accommodations and privileges without discrimination; civil right

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

10:5-5. Definitions

As used in this act, unless a different meaning clearly appears from the context:

* * * *

l. "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land

or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; and public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or postsecondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation, in the admission of students.

* * * *

hh. "Affectional or sexual orientation" means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.

* * * *

10:5-12. Unlawful employment practice or unlawful discrimination

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

* * * *

f. (1) For any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, or directly or indirectly to publish, circulate, issue, display, post or mail any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, or privileges of any such place will be refused, withheld from, or denied to any person on account of the race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation or nationality of such person, or that the patronage or custom thereat of any person of any particular race, creed, color, national origin, ancestry, marital status, sex, affectional or sexual orientation or nationality is unwelcome, objectionable or not acceptable, desired or solicited, and the production of any such written or printed communication, notice or advertisement, purporting to relate to any such place and to be made by any owner, lessee, proprietor, superintendent or manager thereof, shall be presumptive evidence in any action that the same was authorized by such person; provided, however, that nothing contained herein shall be construed to bar any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, and which shall include but not be limited to any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or

school or educational institution which is restricted exclusively to individuals of one sex, from refusing, withholding from or denying to any individual of the opposite sex any of the accommodations, advantages, facilities or privileges thereof on the basis of sex; provided further, that the foregoing limitation shall not apply to any restaurant as defined in R.S.33:1–1 or place where alcoholic beverages are served.

* * * *

Supreme Court, U.S.
FILED
FEB 28 2000
CLERK

No. 99-699

IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

JOINT APPENDIX
Volume I

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

MICHAEL W. MCCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109
Attorneys for Petitioners

EVAN WOLFSON
Counsel of Record
DAVID BUCKEL
JON W. DAVIDSON
BEATRICE DOHRN
RUTH HARLOW
LAMBDA LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585
Attorneys for Respondent

(Attorneys Listing Continued on Inside Cover)

CERTIORARI GRANTED JANUARY 14, 2000
PETITION FOR CERTIORARI FILED OCTOBER 25, 1999

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

SANFORD D. BROWN
CERRATO, DAWES, COLLINS,
SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728
Attorneys for Petitioners

THOMAS J. MOLONEY
ALLYSON W. HAYNES
SETH A. STUHL
KIERITH A. JONES
CLEARY, GOTTLIEB, STEEN
& HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

LEWIS H. ROBERTSON
231 Maple Avenue
P.O. Box Y
Red Bank, New Jersey 17701
(732) 842-6660
Attorneys for Respondent

TABLE OF CONTENTS

	Page
Relevant Docket Entries in the Superior Court of New Jersey, Chancery Division in *Dale v. The Boy Scouts of America and The Monmouth Council, Boy Scouts of America*	1
Relevant Docket Entries in the Superior Court of New Jersey, Appellate Division in *Dale*	5
Relevant Docket Entries in the Supreme Court of New Jersey in *Dale*	7
Complaint	10
Answer	30
Selected Exhibits to Certification of Ayala Deutsch, Attorney for Respondent	
Fact Sheet – Order of the Arrow (excerpts)	43
Fact Sheet – The Presidents of the United States and the Boy Scouts of America	46
Fact Sheet – What Is Boy Scouting?	56
A Representative Membership (1975) (excerpts)	64
Organizations that Use Scouting (excerpts)	69
Fact Sheet – Community Organizations and The Boy Scouts of America (excerpts)	93
The Chartered Organization Representative (excerpts)	99
Announcements of Meetings for Prospective Cub Scouts	102

Press Release Announcing School Night for Scouting by Monmouth Council 104

Fact Sheet – BSA at a Glance (1991) 106

Affidavit of James Dale in Support of Motion for Summary Judgment (Sept. 9, 1993) 112

Selected Exhibits to Affidavit of James Dale

Letter from James W. Kay to James R. Dale (July 19, 1990) 135

Letter from James R. Dale to James W. Kay (Aug. 8, 1990) 136

Letter from James W. Kay to James R. Dale (Aug. 10, 1990) 137

Letter from David K. Park, Esq. to Glenn Gordon, Esq. (Dec. 21, 1990) 138

Affidavit of Gerald Dick in Support of Plaintiff's Motion for Summary Judgment (Sept. 8, 1993) 139

Certification of Michael Adam Kivetz (Aug. 13, 1993) 149

Certification of Reverend Donald K. Hummel in Support of Defendants' Cross-Motion for Summary Judgment (Nov. 3, 1993) 155

Selected Exhibit to Certification of Reverend Donald K. Hummel

A Scout is Reverent – A Manual for Scouts of Catholic Faith (excerpts) 162

Certification of Adam S. Bogner in Support of Defendants' Cross-Motion for Summary Judgment (Nov. 4, 1993) 168

Selected Exhibits to Certification of Adam S. Bogner

Boy Scouts of America Mission Statement 184

The Scout Oath 184

The Scout Law 184

Boy Scout Handbook (1992 Printing) (excerpts) 185

Scoutmaster Handbook (1990) (excerpts) 232

Woods Wisdom Troop Program Features (excerpts) 274

Order of the Arrow Handbook – Boy Scouts of America (1992) (excerpts) 291

Troop Committee Guidebook – Boy Scouts of America (1992 Printing) (excerpts) 299

Certification of James W. Kay in Support of Defendants' Cross-Motion for Summary Judgment (Nov. 9, 1993) 306

Exhibits to Certification of James W. Kay

Charter of Boy Scouts of America 314

Bylaws of Boy Scouts of America 322

Rules and Regulations of the Boy Scouts of America 373

Certification of Dr. Ricky L. Slavings in Support of Defendants' Cross-Motion for Summary Judgment (Oct. 26, 1993) 443

Certification of P. Karl Rowley in Support of Defendants' Cross-Motion for Summary Judgment (Nov. 9, 1993) 450

Exhibits to Certification of P. Karl Rowley

Boy Scouts of America Position Statement (Mar. 17, 1978) 453

Boy Scouts of America Position Statement (June 6, 1991) 457

Boy Scouts of America Position Statement (Feb. 15, 1991) 458

Boy Scouts of America Position Statement (May 6, 1992) 459

Boy Scouts of America Position Statement (Jan. 1993) 460

Certification of Earl C. Wightman in Support of Defendants' Cross-Motion for Summary Judgment (Oct. 16, 1993) 462

Transcript of a Segment of the Joan Rivers Show of July 16, 1993 entitled "Gays in Uniform" 466

Transcript of Deposition of James Dale (May 10, 1993) (excerpts) 474

Selected Exhibits to the Deposition of James Dale

Speech by Jim Dick (May 10, 1993) 505

From an Eagle Scout to Persona Non Grata, *The New York Times* (Aug. 5, 1992) 510

Ex-Eagle Scout Sues Over Ban on Homosexuals, *The New York Times* (July 30, 1992) 513

Seminar Addresses Needs of Homosexual Teens, *The Star-Ledger* (July 8, 1990) 515

The Gay Boy Scout, *Philadelphia* (Jan. 1993) 519

Scoutmaster's Handbook (1972) (excerpts) 542

Expelled Scout Is Taking Lessons to Heart, *The Seattle Times* (July 10, 1992) 548

United Press International article (Apr. 30, 1981) 551

Homosexual Loses Bid to Become Scout Leader, *United Press International* (July 7, 1981) 554

Affidavit of Reverend George Wayne Freyberger in Support of Plaintiff's Motion for Summary Judgment (Jan. 3, 1994) 556

Affidavit of Reverend Richard Giffen in Support of Plaintiff's Motion for Summary Judgment (Jan. 4, 1994) 562

Affidavit of Bishop Thomas Gumbleton in Support of Plaintiff's Motion for Summary Judgment (Jan. 6, 1994) 567

Affidavit of Reverend William A. Hanson (Dec. 31, 1993) 573

Selected Exhibit to the Certification of Patrick G. Marette, Attorney for Respondent

Brief of *Amici Curiae* [illegible]es E. Andrews as Stated Clerk of the Presbyterian Church (U.S.A) General Assembly, *et al.* in *The Presbytery of New Jersey of The Orthodox Presbyterian Church et al. v. Florio et al.*, No. 92-5339 (3rd Cir.) 578

Affidavit of Rabbi Alexander Schindler in Support of Plaintiff's Motion for Summary Judgment (Jan. 4, 1994) 596

Selected Exhibits to Affidavit of Rabbi Alexander Schindler

Resolution by Central Conference of American Rabbis (Apr. 9, 1992) 605

Resolution of the National Federation of Temple Youth (1992-93) 606

Affidavit of Bishop John S. Spong in Support of Plaintiff's Motion for Summary Judgment (Jan. 5, 1994) 607

Affidavit of Father Paul Surlis in Support of Plaintiff's Motion for Summary Judgment (Jan. 6, 1994) 614

Certification of Bishop Melvin Wheatley, Jr. in Support of Plaintiff's Motion for Summary Judgment (Dec. 30, 1993) 618

Certification of Dr. Michael Cahn in Support of Plaintiff's Motion for Summary Judgment (Dec. 21, 1993) 623

Exhibit to Certification of Dr. Michael Cahn

Resolution of Troop Commitee of Scout Troop 260 (Dec. 30, 1991) 630

Supplemental Affidavit of James Dale in Support of Motion for Summary Judgment (Dec. 31, 1993) 631

Certification of Mary Lou Goeke (Dec. 31, 1993) 635

Exhibit to Certification of Mary Lou Goeke

Letter from Dean R. Crafton to Mary Lou Goeke (Feb. 10, 1993) 637

Certification of Robert Gwinn (Jan. 5, 1994) 638

Exhibits to Certification of Robert Gwinn

Letter from Robert Gwinn to National Board of Boy Scouts of America 640

Resolution of Executive Board of Baden-Powell Council, Inc. (Apr. 29, 1992) 644

Resolution of Baden-Powell Council, Inc. (May 13, 1993) 645

Affidavit of William A. J. Kirkner in Support of Plaintiff's Motion for Summary Judgment (Dec. 30, 1993) 647

Certification of David A. Rice in Support of Plaintiff's Motion for Summary Judgment (Dec. 23, 1993) 658

Affidavit of Robert L. Smith, Jr. in Support of Plaintiff's Motion for Summary Judgment (Jan. 3, 1993) 665

Affidavit of Dr. Bryant L. Welch in Support of Plaintiff's Motion for Summary Judgment (Jan. 4, 1994) 675

Certification of Charles Albert Wolfe (Aug. 30, 1993) 685

Transcript of Deposition of Charles D. Ball (Mar. 18, 1993 (excerpts) 691

Selected Exhibits to the Certification of Steven M. Knecht, Attorney for Respondent

1991 Annual Report — Boy Scouts of America (excerpts) 698

United Way Threatens to Cut Aid to Boy Scouts, *The New York Times* (Dec. 17, 1993) 700

Scouts' Ouster of Gay Ends United Way Aid, *Chicago Tribune* (Dec. 18, 1993) 704

Go for the Eagle – A Guide to Achieving Scouting's Highest Rank (excerpts) 705

Certification of Reverend John Giffin (Jan. 27, 1994) 707

Certification of Rabbi Arthur Vernon (Jan. 26, 1994) 710

Certification of Reverend Jerald C. Joersz (Jan. 25, 1994) 714

Certification of Elder Jack H. Goaslind in Support of Defendants' Cross-Motion for Summary Judgment (Jan. 26, 1994) 719

Supplemental Certification of Reverend Donald K. Hummel (Jan. 26, 1994) 722

Certification of Reverend Sam Houston in Support of Defendants' Cross-Motion for Summary Judgment (Jan. 24, 1994) 724

Certification of Reverend Dr. Barry M. Walker (Jan. 25, 1994) 727

Certification of Dr. Park Dietz in Support of Defendants' Cross-Motion for Summary Judgment (Jan. 24, 1994) 731

Supplemental Certification of Dr. Ricky L. Slavings (Jan. 26, 1994) 736

Certification of Parvin L. Bishop (Jan. 26, 1994) 745

Supplemental Certification of David K. Park (Jan. 26, 1994) 748

Transcript of Deposition of James William Kay (Jan. 19, 1993) (excerpts) 750

The following opinions and statutory provisions have been omitted in printing this Joint Appendix because they appear at the following pages in the appendix to the printed Petition for a Writ of Certiorari:

Opinion of the Supreme Court of New Jersey 1a

Opinion of the Superior Court of New Jersey, Appellate Division 102a

Opinion of the Superior Court of New Jersey, Chancery Division 155a

N.J. Stat. Ann. §§ 10:5-4, 10:5-5(l), and 10:5-5(hh) 255a

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

Civil Action No. Mon C 330-92

JAMES DALE,

Plaintiff,

v.

THE BOY SCOUTS OF AMERICA
and THE MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,

Defendants.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
7/29/92	2	SUMMONS [originally filed in Law Division, Docket No. MON-L-5373-92]
7/29/92	3	COMPLAINT
9/25/92	4	ANSWER
10/5/92		Notice of Motion to Transfer Case to Chancery Division (not docketed)
		* * * *
11/6/92	1	TRAN ORD [Transfer Order to Chancery Division by Hon. Alexander F. Lehrer, J.S.C.]
		* * * *

DATE	NO.	PROCEEDINGS
7/9/93	10	MOTN PRDUCE DOC [Notice of Motion to Compel Production of Documents Pursuant to NJCPR 4:23-1 and Certification of Ayala Deutsch in Support of Plaintiff's Motion to Compel]
7/16/93		Certification of Carla A. Kerr in Opposition to Plaintiff's Motion to Compel (not docketed)
7/16/93		Affidavit of Charles D. Ball in Opposition to Plaintiff's Motion to Compel (not docketed)
7/23/93	11	ORDR PRDUCE DOC [Order to Produce Documents Pursuant to NJCPR 4:23-1 by Patrick J. McGann, Jr., J.S.C.]
		* * * *
9/10/93	16	MOT PRT SUM JDG [Plaintiff's Motion for Partial Summary Judgment]
9/10/93	17	CERTIFICTN [Certifications of Michael Adam Kivetz, Ayala Deutsch and Elisabeth G. Ostrow, and Affidavits of Gerald Dick and James Dale in Support of Plaintiff's Motion for Partial Summary Judgment]
		* * * *
9/24/93	20	MOTN MISC [Notice of Motion to Compel Production of Documents by defendants]

DATE	NO.	PROCEEDINGS
9/24/93	21	CERTIFICTN [Certification of Carla A. Kerr in Support of Motion to Compel Production of Documents]
10/22/93		Order Compelling Plaintiff to Produce Documents by Patrick J. McGann, Jr., J.S.C. (not docketed)
11/12/93	22	MOTN CROSS [Notice of Cross-Motion for Summary Judgment by defendants]
		Certifications of Carla A. Kerr, Adam S. Bogner, David K. Park, Connie Adams, P. Karl Rowley, Paul L. Terzulli, James W. Kay, Earl C. Wightman, Dr. Ricky L. Slavings, Donald K. Hummel, and Affidavit of Philip Reissman in Support of Defendants' Cross-Motion for Summary Judgment
		* * * *
1/10/94		Certifications of Steven M. Knecht, Rev. George Wayne Freyberger, and Michael Cahn in Support of Plaintiff's Motion for Partial Summary Judgment (not docketed)
1/28/94		Certifications of Rev. Sam Houston, Rev. Dr. Barry Walker, Dr. Park Dietz, Rev. John Giffin, Rabbi Arthur Vernon, Rev. Jerald C. Joersz, Charles S. Miller, Elder Jack H. Goaslind, Steven D. Royster, Parvin L. Bishop, Peter Sullivan and Grant Robinson

DATE	NO.	PROCEEDINGS
		and Supplemental Certifications of David K. Park, Dr. Ricky Slavings and Rev. Donald K. Hummel in Support of Defendant's Cross-Motion for Summary Judgment
		* * * *
11/20/95	24	ORDR SUMM JDGMNT [Order denying Plaintiff's Summary Judgment Motion; Granting Defendants' Cross-Motion for Summary Judgment, and that Complaint be dismissed with prejudice by Hon. Patrick J. McGann, Jr. J.S.C.]
11/20/95		Findings of Fact and Opinion (not docketed)
		* * * *
10/8/99	27	CONSENT ORDER [Allowing Postponement of Application of James Dale for Entry of Judgment by Hon. Patrick J. McGann, Jr. J.S.C]

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-2427-95T3

James Dale,
Plaintiff-Appellant,

v.

Boy Scouts of America and Monmouth Council Boy Scouts of America,
Defendants-Respondents.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
12/29/95	NOTICE OF APPEAL [by plaintiff]
12/29/95	CASE INFO STATEMENT [Civil Appeal Case Information Statement by Plaintiff-Appellant]
3/8/96	CASE INFO STATEMENT [Civil Appeal Case Information Statement by Defendants-Respondents]
	* * * *
4/8/96	ORAL ARGUMNT REQUES [Request for Oral Argument by Plaintiff-Appellant]
	* * * *
6/25/96	APPEL BRIEF [Brief for Plaintiff-Appellant]

DATE	PROCEEDINGS
6/25/96	JOINT APPENDIX
	* * * *
12/20/96	RES BRIEF/APPENDIX [Brief for Defendants-Respondents Boy Scouts of America and Monmouth Council, Boy Scouts of America]
	* * * *
1/21/97	REPLY BRIEF [for Plaintiff-Appellant James Dale]
3/14/97	ORAL ARGUMNT REQUES [Request for Oral Argument pursuant to Rule 2:11-1(b) by Plaintiff-Appellant]
4/17/97	ADDITIONAL CITATION [Letter by Defendants-Respondents with Additional Citations]
10/9/97	ORD DENY DIR CERT [Ordered that Motion for Direct Certification is denied]
	* * * *
3/2/98	REGULAR OPINION
	* * * *

SUPREME COURT OF NEW JERSEY

September Term 1997

Docket No. A-195/196

James Dale,
Plaintiff-Respondent and Cross-Appellant,

v.

Boy Scouts of America and Monmouth Council,
Boy Scouts of America,
Defendants-Appellants and Cross-Respondents.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
3/20/98	NOT PET CERT [Notice of Petition for Certification by Petitioners]
3/20/98	NOTICE APPEAL [Notice of Appeal by Defendants-Appellants]
	* * * *
3/30/98	NOT X-PET CERT [Notice of Cross-Petition for Certification by Plaintiff-Cross Petitioner]
4/1/98	PETIT CERTIF [Petition for Certification by Defendants-Petitioners]
4/1/98	APP DIV BRIEF [Brief for Defendants-Respondents]

DATE	PROCEEDINGS
4/1/98	APP DIV APPENDIX [Joint Appendix]
4/9/98	X-PETIT CERT/APPEN [Cross Petition for Certification by Plaintiff-Respondent]
4/9/98	APP DIV BRIEF [Brief for Plaintiff-Appellant]
4/9/98	APP DIV REPLY BRIEF [Reply Brief for Plaintiff-Appellant]
4/16/98	RESPOND BRIEF/APPEN [Plaintiff-Appellant's Brief in Opposition to Defendants'-Petitioners' Petition for Certification]
4/24/98	REPLY BRIEF [Defendants'-Petitioners' Reply Brief in Support of Petition for Certification]
4/24/98	X-RESPOND BRIEF [Response to Cross-Petition for Certification]
	* * * *
6/3/98	ORDER [Granting Petition for Certification]
6/3/98	ORDER [Granting Cross-Petition for Certification]
	* * * *
6/29/98	MOT LV FIL SUPPL BR [Notice of Motion for Leave to File Further Briefs on Appeal]
6/29/98	BR/APP SUP MOT [Brief in Support of Motion for Leave to File Further Briefs on Appeal]
7/6/98	ANSWERING BRIEF [Brief in Opposition to Motion for Leave to File Further Briefs on Appeal]

DATE	PROCEEDINGS
8/13/98	ORDER [Motion for Leave to File Supplemental Briefs is Granted]
	* * * *
9/3/98	SUPPL APPELL BRIEF [Supplemental Appellate Brief of Boy Scouts of America and Monmouth Council, Boy Scouts of America]
	* * * *
9/24/98	SUPPL RESPOND BRIEF [Supplemental Brief of Respondent-Cross Petitioner]
	* * * *
8/4/99	OPINION [Affirming Appellate Division's Decision]
	* * * *

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MONMOUTH COUNTY

Civil Action No. Mon L 5373-92

JAMES DALE,

Plaintiff,

v.

THE BOY SCOUTS OF AMERICA
and THE MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,

Defendants.

COMPLAINT

Plaintiff, James Dale, a permanent resident of Port Monmouth, New Jersey, for his Complaint, alleges upon information and belief, except as to those allegations pertaining to himself, as follows:

PRELIMINARY STATEMENT

1. In 1978, at the age of eight, Plaintiff James Dale began what he thought would be a lifetime association with the Boy Scouts of America. As his scouting career progressed, James Dales earned many honors and awards, including thirty "merit badges," and held five leadership positions. James Dale was awarded numerous distinctions by the "Order of the Arrow," an honor association of the Boy Scouts of America, and on July 19, 1988, he was awarded his

Eagle Scout Badge, an achievement attained by only three percent of all Scouts. When James Dale turned eighteen, he was elevated to the position of Assistant Scoutmaster. For more than twelve years, James Dale demonstrated an unfailing commitment to scoutcraft and to the Boy Scouts of America.

On August 5, 1990, all of this came to a swift end. The Boy Scouts notified James Dale that his membership had been revoked and that he had to sever all ties with the Boy Scouts of America. James Dale was given no explanation for his expulsion from the Scouts at that time, but later learned that the decision to revoke his twelve year membership was based on one fact and one fact alone -- James Dale is gay.

The law of this State prohibits discrimination against individuals based on their affectional or sexual orientation. In blatant disregard of the law, the Boy Scouts of America and its affiliates have selectively invoked a secret policy of discrimination against gay males. This policy is not contained in the membership application and cannot be found in any Boy Scout handbook or literature. Nor does the Boy Scouts actively seek information regarding the sexual orientation of its members. Ironically, the only gay Scouts singled out for exclusion are those, such as James Dale, who, in part as a result of Boy Scout training, become leaders in their community and are open and honest about their sexual orientation.

The expulsion of James Dale from the Boy Scouts violates the provisions of the New Jersey Law Against Discrimination prohibiting discrimination based on affectional or sexual orientation in public accommodations, employment and business relationships. The expulsion also violates the common law rights of this State prohibiting

expulsion from organizations in violation of public policy and without fair procedure. Finally, the expulsion must be revoked, because James Dale had no notice of the discriminatory policy prior to its invocation by the Boy Scouts on August 5, 1990.

THE PARTIES

2. Plaintiff James Dale is, and at all times relevant herein was, a citizen of the United States and of the State of New Jersey. He is a permanent resident of Port Monmouth, New Jersey and is currently a full-time student at Rutgers College of Rutgers University ("Rutgers"), New Brunswick, New Jersey.

3. Defendant Boy Scouts of America (the "BSA") is a nonprofit corporation incorporated in the State of Texas. The BSA is authorized to do business in New Jersey.

4. Defendant Monmouth Council, Boy Scouts of America (the "Monmouth Council") is a nonprofit corporation incorporated in the State of New Jersey. The Monmouth Council is a BSA local council and is chartered by the BSA. The Monmouth Council supervises and controls the operations of Troop 73, of which plaintiff was a member from 1985 through August 5, 1990.

ALLEGATIONS

The Boy Scouts

5. The BSA was federally chartered by Act of Congress in 1916 to "promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues

. . . ." 36 U.S.C. §§ 21-29. The BSA is a nationwide organization with a membership of approximately 4.3 million youth and 1.2 million adults.

6. Every Boy Scout in the United States is a member of the BSA as well as of a local council of the BSA. The BSA and its local councils are recreational organizations that provide numerous activities for all of its members. The aim of the Boy Scouts "is to supplement the various existing educational agencies, and to promote the ability in boys to do things for themselves and others." Handbook for Boys at 3.

7. The BSA and its local councils "make training courses available for troop leaders, provide local camping facilities, make available such program material as literature and audiovisuals, conduct district and council program events open to all troops, maintain basic troop records, and provide year-round service by commissioners and local council staff people." The Scoutmaster Handbook at 18. In addition, the BSA and its local councils engage in advertising and other forms of solicitation, including scout fairs at schools, community colleges, fairgrounds and churches, door-to-door canvassing and billboards, to induce membership among the general population of young males.

8. One of the services provided by the BSA is the publication of Boys Life, a magazine which promotes the Boy Scouts and informs boys of Boy Scout activities and programs. The BSA also authors and owns the copyrights to Handbook for Boys, Boy Scout Requirements, The Boy Scout Handbook, and The Scoutmaster Handbook.

9. The BSA and the Monmouth Council, the BSA's local council in Monmouth County, New Jersey (collectively, the

"Boy Scouts") create and implement the policies for and provide the programs and the services to all Boy Scout troops in Monmouth County, including the troop to which plaintiff belonged prior to his expulsion. In providing its services and programs in New Jersey, the Boy Scouts make regular use of public accommodations, including parks, schools and playgrounds, for recruiting and recreational activities, and are afforded special privileges in the Monmouth County public schools.

10. The Boy Scout Handbook, authored by the BSA, sets forth the requirements for membership in the Boy Scouts. According to the Boy Scout Handbook, membership is open to any boy who is the right age, submits an application and health history, and completes the Scout joining requirements, including demonstrating the Scout salute, describing the Scout badge, and understanding the Scout Oath, the Scout Law and the Scout motto.

11. Nowhere in any of the materials made available to Boy Scouts or Assistant Scoutmasters, including their membership applications, literature, handbooks, audiovisual materials, training materials or advertising, do the Boy Scouts make any reference whatsoever to a policy of discrimination on the basis of affectional and sexual orientation.

Plaintiff's Membership in the Boy Scouts

12. In September 1978, at the age of eight, plaintiff completed an application for and became a member of the BSA and the Monmouth Council, joining Cub Scout Pack 142. Plaintiff subsequently became a member of Boy Scout Troop 220 in 1981, Troop 128 in 1983, and Troop 73 in 1985. Plaintiff remained a Boy Scout until his eighteenth birthday in

1988. At all times during his ten years as a Boy Scout, plaintiff was a member in good standing of the Monmouth Council and the BSA.

13. Plaintiff was an exemplary Scout. He earned the following Scouting Achievement Badges:

Boy Scout Badge	Star Badge
Tenderfoot Badge	Life Badge
Second Class Badge	Eagle Scout Badge
First Class Badge	

Plaintiff was awarded the following Merit Badges:

Astrology	Basketry
Camping	Canoeing
Citizenship in the Community	
Citizenship in the Nation	
Citizenship in the World	
Communications	Cooking
Environmental Science	First Aid
Fish & Wildlife Management	
Forestry	Indian Lore
Leatherwork	Lifesaving
Mammals	Music
Pioneering	Personal Fitness
Personal Management	Orienteering
Reptile Study	Rowing
Safety	Small Boat Sailing
Sports	Swimming
Wilderness Survival	Wood Carving

Plaintiff's additional honors and achievements include:

Arrow of Light Award
Completion of Junior Leader Training
Delegate to National Boy Scout Jamboree
World Conservation Award
Guest Speaker at Joshua Huddy Distinguished Citizenship Award Dinner
Eagle Scout Project at Holmdel Park Activities Center
Forestburg Summer Scout Reservation Summer Staff

14. In June 1983, plaintiff was admitted to the Order of the Arrow, the honor campers association of the BSA. He achieved the status of Vigil Honor in 1986. From 1984 through 1988 plaintiff held a number of offices, including Ceremonies Chair, Camping Promotions Chair, Banquet Chair and Vigil Honor Chair. Additional honors received in the Order of the Arrow include three First Place honors in the Character Meteu and a First Place honor in the Team Ordeal Ceremony.

15. Due to his outstanding leadership ability, plaintiff held a number of leadership positions, beginning in 1982, when plaintiff was appointed an Assistant Patrol Leader and later a Patrol Leader. Plaintiff was a Bugler from 1984 through 1988 and a Junior Assistant Scoutmaster from 1985 through 1988.

16. In August 1988, plaintiff reached the age of eighteen and the Monmouth Council invited him to continue his membership in the Boy Scouts as an Assistant Scoutmaster. Assistant Scoutmasters are adults chosen to work with Scoutmasters in leading the activities of individual Boy Scout troops. Plaintiff's application for Assistant Scoutmaster was accepted and approved by the Monmouth Council and the BSA, and he became an Assistant Scoutmaster for Troop 73, which was supervised and controlled by the Monmouth Council.

17. As an Assistant Scoutmaster, plaintiff worked under the control and direction of the Boy Scouts, pursuant to the terms established by the BSA in its publication The Scoutmaster Handbook. In addition to directing plaintiff's activities as an Assistant Scoutmaster, the Boy Scouts provided plaintiff with the resources necessary for him to fulfill his responsibilities to the Boy Scouts, including "magazines, books and printed materials, uniforms, and equipment for Scouting." The Scoutmaster Handbook at 219.

18. As a Scout, and later as an Assistant Scoutmaster, plaintiff made a tremendous investment of time, energy and money to the Boy Scouts. Plaintiff purchased uniforms, books and equipment and paid for camping trips and other activities. Plaintiff attended regular troop meetings as well as jamborees, summer camp and other special events. Plaintiff believed that he would be a Scout for life and intended to be a Scoutmaster after he graduated from college.

19. Plaintiff derived tremendous benefits and privileges from his investment in the Boy Scouts. He was proud to be an Eagle Scout and felt that his association with the Boy Scouts had a positive impact on his status in the community.

Plaintiff's Expulsion From the Boy Scouts

20. As a gay undergraduate student at Rutgers, plaintiff became the co-president of the Rutgers Lesbian and Gay Alliance (the "Alliance"). In early July 1990, plaintiff was interviewed by a reporter for the Newark Star-Ledger in connection with a seminar that he had attended at Rutgers University that addressed the psychological and health needs of lesbian and gay teenagers. As reported on July 8, 1990, in the Sunday edition of the Newark Star-Ledger, the seminar

discussed the problem of suicide among gay and lesbian teenagers, a population which, deprived of support and exposed to discrimination and exclusion, "suffer[s] from depressions and a lack of social coping skills," and has a suicide attempt rate of 20 to 35 percent. The article, entitled "Seminar addresses needs of homosexual teens," identified plaintiff as co-president of the Alliance and printed his picture.

21. On August 5, 1990, with no advance warning, plaintiff received a letter from the Monmouth Council revoking his membership in the Boy Scouts. The letter constituted the first communication, written or otherwise, between plaintiff and any representative of the Boy Scouts regarding defendants' decision to revoke plaintiff's membership. The letter stated no reason whatsoever for the revocation. The letter advised plaintiff that he was entitled to review of the Monmouth Council's decision by the Boys Scouts' regional review committee (the "Review Committee") and referred plaintiff to the "Procedure for Requesting Review of Registration Decision," which was attached to the letter (the "Review Procedure"). Among other things, the Review Procedure provides that plaintiff has a right to attend a hearing before the Review Committee.

22. On or about August 8, 1990, plaintiff sent a letter to the Monmouth Council requesting an explanation for its decision to revoke his membership in the Boy Scouts.

23. By letter dated August 10, 1990, the Monmouth Council responded that plaintiff's membership had been revoked because of his sexual orientation. The letter referred plaintiff to "the standards for leadership established by the Boy Scouts of America," which "specifically forbid membership to homosexuals." At no time prior to receiving this letter had

plaintiff seen or heard of "the standards for leadership," or any policies of defendants' that "forbid membership to homosexuals."

24. On or about September 30, 1990, plaintiff requested review of the Monmouth Council's decision and stated his intention to attend the hearing before the Review Committee, as permitted under the Review Procedure. Plaintiff also requested a copy of the "standards for leadership established by the Boy Scouts of America," to which the Monmouth Council had referred (the "Standards for Leadership"), in order to prepare his response to the Monmouth Council's decision.

25. By letter dated October 5, 1990, the Assistant Regional Director of the Boy Scouts acknowledged receipt of plaintiff's request for review. The letter neither enclosed the Standards for Leadership, nor referred to plaintiff's request for the standards.

26. On or about October 16, 1990, plaintiff once again informed the Assistant Regional Director of his intent to attend the hearing before the Review Committee as provided under the "Review Procedure." Plaintiff once again requested a copy of the Standards for Leadership.

27. Despite the clear provision of the Review Procedure entitling plaintiff to be present at the hearing before the Review Committee, and despite plaintiff's repeated invocation of his right to be present at that hearing, the Review Committee convened in plaintiff's absence, without notice to plaintiff, and summarily affirmed the decision of the Monmouth Council to revoke plaintiff's membership in the Boy Scouts. By letter dated November 27, 1990, the Assistant Regional Director notified

plaintiff of the Review Committee's decision and informed him that he was entitled to review by a National Council Review Committee.

28. Plaintiff has not to this day received from the Monmouth Council, the Review Committee or the BSA a copy of the Standards for Leadership or any other policy statement of the Boy Scouts that specifically forbids membership to certain boys and men on the basis of affectional or sexual orientation.

29. On or about December 18, 1990, plaintiff, through his attorneys, wrote to the Regional Director of the BSA objecting to the summary affirmance of the revocation decision and requesting a hearing before the Review Committee so that he could present information and argument in defense of his membership in the Boy Scouts.

30. On the same date, plaintiff also urged the National Council to reverse the decision of the Monmouth council and reinstate plaintiff's membership. Plaintiff further urged the National Council to revoke the Boy Scout's policy of discrimination on the basis of affectional and sexual orientation. Plaintiff also objected to the Review Committee's failure to observe its own review procedures.

31. By letter dated December 21, 1990, Legal Counsel in the National Office of Boy Scouts informed plaintiff that "as [plaintiff] is apparently an avowed homosexual and the Boy Scouts of America does not admit avowed homosexuals to membership in the organization, no useful purpose would apparently be served by having [him] present at the regional review meeting."

Plaintiff's Attempt to Be Reinstated

32. On or about July 9, 1992, plaintiff, through his attorneys, again requested in writing that defendants abandon their illegal policy of excluding gays from membership in the Boy Scouts and reinstate plaintiff as an Assistant Scoutmaster in the Monmouth Council.

33. By letter dated July 22, 1992, the Monmouth Council denied plaintiff's request for reinstatement.

FIRST CAUSE OF ACTION

VIOLATION OF NEW JERSEY LAW AGAINST DISCRIMINATION PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION IN PUBLIC ACCOMMODATIONS

34. Plaintiff realleges and incorporates herein by reference each and every allegation of paragraphs 1 through 33.

35. Section 10:5-12 (f) of the New Jersey Law Against Discrimination ("NJLAD") makes it unlawful for "any owner, . . . agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof" on the basis of that person's "affectional or sexual orientation."

36. Defendants use New Jersey public accommodations to host their activities and conduct advertising and solicitation to induce membership among the general population of boys. Defendants do not inform the public or applicants for membership that membership is not open to homosexuals or

that affectional or sexual orientation is in any way relevant to the issue of membership.

37. Defendants are public accommodations under the NJLAD. Consequently, their practices are governed by Section 10:5-12(f). Accordingly, defendants cannot exclude potential members or expel current members based on their affectional or sexual orientation.

38. Defendants' revocation of plaintiff's membership and subsequent refusal to reinstate plaintiff in the Monmouth Council and in the Boy Scouts was based on an invidious policy of selective discrimination based on affectional and sexual orientation and violates the NJLAD.

SECOND CAUSE OF ACTION

VIOLATION OF NEW JERSEY LAW AGAINST DISCRIMINATION PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION IN EMPLOYMENT

39. Plaintiff realleges and incorporates herein by reference each and every allegation of paragraphs 1 through 38.

40. Section 10:5-12(a) of the NJLAD makes it unlawful for "an employer because of the . . . affectional or sexual orientation . . . of any individual . . . to refuse to hire or employ or to bar or to discharge or require to retire . . . from employment such individual . . . ."

41. Section 10:5-12 (c) of the NJLAD makes it unlawful for "an employer . . . to print or circulate or cause to be printed or circulated any statement . . . which expresses,

directly or indirectly, any limitation, specification discrimination as to . . . affectional or sexual orientation . . . ."

42. Plaintiff's application for the position of Assistant Scoutmaster was approved and accepted by defendants. Plaintiff's duties and responsibilities as an Assistant Scoutmaster were supervised and controlled by defendants. Thus, plaintiff was an employee of defendants under the NJLAD.

43. By firing and refusing to rehire plaintiff as an Assistant Scoutmaster solely because he is gay, and by printing and circulating the letters informing plaintiff of defendants' discriminatory policy as to affectional and sexual orientation, defendants violated Sections 10:5-12 (a) and 10:5-12 (c) of the NJLAD.

THIRD CAUSE OF ACTION

VIOLATION OF NEW JERSEY LAW AGAINST DISCRIMINATION PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION IN BUSINESS RELATIONSHIPS

44. Plaintiff realleges and incorporates herein by reference each and every allegation of paragraphs 1 through 43.

45. Section 10:5-12(l) of the NJLAD makes it unlawful for "any person to refuse to buy from, sell to, lease from or to, license, contract with, or trade with, provide goods, services or information to, or otherwise do business with any other person on the basis of the . . . affectional or sexual orientation of such other person . . . ."

46. Plaintiff and defendants had a business relationship. Defendants provided plaintiff with goods, services, and

information. Plaintiff, in turn, provided defendants with services.

47. By revoking and refusing to reinstate plaintiff's position as Assistant Scoutmaster, by ceasing to provide goods, services and information to plaintiff and to otherwise conduct business with plaintiff solely because he is gay, defendants violated Section 10:5-12(1) of the NJLAD.

FOURTH CAUSE OF ACTION

VIOLATION OF THE COMMON LAW RIGHT NOT TO BE EXPELLED FROM AN ASSOCIATION ON GROUNDS CONTRARY TO NEW JERSEY PUBLIC POLICY

48. Plaintiff realleges and incorporates herein by reference each and every allegation of paragraphs 1 through 47.

49. Plaintiff was a member of the BSA and the Monmouth Council for twelve years. Plaintiff's expulsion from the Boy Scouts was based on the fact that plaintiff is gay.

50. Expulsion from a membership organization such as the Boy Scouts on the basis of affectional or sexual orientation is against New Jersey public policy as codified in the NJLAD.

51. By revoking plaintiff's membership in the Boy Scouts and refusing to reinstate him solely because plaintiff is gay, defendants violated the New Jersey common law rule prohibiting expulsion from membership organizations on grounds contrary to New Jersey public policy.

FIFTH CAUSE OF ACTION

VIOLATION OF COMMON LAW RIGHT NOT TO BE EXPELLED FROM AN ASSOCIATION UNLESS ORGANIZATION FOLLOWS A FAIR PROCEDURE

52. Plaintiff realleges and incorporates herein by reference each and every allegation of paragraphs 1 through 51.

53. Defendants revoked plaintiff's membership in the Boy Scouts (a) without giving him prior notice that such a decision was being considered; (b) without informing him of the date of the Review Committee hearing; (c) without providing him, despite his repeated requests, with a copy of the Standards for Leadership, which purportedly provided the basis for plaintiff's expulsion; and (d) without affording him, despite his repeated requests, an opportunity to attend the Review Committee hearing and present information in his defense as provided for in the Review Procedures.

54. By reason of the foregoing, defendants violated the New Jersey common law prohibition against expulsion without a fair procedure.

SIXTH CAUSE OF ACTION

ESTOPPEL

55. Plaintiff realleges and incorporates herein by reference each and every allegation of paragraphs 1 through 54.

56. Plaintiff was led to believe that he could be a Boy Scout for life, on the sole condition that he continue to satisfy the membership requirements set forth in the Boy Scouts' published materials. Plaintiff was led to believe that he

would be a Scoutmaster if he continued on the path he was on. Plaintiff satisfied all of the Boy Scouts' express requirements. Plaintiff wanted to become a Scoutmaster. Plaintiff wanted to be a Boy Scout for life.

57. Defendants never informed plaintiff or his parents that the Boy Scouts had a policy against admitting or retaining gay boys and men as members. Had plaintiff known of the Boy Scouts' secret policy of expelling gay males who are open and honest about their sexual orientation, he would have left the Boy Scouts at the age of sixteen.

58. As a result of defendants' promises and omissions, plaintiff spent four years of his life expending time, money and energy in service to the Boy Scouts, years that could have been spent in an organization that would have welcomed him as a lifetime member.

59. By reason of the foregoing, defendants should be estopped from expelling plaintiff from the Boy Scouts.

* * * [in original]

60. Plaintiff maintains his desire to resume his association with and membership in the BSA and the Monmouth Council.

61. By reason of the aforementioned acts of defendants, plaintiff has been wrongfully excluded from a public accommodation, has been wrongfully deprived of employment, has been denied an opportunity to do business with defendants, has been wrongfully expelled from a membership organization, has been denied fair procedure, has been made to suffer emotional distress and has been damaged

in numerous other ways and will continue to be so damaged unless this Court intervenes.

62. The acts of defendants amount to intentional wrongdoing, or were done with wanton and willful disregard of plaintiff's rights, or were done deliberately with knowledge of a high degree of probability of harm to plaintiff and with reckless indifference to the consequences of the acts.

WHEREFORE, plaintiff respectfully requests that this Court grant a judgment:

(1) declaring that defendants infringed plaintiff's rights protected by the New Jersey Law Against Discrimination and by the common law of New Jersey;

(2) declaring that it is unlawful in the State of New Jersey for defendants to forbid membership or expel current members on the basis of affectional or sexual orientation;

(3) ordering defendants immediately to reinstate plaintiff's membership in the Boy Scouts and his position as Assistant Scoutmaster in the Monmouth council;

(4) awarding plaintiff compensatory and punitive damages for the emotional pain and suffering he has experienced and for the loss of his valuable privileges as a member of the Boy Scouts due to defendants' unlawful acts;

(5) awarding plaintiff costs and attorney's fees; and

(6) granting plaintiff such other, further, and additional relief as the Court may deem just and proper.

EVANS, OSBORNE & KREIZMAN
180 White Road
Little Silver, New Jersey 07739
(908) 741-9550
Attorneys for Plaintiff

By /s/ Lewis H. Robertson
Lewis H. Robertson

CLEARY, GOTTLIEB, STEEN
& HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000
Of Counsel to Plaintiff

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
666 Broadway
New York, New York 10012
(212) 995-8585
Of Counsel to Plaintiff

Dated: July 29, 1992

NOTICE OF OTHER ACTIONS

I herewith certify pursuant to Rule 4:5-1 that the matter in controversy in this action is the subject of not other action, pending in any court, or of a pending arbitration proceeding, to the best of my knowledge, information and belief, and that I know of no other action or arbitration proceeding that is contemplated, nor do I know the name of any other party who should be jointed in this action.

Dated: July 29, 1992

By /s/ Lewis H. Robertson
Lewis H. Robertson

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

ANSWER

Defendants Boy Scouts of America, improperly sued as The Boy Scouts of America, and Monmouth Council, Boy Scouts of America, improperly sued as The Monmouth Council, Boy Scouts of America ("Monmouth Council"), by their undersigned attorneys, answer the complaint as follows:

AS TO PRELIMINARY STATEMENT

1. Deny each and every allegation contained in the first paragraph of paragraph 1 except admit that plaintiff became a member of Boy Scouts of America in 1978, that he was awarded approximately 25 merit badges, that he was awarded the Eagle Scout badge on or about July 19, 1988, that approximately three percent of all Boy Scouts achieve Eagle Scout rank, and that plaintiff registered as an Assistant Scoutmaster in 1988; deny each and every allegation contained in the second paragraph of paragraph 1 except admit that plaintiff was notified by letter dated July 19, 1990 that his registration was revoked and that he should sever any relations with Boy Scouts of America; deny each and every allegation contained in the third paragraph of paragraph 1; and deny each and every allegation contained in the fourth paragraph of paragraph 1.

AS TO THE PARTIES

2. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.

3. Deny each and every allegation contained in paragraph 3.

4. Admit the allegations contained in the first two sentences of paragraph 4, and deny each and every allegation contained in the third sentence of paragraph 4 except admit that plaintiff was registered with Boy Scouts of America as a youth member in Troop 73 in Monmouth Council from September 1986 until July 1988 and as an adult member from March 1989 until July 1990.

AS TO ALLEGATIONS

5. Admit the allegations contained in paragraph 5 and aver that the quotation of 36 U.S.C. § 23 in paragraph 5 omits the language "using the methods which were in common use by Boy Scouts on June 15, 1916."

6. Deny each and every allegation contained in paragraph 6 except admit that the quoted words appear at page three of the Handbook for Boys, published in 1911.

7. Deny each and every allegation contained in the first sentence of paragraph 7 except admit that the quoted words appear at page 18 of The Scoutmaster Handbook, and deny each and every allegation contained in the second sentence of paragraph 7 and aver that adult and youth members engage in various activities designed to encourage those persons who share the values of the Scouting movement to join Boy Scouts of America.

8. Deny each and every allegation contained in the first sentence of paragraph 8, and admit the allegations contained in the second sentence of paragraph 8.

9. Deny each and every allegation contained in the first sentence of paragraph 9 except admit that Boy Scouts of America has created policies applicable to all Boy Scout troops, and deny each and every allegation in the second sentence of paragraph 9 except admit that troops in Monmouth Council conduct some activities in parks and on school grounds in accordance with established rules.

10. Admit the allegations contained in the first sentence of paragraph 10, and deny each and every allegation contained in the second sentence of paragraph 10 and aver that, among other joining requirements, a boy must understand and agree to live by the Scout Oath and Scout Law.

11. To the extent the allegations in paragraph 11 mean that the alleged materials do not state that adherence to the Scout Oath and Scout Law is required of members, deny each and every allegation contained in paragraph 11. To the extent the allegations in paragraph 11 mean that the alleged materials do not state that Boy Scouts of America engages in unlawful discrimination, admit the allegations contained in paragraph 11.

12. Deny each and every allegation contained in paragraph 12 and aver that plaintiff applied and was accepted for membership in Boy Scouts of America as a Cub Scout in Pack 142 in 1978, that he subsequently became a Boy Scout in Troop 220 in 1981 and thereafter was a Boy Scout in Troop 128 beginning in 1983 and a Boy Scout in Troop 73 beginning in 1986 and that plaintiff was a Boy Scout until his 18th birthday on August 2, 1988.

13. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 13, deny each and every allegation contained in the second sentence of paragraph 13 except admit that plaintiff was awarded the badges set forth therein, deny each and every allegation contained in the third and fourth sentences of paragraph 13 except admit that plaintiff was awarded merit badges in camping, canoeing, citizenship in the community, citizenship in the nation, citizenship in the world, communications, cooking, environmental science, first aid, fish and wildlife management, forestry, indian lore, lifesaving, mammals, music, pioneering, personal management, reptile study, rowing, safety, small boat sailing, sports, swimming and wood carving and that plaintiff earned the Arrow of Light Award as a Cub Scout, attended the National Boy Scout Jamboree, was a guest speaker at a Joshua Huddy Distinguished Citizenship Award Dinner and completed his Eagle Scout project at Holmdel Park Activities Center.

14. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 14 except admit that plaintiff was a Vigil Honor member of the Order of the Arrow, an honorary camping society of members of Boy Scouts of America.

15. Deny each and every allegation contained in paragraph 15 except admit that plaintiff served as junior assistant Scoutmaster from September 1985 to July 1988.

16. Deny each and every allegation contained in the first and third sentences of paragraph 16 except admit that plaintiff applied for and was admitted to adult membership and aver that plaintiff represented that he subscribed to the policies and

principles of Boy Scouts of America, that he agreed to be guided by the Charter and Bylaws of Boy Scouts of America and that he met the requirements for adult leaders of Boy Scouts of America, and admit the allegations contained in the second sentence of paragraph 16.

17. Deny each and every allegation contained in paragraph 17 except admit that the quoted words appear at page 219 of The Scoutmaster Handbook.

18. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18.

19. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19.

20. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 except admit that an article, entitled and containing a picture and the quoted words as alleged, appeared in the July 8, 1990 edition of the Newark Star-Ledger.

21. Deny each and every allegation contained in paragraph 21 except admit that by letter dated July 19, 1990 the Council Executive of Monmouth Council advised plaintiff that after careful review it had been decided that his registration with Boy Scouts of America should be revoked, that he was therefore compelled to request that plaintiff sever any relations with Boy Scouts of America and that a regional review committee of Boy Scouts of America would review that decision if plaintiff so requested within 60 days.

22. Deny each and every allegation contained in paragraph 22 except admit that by letter dated August 8, 1990 to Monmouth Council plaintiff requested the grounds or basis for the decision.

23. Deny each and every allegation contained in paragraph 23 except admit that Monmouth Council responded by letter dated August 10, 1990 and that the quoted words appear in the letter.

24. Deny each and every allegation contained in paragraph 24 and aver that by letter dated September 30, 1990 plaintiff requested review of the decision to revoke his registration, stated that he "would like to attend" the review and requested "a copy of the 'standards for leadership established by the Boy Scouts of America.'"

25. Admit the allegations contained in paragraph 25.

26. Deny each and every allegation contained in paragraph 26 except admit that by letter dated October 16, 1990 plaintiff stated that he planned to attend the review and requested "a copy of the 'standards for leadership established by the Boy Scouts of America.'"

27. Deny each and every allegation contained in the first sentence of paragraph 27 except admit that the review committee convened in plaintiff's absence and affirmed the decision of Monmouth Council, and admit the allegations contained in the second sentence of paragraph 27.

28. Deny each and every allegation contained in paragraph 28.

29. Deny each and every allegation contained in paragraph 29 and aver that an attorney purporting to represent

plaintiff by letter dated December 18, 1990 wrote to the Assistant Regional Director requesting that the decision of the review committee be revoked.

30. Deny each and every allegation contained in paragraph 30 and aver that an attorney purporting to represent plaintiff by letter dated December 18, 1990 wrote to the Chief Scout Executive of Boy Scouts of America.

31. Admit the allegations contained in paragraph 31.

32. Deny each and every allegation contained in paragraph 32 except admit that by letters dated July 9, 1992 another attorney purporting to represent plaintiff characterized Boy Scouts of America's adult membership policies as "illegal" and demanded that plaintiff be reinstated as Assistant Scoutmaster.

33. Deny each and every allegation contained in paragraph 33 except admit that Monmouth Council wrote to plaintiff by letter dated July 22, 1992.

AS TO FIRST CAUSE OF ACTION

34. In response to the allegations contained in paragraph 34, repeat and reallege paragraphs 1 through 33 hereof with the same force and effect as though here set forth in full.

35. Deny each and every allegation contained in paragraph 35 except admit that the quoted words appear in the statute.

36. Deny each and every allegation contained in paragraph 36.

37. Deny each and every allegation contained in paragraph 37.

38. Deny each and every allegation contained in. paragraph 38.

AS TO SECOND CAUSE OF ACTION

39. In response to the allegations contained in paragraph 39, repeat and reallege paragraphs 1 through 38 hereof with the same force and effect as though here set forth in full.

40. Deny each and every allegation contained in paragraph 40 except admit that the quoted words appear in the statute.

41. Deny each and every allegation contained in paragraph 41 except admit that the quoted words appear in the statute.

42. Deny each and every allegation contained in paragraph 42.

43. Deny each and every allegation contained in paragraph 43.

AS TO THIRD CAUSE OF ACTION

44. In response to the allegations contained in paragraph 44, repeat and reallege paragraphs 1 through 43 hereof with the same force and effect as though here set forth in full.

45. Deny each and every allegation contained in paragraph 45.

46. Deny each and every allegation contained in paragraph 46.

47. Deny each and every allegation contained in paragraph 47.

AS TO FOURTH CAUSE OF ACTION

48. In response to the allegations contained in paragraph 48, repeat and reallege paragraphs 1 through 47 hereof with the same force and effect as though here set forth in full.

49. Deny each and every allegation contained in paragraph 49 except admit that plaintiff was a member of Boy Scouts of America for a significant portion of the twelve year period before his registration was revoked.

50. Deny each and every allegation contained in paragraph 50.

51. Deny each and every allegation contained in paragraph 51.

AS TO FIFTH CAUSE OF ACTION

52. In response to paragraph 52, repeat and reallege paragraphs 1 through 51 hereof with the same force and effect as though here set forth in full.

53. Deny each and every allegation contained in paragraph 53.

54. Deny each and every allegation contained in paragraph 54.

AS TO SIXTH CAUSE OF ACTION

55. In response to paragraph 55, repeat and reallege paragraphs 1 through 54 hereof with the same force and effect as though here set forth in full.

56. Deny each and every allegation contained in the first, second, third and fifth sentences of paragraph 56, and

state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the fourth sentence of paragraph 56.

57. Deny each and every allegation contained in paragraph 57.

58. Deny each and every allegation contained in paragraph 58.

59. Deny each and every allegation contained in paragraph 59.

60. State that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 60.

61. Deny each and every allegation contained in paragraph 61.

62. Deny each and every allegation contained in paragraph 62.

WHEREFORE, defendants Boy Scouts of America and Monmouth Council demand judgment:

A. dismissing the complaint with prejudice;

B. awarding defendants their costs; and

C. granting such other and further relief as the Court may deem just and proper.

SEPARATE DEFENSES

1. The complaint fails to state a claim upon which relief may be granted.

2. Monmouth Council and Boy Scouts of America are each institutions, bona fide clubs, or places of accommodation which are in their nature distinctly private and are exempt from the New Jersey Law Against Discrimination.

3. Monmouth Council and Boy Scouts of America are each educational facilities operated or maintained by bona fide religious or sectarian institutions and are exempt from the New Jersey Law Against Discrimination.

4. Monmouth Council and Boy Scouts of America each act in loco parentis to direct the education and upbringing of the children in their control and are exempt from the New Jersey Law Against Discrimination.

5. Plaintiff and defendants do not share an employment relationship or any other relationship covered under the New Jersey Law Against Discrimination.

6. Boy Scouts of America is a national volunteer movement dedicated to inculcating the values of the Scouting movement in boys and young people.

(a) It is the mission of Boy Scouts of America to serve youth by helping to instill in them the values of the Scout Oath and the Scout Law and to prepare them to make ethical choices over their lifetime.

(b) The Scout Oath states,

On my honor I will do my best
To do my duty to God and my country and
to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

The Scout Law states,

A Scout is: Trustworthy, Loyal,
Helpful, Friendly, Courteous, Kind,
Obedient, Cheerful, Thrifty, Brave,
Clean, Reverent.

(c) Adult members of Boy Scouts of America associate in neighborhood troops in Monmouth Council in order to bring the values of the Scouting movement to boys who have joined Boy Scout troops.

(d) Adult leaders such as Assistant Scoutmasters play a critical role in transmitting Scouting values to the boys in their troops, through teaching, counseling, example and other means.

(e) It is the position of Boy Scouts of America that homosexual conduct is inconsistent with the requirements of the Scout Oath and Scout Law to be morally straight and clean.

(f) Requiring acceptance of an open or avowed homosexual as an Assistant Scoutmaster would interfere with the process of communication and transmission of Scouting values to the boys in the troop.

(g) To the extent the New Jersey Law Against Discrimination were applied to force defendants to accept

plaintiff, an avowed homosexual, as an adult leader, those statutes would unconstitutionally infringe upon the rights of association of the members of Boy Scouts of America in Monmouth Council under the New Jersey and United States Constitutions.

Dated: September 25, 1992
Freehold, New Jersey

CERRATO, DAWES, COLLINS,
SAKER & BROWN
Wemrock Professional Mall
509 Stillwells Corner Road
P.O. Box 930
Freehold, New Jersey 07728

By: /s/ Sanford D. Brown
Sanford D. Brown

Selected Exhibits to Certification of
Ayala Deutsch, Attorney For Respondent

FACT SHEET
ORDER OF THE ARROW
(excerpts)

PURPOSE The purpose of the Order of the Arrow is fourfold:

1. To recognize those Scout campers who best exemplify the Scout Oath and Law in their daily lives
2. To develop and maintain camping traditions and spirit
3. To promote Scout camping
4. To crystallize the Scout habit of helpfulness into a life purpose of leadership in cheerful service to others

HISTORY The Order of the Arrow (OA) was founded by Dr. E. Urner Goodman and Carroll A. Edson in 1915 at the Treasure Island Camp of the Philadelphia Council Boy Scouts of America. It became an official program experiment in 1922 and was approved as part of the Scouting program in 1934. In 1948 the OA, recognized as the BSA's national brotherhood of honor campers, became an official part of the national camping program of the Boy Scouts of America.

MEMBERSHIP The OA has more than 160,000 members located in lodges affiliated with 397 local BSA councils.

ELIGIBILITY To become a member, a youth must be a registered member of a Boy Scout troop or Varsity Scout team and hold the First Class rank. The youth must have experienced a minimum of 15 days and nights of Scout camping (including a 6-day/night resident camp). Scouts are elected to the order by their fellow unit members, following approval by the Scoutmaster or Varsity Team Coach.

INDUCTION The induction ceremony, called the Ordeal, is conducted at Scout camp and is the first step toward full membership. During the experience, candidates maintain complete silence, receive small amounts of food, work on camp improvement projects, and are required to sleep alone, apart from other campers, which teaches significant values.

BROTHERHOOD MEMBER After 10 months of service and fulfilling certain requirements, a member may take part in the Brotherhood ceremony, which places further emphasis on the ideals of Scouting and the Order. Completion of this ceremony signifies full membership in the OA.

VIGIL HONOR After 2 years of service as a Brotherhood member, and with the approval of the national Order of the Arrow Committee, a Scout may be recognized with the Vigil Honor for outstanding service to Scouting, his lodge, and the community. This honor is by special selection and is limited to 1 person for every 50 members registered with the lodge each year.

* * * *

FACT SHEET

THE PRESIDENTS OF THE UNITED STATES AND THE BOY SCOUTS OF AMERICA

One of the causes contributing to the success of the Boy Scouts of America has been the thoughtful, wholehearted way in which each President of the United States since William Howard Taft in 1910 has taken an active part in the work of the movement. Each served as Honorary President during his term in office.

President Reagan became involved in Scouting with the Golden Empire Council in Sacramento, Calif., while serving as governor of the state. During his 8 years in office, he chaired Project SOAR (Save Our American Resources), served as membership roundup chairman, participated in annual Report to the Governor ceremonies, and served on the council's advisory board. For his service to youth, he was awarded the Silver Beaver Award. As a member of the Los Angeles Area Council, he served as Scoutorama chairman, as a speaker for the council recognition dinner, and as a sustaining member.

"I applaud your many efforts and programs encouraging character development and leadership among American youth. By sponsoring many useful physical, mental, and social activities designed to promote self-responsibility, the Scouts strengthen the cornerstone of individual freedom in our nation. These programs develop the youngster's confidence in his ability to deal with nature, society, and a challenging world."

Ronald Reagan

[PHOTOS OMITTED]

President Carter was involved in Scouting as a troop committee chairman, Explorer Advisor, and Scoutmaster. In support of the President's appeal for an energy conservation program, the Boy Scouts of America held a Scouting Environment Day, April 23 1977, with other programs planned to make a major contribution toward achieving national energy conservation goals.

"As a former volunteer Scout leader . . . I am greatly impressed by the role of your fine program in our national life. It is a constructive initiative on the part of young Americans to explore career interests and to become better prepared for a more satisfying and rewarding future."

[PHOTO OMITTED]

Gerald Ford was the first Eagle Scout to become Vice President and later President. He began his Scouting career on December 17, 1924, when he became a member of Troop 15, sponsored by the Trinity M.E. Church in Grand Rapids, Mich. He was recognized with the Distinguished Eagle Scout Award "for his service to the Nation and community," by the Grand Valley Council at Grand Rapids, Mich., in May 1970. He received the Scouter of the Year Award on December 2, 1974, from the National Capitol Area Council, Washington, D.C.

"One of the proudest moments of my life came in the Court of Honor when I was awarded the Eagle Scout badge. I still have that badge. It is a treasured possession. I am the first Eagle Scout Vice President. The three great principles which Scouting provides--self-discipline, teamwork, and moral and patriotic values--are the basic building blocks of leadership. I

applaud the Scouting program for continuing to emphasize them. I am confident that your ability to bring ideals, values, and leadership training to millions of our young people will help to bring about a new era--a time in which not only our Republic will progress in peace and freedom, but a time in which the entire world shall be secure, and all its people free."

Gerald R. Ford

President Nixon hosted the First National Explorer Presidents' Congress in 1971 on the White House lawn. As Vice President he visited and spoke at the national jamborees held at Irvine Ranch, Calif., in 1953, and at Valley Forge State Park, Pa., in 1957.

"I welcome your determination to seek out new members in our great and growing cities, as well as throughout rural America. For through Scouting many of these young citizens can more fully develop their potential for public service and become effective leaders in their communities and in our nation.

"I strongly believe that Scouting offers an exceptional opportunity to learn about good citizenship by being a good citizen, and I am glad to hear that we can count on you to carry on the very important work . . . in encouraging America's boys to make themselves into the men our country needs."

Richard M. Nixon

[PHOTO OMITTED]

President Johnson was an active Scout leader with the Capitol Area Council at Austin, Texas, serving on its Exploring

committee. He was a member of the National Capitol Area Council from 1959 through 1963. In 1963 he helped to organize Post 1200 in Washington, D.C., which was chartered to the House of Representatives for page boys working in the U.S. Congress.

"I welcome this opportunity to express my pride and deep sense of gratitude for the outstanding example and enviable reputation for human understanding and fair play which have throughout the productive life of your organization been hallmarks of Scouting everywhere. Your conduct, both individually and in your group activities, has been worthy of admiration by all the young citizens of our land. Today, as we face the challenges of an increasingly complex and frequently disturbing world, America needs an alert, responsible, and energetic youth to provide her with a vital resource in a hopefully happier and fuller future for all. As I applaud your past, I also urge you to rededicate yourselves to the ideals of the Scout Oath, and to reaffirm your obligations to God and to your country. In so doing, you will contribute to the strengthening of America's heritage and thereby to the realization of our common goals in the Great Society."

Lyndon B. Johnson

[PHOTOS OMITTED]

President Roosevelt was the first to enter the White House with a record as an active Scout leader. He was president of the Greater New York Councils of the Boy Scouts of America. In 1934 hundreds of thousands of Scouts assembled to hear President Roosevelt's broadcast appealing for help for the needy. In response, Scouts contributed by collecting nearly 2 million articles of clothing, household furnishings,

and other articles for needy families. When FDR died in 1945, he had a record of 24 years' service in Scouting.

"As one who has been interested in Scouting over many years, it has been most heartening to have so many evidences of the practical values of Scout training. We must remember that next to active military service itself, there is no higher opportunity for serving our country than helping youth to carry on in their efforts to make themselves physically strong, mentally awake, and morally straight, and prepared to help their country to the full in time of war, as well as in time of peace. We must make sure that those volunteer agencies which are supplementing the church, the home, and the school by providing programs that will help equip the present generation to cope with life problems in the difficult days ahead are maintained to their maximum capacity and effectiveness."

Franklin D. Roosevelt

President Hoover launched a forward movement and development program for the Boy Scouts of America at a dinner commemorating Scouting's 20th anniversary.

"The first test of democracy is that each individual shall have the opportunity to take that position of leadership in the community to which his character, his ability, and his ambition entitle him; and because the progress of our country is thus directly related to the training in leadership we can give the youth of the Nation. In meeting the vital need that when the oncoming generation takes over our national affairs it shall be a generation bulwarked with character, the Boy Scout movement plays a most useful part.

"The Boy Scout movement has opened for him the portals to adventure and constructive joy, by reviving the lore of the frontier and the campfire; by establishing contacts with the birds and sometimes with the bees; by matching his patience to the deliberate character of fish; by efficient operations of the swimming hole; and by peeps into the thousand mysteries of the streams, the trees, and the stars."

Herbert C. Hoover

[PHOTOS OMITTED]

President Coolidge's two sons were Scouts, and he had many opportunities to see the Scout program at work. He participated in the 16th Annual Meeting of the National Council in Washington, D.C., in 1926 by presenting the first Silver Buffalo Award for distinguished service to boyhood.

"The more I have studied this movement, its inception, purposes, organization and principles, the more I have been impressed. Not only is it based on the fundamental rules of right thinking and acting, but it seems to embrace in its code almost every virtue needed in the personal and social life of mankind. It is a wonderful instrument for good. If every boy in the United States could be placed under the wholesome influences of the Scout program and should live up to the Scout Oath and rules, we would hear fewer pessimistic words as to the future of our nation."

[PHOTO OMITTED]

The first Scout to become President was John F. Kennedy, who was a member of Troop 2, Bronxville, N.Y., from 1929 to 1931 and a leader of the Boston Council.

"For more than 50 years Scouting has played an important part in the lives of the Boy Scouts of this nation. It has helped to mold character, to form friendships, to provide a worthwhile outlet for the natural energies of growing boys and to train these boys to become good citizens of the future.

"In a very real sense, the principles learned and practiced as Boy Scouts adds to the strength of America and her ideals."

John F. Kennedy

President Eisenhower became a member of the national Executive Board of the Boy Scouts of America in 1948. He had been a staunch supporter of Scouting ever since his son was a Scout.

"The Boy Scout movement merits the unstinted support of every American who wants to make his country and his world a better place in which to live. Its emphasis on community service and tolerance and world friendship promotes a speedier attainment of the enduring peace among men for which we all strive. By developing among its members both a spirit of sturdiness, self-reliance, and a realization of the need for cooperative effort in every major enterprise, the movement is a prime force in preparing tomorrow's men for their duty to themselves, their country, and their world. Here in the United States the Boy Scouts of America have accomplished much in its years of service. But today, more than ever before, we need expansion of its membership and influence."

Dwight D. Eisenhower

[PHOTOS OMITTED]

President Truman gave strong support to the Boy Scouts of America at every opportunity. He traveled to Valley Forge, Pa., in June 1950 to open personally the Second National Jamboree.

"The Boy Scouts of America, since it was founded in 1910, has contributed greatly to the character training of our youth. What a greater nation this would be if the principles of Scouting could be woven more closely into our daily lives. If we can impress upon our youth principles of friendliness and mutual respect we shall go a long way toward establishing a better understanding among the nations of the world. The Boy Scouts of America is making a vital contribution to the character building of our boys and young men. Let us work together to make the program of the Boy Scouts available to every American boy."

Harry S. Truman

"Harding Awards" authorized by President Harding went to 5,058 Scout troops in 1923 for having increases in membership.

"I am with the Scout movement heart and soul. It is an organization teaching the spirit of service and honor which we must always have in our citizenship. It is a school of democracy because in it, standing is won only by taking the equal opportunity given all individuals to show their own merit, capacity, and worth. I wish every boy in our America could have the advantage and the honor of being in the Boy Scout organization."

Warren G. Harding

[PHOTOS OMITTED]

President Wilson signed a bill on June 15, 1916 which was passed by both Houses of Congress by unanimous consent granting the organization federal incorporation.

"The Boy Scouts have not only demonstrated their worth to the Nation, but have also materially contributed to a deeper appreciation by the American people of the higher conception of patriotism and good citizenship. Every nation depends for its future upon the proper training and development of its youth. The American boy must have the best training and discipline our great democracy can provide if America is to maintain her ideals, her standards, and her influence in the world. Anything that is done to increase the effectiveness of the Boy Scouts of America will be a genuine contribution to the welfare of the Nation."

Woodrow Wilson

When President Taft in 1910 agreed to be Honorary President of the Boy Scouts of America, he set a precedent accepted by each of his successors. President Taft accepted to "thus sustain a similar relation to the movement as does King George V to a similar movement in England." The First Annual Meeting of the organization was held in the White House at the invitation of President Taft.

"I am very glad to give my sympathy and support to such a movement as this. Anything that directs the boy's spirit in the right channel for usefulness and for the making of manly men should be encouraged."

[PHOTOS OMITTED]

Theodore Roosevelt was no longer President of the United States when the Boy Scouts of America was started in 1910. But he was an ardent booster of the organization. He was a troop committeeman of Troop 39, Oyster Bay, N.Y., and first council

commissioner of Nassau County Council. As a former President he was elected an Honorary Vice-President of the Boy Scouts of America. He was the first and only man designated as the "Chief Scout Citizen." For many years after his death in 1919, several thousand Scouts and leaders in the New York area made annual pilgrimages to his grave in Oyster Bay.

"More and more I have grown to believe in the Boy Scout movement. I regard it as one of the movements most full of promise for the future here in America. The Boy Scout movement is distinctly an asset to our country for the development of efficiency, virility, and good citizenship. It is essential that its leaders be men of strong, wholesome character; of unmistakable devotion to our country, its customs and ideals, as well as in soul and by law citizens thereof, whose wholehearted loyalty is given to this nation, and to this nation alone."

ARTICLE V, SECTION 2—BYLAWS

HONORARY OFFICERS

SECTION 8.

Honorary President and Vice-President

Clause . The President of the United States may, during term of office, be elected to be the Honorary President of the Boy Scouts of America. In addition, living former Presidents of the United States and other citizens who have rendered distinguished service to our country through work for young people may be elected to be honorary vice-presidents. Such election shall be by the Executive Board upon the recommendation of the Nominating Committee for such terms as the Executive Board shall specify.

FACT SHEET

WHAT IS BOY SCOUTING?

PURPOSE OF THE BSA

Boy Scouts of America was incorporated to provide, for community organizations, a program that offers effective character, citizenship, and personal fitness training for youth.

Specifically, the BSA endeavors to develop American citizens who are physically, mentally, and emotionally fit; have a high degree of self-reliance as evidenced in such qualities as initiative, courage, and resourcefulness; have personal values based on religious concepts; have the desire and skills to help others; understand the principles of the American social, economic, and governmental systems; are knowledgeable about and take pride in their American heritage and understand our nation's role in the world; have a keen respect for the basic rights of all people; and are prepared to participate in and give leadership to American society.

BOY SCOUT PROGRAM MEMBERSHIP

Boy Scouting, one of three membership divisions of BSA (the others are Cub Scouting and Exploring), is available to boys who are at least 10 ½ years old and have completed the fifth grade or who are 11 through 17 years old. The program achieves BSA's objectives of developing character, citizenship, and personal fitness qualities among youth by focusing on a vigorous program of outdoor activities.

Currently, the Boy Scout program membership is:

1,032,488 Boy Scouts*

421,508 adult volunteers*

53,796 troops*

VOLUNTEER SCOUTERS

Thousands of volunteer leaders, both men and women, are involved in the Boy Scout program. They serve in a variety of jobs—everything from unit leaders to chairmen of troop committees, to committee members and commissioners, to merit badge counselors and Scouting coordinators.

WHO CAN USE THE BOY SCOUT PROGRAM?

Like other phases of the Scouting program, Boy Scouting is made available to community organizations having similar interests and goals. Chartered organizations include professional organizations, government bodies, and religious, education, civic, fraternal, business, labor, and citizens' groups. These sponsors are called chartered organizations. Each organization appoints one of its members as Scouting coordinator. The organization, through the committee, is responsible for leadership, the meeting place, and support for troop activities.

WHO PAYS FOR IT?

Several groups are responsible for supporting Boy Scouting: the boy and his parents, the troop, the chartered organization, and the community. Boys are encouraged to earn money whenever possible to pay their own expenses, and they also contribute dues each week to their troop treasuries to pay for budgeted items. Troops obtain additional income by working

on approved money-earning projects. The community, including parents, supports Scouting through the United Way, sustaining membership enrollment, bequests, and special contributions to the local Scouting council. This provides leadership training, outdoor program, council service centers and other facilities, and professional service for units.

AIMS AND METHODS OF THE SCOUTING PROGRAM

The Scouting program has three specific objectives, commonly referred to as the "Aims of Scouting." They are character development, citizenship training, and personal fitness.

The methods by which the aims are achieved are listed below in random order to emphasize the equal importance of each.

Ideals. The ideals of Boy Scouting are spelled out in the Scout Oath, the Scout law, motto, and slogan. The Boy Scout measures himself against these ideals and continually tries to improve. The goals are high, and, as he reaches for them, he has some control over what he becomes.

Patrols. The patrol method gives Boy Scouts an experience in group living and participating citizenship. It places a certain amount of responsibility on young shoulders and teaches boys how to accept it. The patrol method allows Scouts to act in small groups where they can easily relate to each other. These small groups determine group activities through their elected representatives.

Outdoor Program. Boy Scouting is designed to take place outdoors. It is in the outdoors setting that Scouts share responsibilities and learn to live with each other. It is here

that the skills and activities practiced at troop meetings come alive with purpose. Being close to nature helps Boy Scouts gain an appreciation for God's handiwork and mankind's place in it. The outdoors is the laboratory for Boy Scouts to learn ecology and practice conservation of nature's resources.

Advancement. Boy Scouting provides a series of surmountable obstacles and steps to overcome them through the advancement method. The Boy Scout plans his advancement and progresses at his own pace as he overcomes each challenge. The Boy Scout is rewarded for each achievement, which helps him gain self-confidence. The steps in the advancement system help a boy grow in self-reliance and the ability to help others.

Personal Growth. As Boy Scouts plan their activity and progress toward their goals, they experience personal growth. The Good Turn concept is a major part of the personal growth method of Boy Scouting. Boys grow as they participate in community service projects and do Good Turns for others. There is probably no device so successful in developing a basis for personal growth as the daily Good Turn. The religious emblems program also is a large part of the personal growth method. Frequent personal conferences with his Scoutmaster help each Boy Scout to determine his growth toward Scouting's aims.

Leadership Development. The Boy Scout Program encourages boys to learn and practice leadership skills. Every Boy Scout has the opportunity to participate in both shared and total leadership situations. Understanding the concepts of leadership helps a boy accept the leadership role of others and guides him toward the citizenship aim for Scouting.

Uniform. The uniform makes the Boy Scout troop visible as a force for good and creates a positive youth image in the community. Boy Scouting is an action program, and wearing the uniform is an action that shows each Boy Scout's commitment to the aims and purposes of Scouting. The uniform gives the Boy Scout identity in a world brotherhood of youth who believe in the same ideals. The uniform is practical attire for Boy Scout activities and provides a way for Boy Scouts to wear the badges that show what they have accomplished.

SCOUT LAW

TRUSTWORTHY

A Scout tells the truth. He keeps his promises. Honesty is part of his code of conduct. People can depend on him.

LOYAL

A Scout is true to his family, Scout leaders, friends, school, and nation.

HELPFUL

A Scout is concerned about other people. He does things willingly for others without pay or reward.

FRIENDLY

A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs other than his own.

COURTEOUS

A Scout is polite to everyone regardless of age or position. He knows good manners make it easier for people to get along together.

KIND

A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not hurt or kill harmless things without reason.

OBEDIENT

A Scout follows the rules of his family, school, and troop. He obeys the laws of this community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.

CHEERFUL

A Scout looks for the bright side of things. He cheerfully does tasks that come his way. He tries to make others happy.

THRIFTY

A Scout works to pay his way and to help others. He saves for unforeseen needs. He protects and conserves natural resources. He carefully uses times and property.

BRAVE

A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at or threaten him.

CLEAN

A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean.

REVERENT

A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.

SCOUT OATH OR PROMISE

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

SCOUT MOTTO
Be Prepared

SCOUT SLOGAN
Do a Good Turn Daily

ADVANCEMENT RANKS

[IMAGE OMITTED]	[IMAGE OMITTED]	[IMAGE OMITTED]
Tenderfoot	Second Class	First Class
[IMAGE OMITTED]	[IMAGE OMITTED]	[IMAGE OMITTED]
Star	Life	Eagle

A REPRESENTATIVE MEMBERSHIP
(excerpts)

What Is a Representative Membership?

"To deeply involve an ever-increasing number of *representative* youth in quality program" is a long-term objective of the Boy Scouts of America—a commitment to a membership that is representative of all economic and racial groups. The national objective, as well as for regions, areas, councils, and districts is to see that all eligible youth have the opportunity to affiliate with the Boy Scouts of America and receive the finest possible quality program under the best leadership available.

NATIONAL DEFINITION

The Boy Scouts of America will have a *representative membership* when the boy membership of the movement reflects proportionately the characteristics of the boy population of the nation. For this to occur the national organization, through its regional and area volunteer and professional leadership, will support councils and districts in working toward a representative membership.

Note: This definition does *not* refer to the proportion of boys in each annual age group from 7 to 21. *Neither* does it suggest that we will have a representative proportion of our membership in each of the Boy Scouts of America program phases.

LOCAL DEFINITION

A council or district has a *representative membership* when its boy membership reflects proportionately the characteristics of the boy population of its service area.

Goals in each council and district are different in numbers and in proportions, but together they work toward the national objective.

But we could reach other numerical objectives and yet fail to achieve a representative membership. The long-range objective of achieving a representative membership is one of the most significant and challenging aspects of our program.

We are shifting our focus from mere growth to representative growth. We have grown through the years and we have been proud of a kind of representativeness indicated by the fact that Scouting has enrolled boys from all parts of America, from all religious denominations, from all racial and ethnic groups, and from all levels of society. We know the movement has always wanted to be representative and yet as we look critically at ourselves and as others evaluate Scouting, we become acutely aware that we have not served some groups as well as others.

The problems have become more complex, and Scouting's efforts to grow have often caused us to shift our greatest efforts to areas where growth could be most readily achieved. Rather than make needed changes in our system, we have tended to move toward those who could best understand and use the system.

To achieve the present membership, the movement has created patterns of operation that have served it well. In many

locations, the proportion of boys in Scouting long ago exceeded one boy in four. If we were able to enroll every boy in America, we would, of course, be perfectly representative. We know that this is unrealistic and, therefore, as we strive to increase our membership, we are at the same time striving toward a representative membership.

Why a Representative Membership?

We have high hopes for our nation's future. These hopes cannot flower if any part of our citizenry feels deprived of the opportunity to help shape the future. How can you persuade other Scouters to accept a commitment to a representative membership? Consider these facts:

1. Our federal charter sets forth our obligation to serve boys. Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy. The National Council and Executive Board have always taken the position that Scouting should be made available for all boys who meet entrance age requirements.
2. While boys of all economic levels want to be Scouts, research indicates that the desire among non-Scouts for Scouting membership is greater among low-income than middle- and upper-income boys.
3. A principal aim of Scouting is the development of citizenship. In our society all adults have equal citizenship responsibilities. The fulfillment of this aim requires that the benefits of Scout training in citizenship be made available to all segments of the youth population.

4. Another aim of Scouting is the development of leadership. Leadership in America is needed in all sections of the country and in all economic, cultural, and ethnic groups.
5. To meet these responsibilities we have made a commitment that our membership shall be representative of *all* the population in every community, district, and council.
6. Discerning professional and business leadership is taking a more careful look at the extent to which programs like Scouting are serving low-income, Black, Hispanic, Appalachian, and other underserved population groups.
7. Many types of funding agencies are challenging us to be more deeply involved in serving disadvantaged groups. We can predict that some gifts, grants, and allocations will be linked to the extent to which we serve a representative membership and relate to those needs which pose the most serious threats to the well-being of our communities.
8. Internal organizational self-analysis and self-renewal is preferable to outside attack which is otherwise possible due to our failure to adequately interpret our program and serve all groups.
9. Many of the underserved groups of boys are those who may profit most from the values and contributions Scouting offers.

10. Our urban industrial society is the most interdependent society in human history. (Poverty affects the nonpoor today in as many ways as the nonpoor affect poverty.) Inner-city, suburb, small town, and rural countryside are inseparably interrelated. Scouting must, therefore, serve all segments of the American population.

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ORGANIZATIONS THAT USE SCOUTING

KEYS TO RELATIONSHIPS

BOY SCOUTS OF AMERICA

(excerpts)

* * * *

Educational Organizations

The basis of the Scouting program is *education.* The congressional charter to the Boy Scouts of America carries the statements "The Scout scheme is based upon the methods involved in educating the boy" and "is intended to supplement and enlarge established education facilities." BSA bylaws state that "that emphasis shall be based on its educational program."

The Scout learns outdoor skills as progressive challenges. Youth also acquire leadership skills and investigate self-chosen fields of vocational and career opportunities with qualified counselors in the subjects.

National groups of school-related professionals have a keen interest in Scouting by virtue of its "learning by doing" techniques. School superintendents, high school principals, rural educators, teachers — all have separate national associations which have expressed support of Scouting.

The National Congress of Parents and Teachers (PTA) finds a real parallel in their five objectives and Scouting's purposes. Both are geared to "kids." More than 26 percent of Scouting's chartered organizations are PTA and other academic and education organizations.

Associations for the handicapped, in their desire to make life more meaningful to afflicted youngsters, have discovered in Scouting a great resource. The National Association for Retarded Citizens, the Easter Seal Society, associations for victims of cerebral palsy and epilepsy, the blind, and groups for exceptional children all endorse Scouting and promote it through their respective state and local affiliates. It helps them do what they would like to do for youth.

It is of real value in the district to know that national leadership of a particular group has endorsed the Scouting program and in most cases is actively promoting it.

Excellent cooperation exists among schools, parent-teacher groups, and the Boy Scouts of America. The education field holds our greatest potential with 112,368 schools, 5.8 million members in PTAs, and thousands more in related school-parent groups. The opportunities for Scouting are limited only by our imagination and ingenuity.

Public Schools

More and more of our schools are becoming available for other than formal education. The community-school idea is growing rapidly and is based on a concept that uses the facilities from early morning to late evening.

In-school Scouting, where the pack, troop, team, or post meets during the school day, is recognized in many areas. It is testimony to the educational value of the program and its ability to interest youth.

School Contacts

In most areas the superintendent is the key to cooperation. Most school systems are interested in innovative methods of

providing education and related activities. With the superintendent's approval, direct contact can be made with the school principal.

Serving youth is the magic word. How you can help students through the Scouting program is the approach. If a parent group exists, the superintendent can prepare the way for a meeting with its officers. A faculty member may also be involved. Explain how Scouting will help them serve their students.

Parochial Schools

Church-related schools have long been advocates of Scouting. The pastor is the best contact, but in many cases the principal, whether lay or religious, gives approval when the program is school-oriented. This you can determine in discussion with the pastor, minister, or layman in charge. Their own pack, troop, team, or post makes the difference. Remember that PTAs exist also in parochial schools.

Private or Independent Schools

In the past decade private schools have burgeoned in this country; boarding schools, day schools, prep schools, military schools, and yeshivas are all in this category. Scouting is a feature in many of them, and faculty in sizable numbers have had experience in Scouting. The headmaster or principal is the initial contact.

Training Schools

Sometimes called industrial or correctional schools, they have faculties that look upon Scouting as an excellent method of getting across a sense of responsibility. An important

factor is the continuity it has for many youth when they return to their community.

Detention Centers

These are facilities for housing youth in difficulties with the law until the court makes disposition of the case. Youth may be held overnight or for several weeks. The program of Scouting operates on a given night of the week conducted by local council Scouters, and those boys present that day are invited to attend. Minimum registration is established once a year and the troop functions with a various enrollment each week. No additional enrollments are required. Explorer posts also operate in some of these facilities.

Scouting for the Handicapped

Scouting for the Handicapped is a program of the Boy Scouts of America designed to serve Scouting-age youth who are handicapped. Scouting methods are used to accomplish specific objectives. This program can be incorporated in the classroom during the school day. Leadership is provided by classroom teaches, trained volunteers, or trained supervised students from surrounding college campuses.

The premise of Scouting for the Handicapped is that youth with handicaps want to be like other youth. Scouting gives them that chance.

Traditional Scouting is sometimes difficult for youth who are handicapped. Many of the youth are bused outside their neighborhoods to school. The in-school Scouting approach offers youth who are handicapped all the benefits of Scouting, including citizenship training and character development, as well as the opportunity for meaningful outdoor experiences. Because the program material enhances the classroom

curriculum many teachers have reported great results, not only in academic achievement but in social behavior as well.

Many parents, professionals, and volunteers are combining efforts to bring the Scouting program to these handicapped youth, once denied the opportunity to be in Scouting.

Parent Teacher Associations

PTA is the largest single user of the Scouting program. The PTA in a school has a president who should be your first contact. However, the PTA unit as a whole votes on using the program. Each school PTA is autonomous. Policy guidelines have been established nationally but do not control the local unit.

Face-to-face is the best approach to the president. The school principal can provide the name and can be most helpful. PTAs have city and county councils. The presidents of these councils are important in the setup, and your cultivation of them can be invaluable. Ask for the opportunity of a 10-minute spot on their meeting agenda and offer your help to them. New officers are elected annually, either in the spring or the fall. Do not assume they know about Scouting. Explain how we operate, answer questions, and you will get the ultimate in cooperation. You'll find that a great number are now, or have been, involved in the program — especially with Cub Scouts.

PTAs exist for only one reason — children. Know their objectives:

- To promote the welfare of children and youth in the home, school, church, and community
- To raise the standards of home life

- To secure adequate laws for the care and protection of children and youth
- To bring into closer relationship the home and the school, that parents and teachers may cooperate intelligently in the training of the child
- To develop between educators and the general public such united efforts that will secure for every child the highest advantages in physical, mental, social, and spiritual education

These PTA objectives and Scouting's objectives are closely related. The local PTA is a natural for Scouting units. Scouting continues to grow in PTAs because of their national policies that encourage cooperation with youth-serving agencies.

Alpha Phi Omega

This is a national service fraternity of college and university men who have been affiliated with Scouting. With chapters operating in hundreds of colleges and universities, we find real appreciation of APO among presidents and faculties who see them in action on their own campuses.

APO is self-governing and self-supporting. The district or council executive serves as one of the chapter's advisers. They can be a valuable adjunct to council operation.

Information on APO, details of service projects, and listings of colleges and universities having chapters can be obtained from APO National Office, 400 Mainmark Building, 1627 Main Street, Kansas City, MO 64108.

Scouting Courses in Colleges, Universities, and Seminaries

Courses in Scouting are given in many schools across the country. Faculty members of these institutions are active in local councils.

Through these people, we can maintain and expand Scouting courses in schools, courses that train teachers and future leaders in all professions. Much of our literature is used in more general courses, particularly merit badge pamphlets for reference work and curriculum resources. APO members can aid in establishing courses and recruiting students.

Similar opportunities are available in seminaries and yeshivas for the major faiths.

Directory of Scholarships

Scholarships and grants for Scouts and Explorers are listed in a pamphlet available from the Education Relationships Service at the Boy Scouts of America national office. The Boy Scouts of America as such has no scholarships or grants. The directory is a compilation of scholarships provided by colleges, universities, schools, and foundations throughout the country. Scout executives are urged to consult faculty and officers of institutions in their area who may be interested in providing scholarships or stipulating a Scouting background as a prerequisite for an existing scholarship in the institution.

Religious Organizations

Over 125 religious organizations use the Scouting program to provide youth activity — testimony to the value of Scouting training in the minds of America's religious leaders.

The BSA has repeatedly emphasized a commitment to religious principles. "The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God." (Article IX, Section 1, of the *Charter and Bylaws of the Boy Scouts of America*, No. 4491.)

The following statement of religious principles uses the *Charter and Bylaws* as a reference:

1. All those registered in Scouting must subscribe to the religious principles stated in the *Charter and Bylaws*, the Cub Scout Promise, the Scout Oath or Promise, and the Explorer Code. They are stated on the membership application for both youth and adults. These commitments are involved: Duty to God, reverence toward God, fulfillment of religious duties, and respect for the religious convictions of others.
2. The BSA does not define what constitutes duty to God or the practice of religion. This is the responsibility of parents and religious leaders.
3. The BSA does not require membership in a religious organization or association for enrollment in the movement. It does require subscription to the "duty to God" concept.

4. The BSA does strongly encourage membership and participation in the religious programs and activities of an organized religious body.

All clergy, regardless of the level of authority, expect us to know and live up to these principles, exemplifying them in our daily lives. In addition, this philosophy must run through the specific Cub Scout, Boy Scout, Varsity Scout, and Explorer programs as they relate to the religious organizations chartered to use the Scouting program.

Become familiar with and be comfortable in the use of titles and terms related to specific faiths. This relates to all religious recognition programs on a denominational basis.

Know the aims and objectives of each denomination. It is impossible to give service to a unit without understanding what they are trying to accomplish with their youth. Be sure to commend the religious leaders who are using the Scouting program as an integral part of their youth ministry, apostolate, or service. They are doing a great job for youngsters.

Use Proper Approach and Marketing Techniques

Your first call on the clergy is to get acquainted. They may not adopt Scouting on your first visit. High-pressure sales methods are to be avoided if you are to come in good standing. Recognize that all religious groups are concerned about four areas of ministry where BSA has resources to offer:

Concern

- Family
- Outreach

- Youth
- Lay Leader Development

Resource

- Cub Scouting
- Boy Scouting/Varsity Scouting
- Exploring
- Volunteer Training

During this cultivation period, volunteer Scouters should be cultivating lay members of the organization (parents of prospective members), and encourage them to visit with the head of the institution from within about the values of Scouting, including their support.

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Community Organizations

In addition to the role it has played in religious and educational organizations, the Scouting program has been accepted and used successfully by many other community organizations. Included are service clubs, fraternal orders, veterans' associations, the armed services, businesses, industries, labor unions, government agencies, urban, low-income, inner-city, and many other locally and nationally concerned groups and agencies. These organizations exist in the cities, in suburbia, in rural areas — wherever there are people. They serve many purposes. Scouting helps them achieve their objectives.

Many of these organizations are national and even international in scope. Since its earliest days in the U.S., groups like community service organizations have had a hand in the development of the Scouting movement. All of these and many of their counterparts have been designated national chartered organizations of the BSA. In nearly every case, agreement has been reached through which the national chartered organization establishes a plan for the use of the Scouting program that emphasizes the organization's basic interests. Many assign responsibility for supervision of Scouting to a special national committee, publish their own Scouting promotional literature, and commend their local affiliates for successful operation of Scouting units.

To help any group establish Scouting as all or part of its youth program we need to know the following:

1. The organization's objectives
2. The organization's basic structure, titles, and terminology

3. Names of key people in the group
4. Something of the group's history and current mood

With this information we can build a compelling case for use of the Scouting program by nearly every local affiliate of a national chartered organization, as well as many purely local groups.

Progress and potential can be measured with any organization by asking the following questions:

1. How many local affiliates are in the district?
2. How many of these are using the Scouting program?
3. Does the organization have a program of commendation of local groups in their successful use of Scouting?

Community Relationships

About on third of all Scouting units are operated by community organizations that are not primarily religious or educational. For convenience, and because of some common characteristics, these organizations have been grouped as follows:

1. Civic service clubs
2. Fraternal orders
3. Veterans' military groups
4. Labor organizations

Civic/Service Clubs

Civic and service clubs stress participating citizenship and youth projects. These clubs operate many Scouting units. They are good sources of district and council leadership.

They have money and will spend it for projects that can be identified with their clubs. They give leadership to camporees, Scoutoramas, Scouting shows, and Scout camps. Each local service club has a committee responsible for projects related to youth. Scouting is a major youth activity of almost all service clubs.

Usually the Scouting committee is a subcommittee of the youth committee, and membership of the Scouting committee is continued and not changed every year. The approach to the club should be through the club president and the chairman of the youth committee.

* * * *

- The Veterans of Foreign Wars of the United States (VFW) and its auxiliary is one of the oldest of the veterans' organizations, dating back to 1899. It has an aggressive national youth activities program which has included Scouting almost from Scouting's beginnings in the U.S.
- Disabled American Veterans (DAV), sensitive to the problems of youth with handicaps, has funded major emphasis on Scouting for the Handicapped since 1970. Thousands of handicapped youth have benefited. Many DAV chapters also have organized units for handicapped boys.
- American Veterans of World War II and Korea was organized in 1944. In 1956, AMVETS made Scouting its major youth program and appointed a special national Scouting committee. Each post is urged to have Scouting units.

Other veterans' and military organizations that have endorsed Scouting and urge their local posts to assist with Scouting locally are:

Air Force Association
Association of U.S. Army
Catholic War Veterans
Fleet Reserve Association
Jewish War Veterans
Marine Corps League
Military Order of the Purple Heart
National Sojourners
Navy League
Reserve Officers Association
Retired Officers Association

The Military

Scouting can be an outstanding youth activity at a military installation. It is frequently given personal leadership and endorsement by the facility commanders. Unit charters may be held by military clubs, by the personnel themselves, or by nearby civilian institutions. Facilities are available for council and district events, and military personnel serve Scouting in many capacities. Many Scouts, Explorers, and Scouters assigned to installations wait for an invitation to renew or to continue their Scouting affiliation.

Military reserve and National Guard groups support Scouting in various ways. Many installations have equipment and personnel for Explorer specialty posts.

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Organized Labor

Among organizations, the labor movement has the largest potential for supporting the Scouting program and operating BSA units. There are more than 50,000 locals of various labor organizations throughout the United States, and most have union halls or access to meeting facilities. Consider the latest figures, which deserve attention even though they are necessarily partial. (The first number indicates those AFL-CIO locals currently active in the Federation's statewide labor council, and thus does not cover some affiliates' locals or any of those of independent groups. The second number shows the AFL-CIO local central labor councils in each state.)

Number of Local Unions and Central Bodies by State Within Regions (as of August 1987)

NORTHEAST REGION

Connecticut	445/15
Maine	170/3
Massachusetts	699/14
New Hampshire	122/4
New Jersey	657/15
New York	2302/31
Pennsylvania	1616/46
Rhode Island	266/4
Vermont	55/5
TOTAL	**6332/136**

NORTH CENTRAL REGION

Colorado	216/6
Kansas	209/8
Minnesota	623/26
Missouri	383/10
Montana	180/12
Nebraska	205/7
North Dakota	87/5
South Dakota	64/6
Wyoming	53/5
TOTAL	**2020/79**

SOUTHEAST REGION

Alabama	432/10
Delaware	79/1
Florida	339/16
Georgia	209/9
Kentucky	333/13
Maryland/DC	335/5
Mississippi	204/12
North Carolina	248/17
South Carolina	139/6
Tennessee	324/7
Virginia	308/11
TOTAL	**2950/102**

SOUTH CENTRAL REGION

Arkansas	218/13
Louisiana	294/12
New Mexico	145/6
Oklahoma	173/8
Texas	579/31
TOTAL	**1409/70**

EAST CENTRAL REGION

Illinois	1700/35
Indiana	654/27
Iowa	312/15
Michigan	1509/32
Ohio	1525/49
West Virginia	309/15
Wisconsin	1289/40
TOTAL	**7298/213**

WESTERN REGION

Alaska	28/6
Arizona	148/6
California	1089/26
Hawaii	38/1
Idaho	119/9
Nevada	61/3
Oregon	255/13
Utah	99/3
Washington	454/19
TOTAL	**2291/84**

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Essential Tools

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School Night for Scouting (Cub Scouting)

This recruiting technique is designed primarily to place boys in Cub Scout packs of their choice. Experience has shown it to be less effective for Boy Scout recruiting, but with proper planning, it will work. It's a one-night stand, with four key assignments:

- *Coordinator* — has charge of session at school
- *Commissioner* — gets his units there
- *Unit leaders* — sign up boys
- *Organizer* — begins the steps to start a new unit for non-assigned boys

Boys attending are signed up by leaders, and parents are recruited for unit committee roles by Scouting coordinators or other representatives from the chartered organizations involved.

The School Night saves time for professionals and volunteers. When done on a councilwide scale, it has the magnitude to interest newspapers, radio, and television.

School Night requires adult volunteers' assistance and thus becomes a valuable means of recruiting new people to Scouting. Reference: *School Night: A Guide for Councils and Districts*. No. 3085.

National Chartered Organizations

Community and Fraternal

Organization	Unit	Contact
American Legion	Post	Commander
AMVETS	Post	Commander
Benevolent and Protective Order of Elks	Lodge	Exalted Ruler
Boys' Club	Club	Executive Director
Civitan	Club	President
Disabled American Veterans	Chapter	Commander
Fraternal Order of Eagles	Aerie	Worth President or Secretary
Future Farmers of America	Chapter	FFA Adviser
Grange, The	Grange	Master
Independent Order of Odd Fellows	Lodge	Noble Grand
Izaak Walton League of America	Chapter	President
Jaycees	Chapter	President
Kiwanis	Club	President
Knights of Columbus	Council	Grand Knight
Lions	Club	President
Loyal Order of Moose	Lodge	Secretary or

Organization	Unit	Contact
		Governor
National Guard	Armory	Commander
Veterans of Foreign Wars	Post	Commander
Optimists	Club	President
Organized Labor	(see section on organized labor)	
Parent-Teacher Associations	Unit	President
Rotary	Club	President
Serra International	Club	President (Board of Trustees)
Toastmasters	Club	President
U.S. Air Force	Command	Commanding Officer
U.S. Army	Command	Commanding Officer
U.S. Coast Guard	District	Commanding Officer
U.S. Navy and Marines	Command	Commander
Veterans of Foreign Wars	Post	Commander

ADDITIONAL ORGANIZATIONS AND SUPPORTERS OF SCOUTING

Active 20-30 International—Sacramento, Calif.
Aircraft Owners and Pilots' Association—Bethesda, Md.
Air Force Association—Washington, D.C.
Altrusa International—Chicago, Ill.
Ambucs, National—High Point, N.C.
American Bar Association—Chicago, Ill.
American Camping Association—Martinsville, Ind.
American Dental Association—Chicago, Ill.
American Farm Bureau Federation—Chicago, Ill.
American G.I. Forum—Albuquerque, N.M.
American Hospital Association—Chicago, Ill.
American Library Association—Chicago, Ill.
American Medical Association—Chicago, Ill.
American National Red Cross—Washington, D.C.
American Society of Dentistry for Children—Chicago, Ill.
Apostolic Church
Associated General Contractors of America—Washington, D.C.
Association of the U.S. Army—Arlington, Va.
B'nai B'rith—Washington, D.C.
Bureau of Indian Affairs—Washington, D.C.
Catholic Knights of St. George—Pittsburgh, Pa.
Catholic War Veterans—Washington, D.C.
Churches of Christ
Church of Peace
Chinese-American Civic Councils—San Francisco, Calif.
Community Service Organization—Washington, D.C.
Congregational Church

Cooperative League, U.S.A.—Washington, D.C.
Cosmopolitan International—Overland Park, Kan.
Federation of Islamic Associations in the U.S. and Canada—New York, N.Y.
Fleet Reserve Association—Washington, D.C.
Foursquare Gospel, International Church of the—Los Angeles, Calif.
Free Methodist Church of North America—Winona Lake, Ind.
Frontiers International—Philadelphia, Pa.
General Aviation Manufacturers Association—Washington, D.C.
General Federation of Women's Clubs—Washington, D.C.
Gyro International—Painesville, Ohio
High Twelve International—St. Louis, Mo.
Improved B.P.O. Elks of the World—Winton, N.C.
Independent Order of Odd Fellows—Baltimore, Md.
International Order of the Alhambra—Baltimore, Md.
Japanese-American Citizens League—San Francisco, Calif.
Junior Engineering Technical Society—New York, N.Y.
Knights of Pythias—Stockton, Calif.
League of United Latin American Citizens (LULAC)—Washington, D.C.
Marine Corps League—Arlington, Va.
Mennonite Church—Lombard, Ill.
Moravian Church of America
  Northern Provincial Synod—Bethlehem, Pa.
  Southern Provincial Synod—Winston Salem, N.C.
National Association of Accountants—New York, N.Y.
National Association for the Advancement of Colored People—New York, N.Y.
National Association of Home Builders—Washington, D.C.
National Bowling Council—Washington, D.C.

National Congress of Puerto Rican Volunteers—Mount Vernon, N.Y.
National Council of La Raza—Washington, D.C.
National Federation of Business and Professional Women's Clubs—Washington, D.C.
National Safety Council—Chicago, Ill.
National Society of Professional Engineers—Washington, D.C.
National Sojourners—Alexandria, Va.
National Tennis Foundation and Hall of Fame—New York, N.Y.
National Urban League—New York, N.Y.
Navy League—Washington, D.C.
North American Hindu Association—Plymouth, Mich.
Open Bible Standard Churches, Inc.—Des Moines, Iowa
Order of United Commercial Travelers—Columbus, Ohio
Parents Without Partners, Inc.—Washington, D.C.
Pentecostal Holiness Church—Oklahoma City, Okla.
Pilot Club International—Macon, Ga
Professional Golfers Association of America—Palm Beach Gardens, Fla.
Reserve Officers Association—Washington, D.C.
Roundtable International—Fort Collins, Colo.
Seventh-day Adventists—Washington, D.C.
Soaring Society of America—Los Angeles, Calif.
Soroptimist International of the Americas—Philadelphia, Pa.
U.S. Coast Guard Auxiliary—Washington, D.C.
Young Men's Christian Association—Chicago, Ill.
Zonta International—Chicago, Ill.
Zoroastrian Association—Spotswood, N.J.

A Sampling of Chartered Organizations Serving Children, Youth, and Families with the Program of the Boy Scouts of America

BUSINESS AND INDUSTRY
Aluminum Company of America
AT&T
American Airlines, Inc.
Amoco Corporation
Burlington Northern Inc.
Corning Glass Works
Dow Chemical Co.
Eastman Kodak Co.
Ford Motor Co.
General Electric Co.
General Motors Corp.
The Goodyear Tire & Rubber Company
Hewlett-Packard Co.
Honeywell Inc.
International Business Machines Corp.
J. C. Penney Company, Inc.
McDonnell-Douglas Corp.
PPG Industries, Inc.
Rockwell International Corp.
Tandy Corp.
Upjohn Co.
USX Corporation
Westinghouse Corporation

FACT SHEET – COMMUNITY ORGANIZATIONS AND THE BOY SCOUTS OF AMERICA
(excerpts)

COMMUNITY
Air Force Association
Alpha Phi Alpha
American Bar Association
American Legion, The
American Red Cross
AMVETS (American Veterans of WWII, Korea, and Vietnam)
Boys Clubs of America
Civil Air Patrol
Civitan International
Community Centers
Conservation Clubs
DAV (Disabled American Veterans)
Eagles, Fraternal Order of (F.O.E.)
Economic Opportunity Commission
Elks, Benevolent and Protective Order of (B.P.O.E.)
Exchange International
Farm Bureau Federation, American
Fire Chiefs, International Association of (I.A.F.C.)
Fire Departments
4-H
Future Farmers of America (F.F.A.)
Grange National
Hospitals, Medical & Professional,

Engineering Societies
Housing Projects
Indian Affairs, American Association on
Indian Tribal Councils
Izaak Walton League of America
Jaycees, United States
Job Corp Centers
Kiwanis International
Knights of Pythias
Lions International
Masonic Order
Eastern Star Order of
Military Reserves
Moose Loyal Order of
National Guard Army and Air
Neighborhood Associations
Odd Fellows Independent Order of
Optimist International
Parents Without Partners
Police Departments
Power Squadrons
Rotary International
Roundtable International
Runtan National
Sertoma International
Sons of the American Revolution
U.S. Air Force
U.S. Army
U.S. Coast Guard
U.S. Coast Guard Auxiliary
U.S. Marine Corps
U.S. Navy

VFW (Veterans of Foreign Wars and Auxiliaries)
Western Electric
Women's Clubs
YMCA (Young Men's Christian Association)
YMHA (Young Men's Hebrew Association)
YWCA (Young Women's Christian Association)

EDUCATION
Independent Schools, National Association of
PTA (National Congress of Parents and Teachers)
Private Schools
Public Schools

LABOR
AFL-CIO (American Federation of Labor and
Congress of Industrial Organization)
Automobile, Aerospace & Agricultural
Implement Workers of America
International Union, United
Boilermakers, Iron Ship Builders,
Blacksmiths, Forgers and Helpers of
America, International Brotherhood of
Communications Workers of America
Electronic, Electrical, Salaried, Machine and
Furniture Workers, International Union of
Electrical Workers, International Brotherhood of
Engineers, International Union of Operating
Fire Fighters, International Association of
Food and Commercial Workers International
Union, United
Glass, Pottery, Plastics and Allied Workers
International Union

Industrial Workers of America, International Union, Allied
Iron Workers, International Association of Bridge, Structural and Ornamental
Letter Carriers, National Association of
Machinists and Aerospace Workers, International Association of
Molders and Allied Workers Union, International
Oil, Chemical and Atomic Workers International Union
Paperworkers International Union, United
Plumbing and Pipe Fitting Industry of the United States and Canada, United Association of Journeymen and Apprentices of the
Postal Workers Union, American
Rubber, Cork, Linoleum and Plastic Workers of America, United
Steelworkers of America, United
Teachers, American Federation of
United Industrial Workers of North America
Seafarers International Union of North America
Education Association, National
Teamsters, Chauffeurs Warehousemen, Helpers of America, International Brotherhood of

RELIGIOUS
African Methodist Episcopal Church
African Methodist Episcopal Zion Church
Armenian Church of North America

Assembly of God Church
Baha'i Faith
Baptist Churches
American Baptist Association
American Baptist Churches in USA
General Association of Regular Baptists
Primitive Baptist
Baptist Conventions
National Baptist Convention of America
National Baptist Convention USA Inc.
Progressive National Baptist Convention, Inc.
Southern Baptist Convention
B'nai B'rith
Brethren, Church of the
Buddhist Churches of America
Byzantine Rite Catholic Church
Catholic Church (Roman)
Catholic Organizations
Catholic Parent Organization, National Forum of
Holy Name Society (Roman Catholic)
Knights of Columbus
Catholic Youth Organization
Catholic War Veterans
Serra International
Christian Church (Disciples of Christ)
Christian and Missionary Alliance Church
Church of Christ
Church of Jesus Christ of Latter-day Saints (Mormon)
Church of God
Congregational Church

Episcopal Church, The
Evangelical Churches
Federation of Islamic Associations in the
and Canada
First Church of Christ. Scientist
Greek Orthodox
Jehovah's Witnesses
Jewish Synagogues and Centers
Jewish War Veterans
Lutheran Churches
Evangelical Lutheran Church in
America, The
Lutheran Church, Missouri Synod, The
Mennonite Church
Methodist Church, The United
Moravian Church in America
Nazarene, Church of the
Orthodox Churches
Pentecostal Churches
Presbyterian Church (USA)
Cumberland Presbyterian Church
Reformed Church in American
Religious Society of Friends (Quakers)
Reorganized Church of Jesus Christ of Latter
Day Saints
Salvation Army, The
Seventh Day Adventists
Unitarian Universalist Association

THE CHARTERED ORGANIZATION REPRESENTATIVE

(excerpts)

* * * *

Council/Chartered Organization Responsibilities

The Boy Scouts of America is an educational resource program. It charters community or religious organizations or groups to use Scouting as part of their service to their own members, as well as the community at large.

The chartered organization agrees to

- Conduct the Scouting program according to its own policies and guidelines as well as those of the Boy Scouts of America.
- Include Scouting as part of its overall program for youth and families.
- Appoint a chartered organization representative who is a member of the organization and will represent it to the Scouting district and serve as a voting member of the local council. **(The chartered organization head or chartered organization representative must approve all leader applications.)**
- Select a unit committee of parents and members of the chartered organization (minimum of three) who will screen and select unit leaders who meet the organization's standards as well as the leadership standards of the BSA. **(The committee chairman must sign all leadership applications.)**

- Provide adequate facilities for the Scouting unit(s) to meet on a regular schedule with time and place reserved.
- Encourage the unit to participate in outdoor experiences, which are vital elements of Scouting.

The BSA local council provides the support services necessary to help the chartered organization succeed in their use of the program. The responsibilities of both the BSA local council and the chartered group are described below.

The council agrees to

- Respect the aims and objectives of the organization and offer the resources of Scouting to help in meeting those objectives.
- Provide year-round training, service, and support to the organization and its unit(s).
- Provide training and support for the chartered organization representative as the primary communication link between the organization and the BSA.
- Provide techniques and methods for selecting quality unit leaders and then share in the approval process of those leaders. **(A council representative must sign all leader applications.)**
- Provide primary general liability insurance to cover the chartered organization, its board, officers, chartered organization representative, and employees against all personal liability judgments. This insurance includes attorney's fees and court costs as well as any judgment brought against the individual or organization. Unit leaders are covered in excess of any personal coverage they might have, or, if there is no personal coverage, the

BSA insurance immediately picks them up on a primary basis.

- Provide camping facilities, service center, and a full-time professional staff to assist the organization in every way possible.

* * * *

Announcements of Meetings for Prospective Cub Scouts

[LOGO OMITTED]

Step into the Exciting World of CUB SCOUTING

[PICTURE OMITTED]

FOR FUN AND ADVENTURE

COME JOIN THE CUB SCOUTS

WHEN: NOVEMBER 18, 1992

WHERE: GREGORY SCHOOL

TIME: 7:30 P.M.

For more information contact Magne Gundersen, 531-3636

[LOGO OMITTED]

[LOGO OMITTED]

Meet New Friends in Tiger Cubs, BSA

[PICTURE OMITTED]

FOR FUN AND ADVENTURE

COME JOIN THE CUB SCOUTS

WHEN: NOVEMBER 18, 1992

WHERE: GREGORY SCHOOL

TIME: 7:30 P.M.

For more information contact Magne Gundersen, 531-3636

[LOGO OMITTED]

You Can Be A Cub Scout.

[PICTURE OMITTED]

Bring Your Parents And Be Our Guest

LAKEWOOD PREP

DECEMBER 4, 1992 - 7:00 P.M.

Come find out about an exciting program happening right at your school. Give yourself the opportunity for a sharing, learning and growing experience. Meet new people and be part of the action.

Press Release Announcing School Night for Scouting by Monmouth Council

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[LOGO OMITTED]

MONMOUTH COUNCIL BOY SCOUTS OF AMERICA
P. O. Box 188
Oakhurst, N. J. 07755
201-531-3636

Contact: Jeffrey J. Rand

Field Director

FOR IMMEDIATE RELEASE

MONMOUTH COUNCIL LAUNCHES SCHOOL NIGHT FOR SCOUTING

Hundreds of boys in Monmouth County will go to school twice on Thursday, September 24th, returning that evening to sign-up for Scouting.

In cooperation with the Monmouth Council, Boy Scouts of America, over 39 area school districts will be hosting the School Night for Scouting at participating schools.

Robert Kibbler, Assistant Principal at the Neptune Middle School serves as this year's School Night for Scouting chairman with the support of recently retired County School Superintendent Milton G. Hughes who serves as Monmouth Council Vice President for Membership.

The Boy Scouts of America offers programs for boys of all ages from first grade to high school. Cub Scouting is for

boys in second through fifth grades and is family oriented. Cub Scouts engage in a number of worthwhile activities designed to help them grow in character.

The Tiger Cub program is the newest link to Cub Scouting and offers an introduction to Scouting for first grade boys. Tiger Cubs participate with adult partners by learning to live the Tiger Cub motto - Search, Discover, and Share.

Boy Scouting, for boys in sixth grade and above (ages 11-17), provides a challenging program of outdoor living skills, hobby interests, and personal and social development. Boy Scouts learn to become productive citizens, while practicing self-reliance and leadership skills.

Exploring, which will not be a part of the school night program, is another phase of Scouting for high school age youth. Both boys and girls join posts sponsored by local businesses, religious institutions, or civic clubs. These posts explore career, hobby, or outdoor interests. Most Explorer posts serve a specific interest and cooperate with local school guidance departments to recruit members.

Flyers will be sent home with students the week of September 14th with times and locations.

For information on School Night for Scouting or any Scouting program, please call the Monmouth Council at 908-531-3636.

FACT SHEET

BSA AT A GLANCE

PURPOSE

The purpose of the Boy Scouts of America, incorporated on February 8, 1910, and chartered by Congress in 1916, is to provide an educational program for boys and young adults to build character, to train in the responsibilities of participating citizenship, and to develop personal fitness.

CHARTERED ORGANIZATIONS

Community groups receive national charters to use the Scouting program as a part of their own youth work. These groups, which have goals compatible with those of the BSA, include religious, educational, civic, fraternal, business, and labor organizations, governmental bodies, corporations, professional associations, and citizens' groups.

PROGRAM

Tiger Cubs, BSA. A 1-year program for first-grade (or 7-year-old) boys and their adult partners that stresses equal participation. The boy and adult meet weekly for family activities and monthly for an activity with other Tiger Cubs and adults in their group.

Cub Scouting. A family- and home-centered program for boys who are in second through fifth grades (or 8, 9, and 10 years old). When they enter the fourth grade, they can become Webelos Scouts and prepare to become Boy Scouts.

Boy Scouting. A program for boys 11 through 17 designed to achieve the aims of Scouting through a vigorous outdoor

program and peer group leadership with the counsel of an adult Scoutmaster. (Boys also may become Boy Scouts if they have earned the Arrow of Light Award or have completed the fifth grade.)

Varsity Scouting. An active, exciting program for young men 14 through 17 built around five program fields of emphasis: advancement, high adventure, personal development, service, and special programs and events.

Exploring. A contemporary program for young men and women ages 14 through 20 that provides opportunities to participate in career or recreational programs in association with business and community organizations. Special-interest posts cover more than 100 careers. Career Awareness Exploring provides a series of career seminars during school time.

MEMBERSHIP AND UNITS

Membership since 1910 totals more than 82 million. As of December 31, 1990, membership was 5,448,069.

Youth Members

Tiger Cubs	345,790
Cub Scouts	1,831,647
Boy Scouts	958,490
Varsity Scouts	59,758
Explorers	355,821
Career Awareness Explorers	741,105
Lone Scouts	381
	4,292,992

Adult Members

Cub Scout leaders	566,267

Boy Scout leaders	402,920
Varsity Scout leaders	18,033
Explorer leaders	80,696
Career Awareness Explorer leaders	10,540
Council Scouters	76,621
	1,153,077

Units

Cub Scout packs	53,579
Boy Scout troops	46,466
Varsity Scout teams	5,894
Explorer posts/ships	20,090
Career Awareness Explorer posts	4,939
	130,968

VOLUNTEER LEADERS

Volunteer adult leaders serve at all levels of Scouting in 407 local councils, 36 areas, and 5 regions, and nationally with volunteer executive boards and committees providing guidance.

Each autonomous local council is chartered by the BSA, which provides program and training aids along the guidelines established by the national Executive Board and the national charter from Congress.

NATIONAL ACTIVITIES

Cub Scouting continues to strengthen the tie of the family in Scouting and to encourage physical fitness through the Cub

Scout sports emphasis, and more than 2,200 Cub Scout day camps.

In 1991, Cub Scouting introduces Ethics in Action, a program designed to incorporate the latest knowledge in child development in a systematic process to teach ethical behavior.

Boy Scouts and Varsity Scouts have many special activities available to them, such as camporees, more than 500 summer camps, Scouting shows, and national jamborees. The Order of the Arrow, the national brotherhood of honor campers, recognizes those Scout campers who best exemplify the Scout Oath and Law in their daily lives, and it has local lodge, section, and national meetings. Those who have become Eagle Scouts, the highest advancement award in Scouting, may join the National Eagle Scout Association. All camps are inspected and accredited annually by teams of trained volunteers to ensure the health, safety, and quality of program for campers.

Exploring holds a biennial national conference for youth and adult members that offers workshops and activities on careers, leadership, sports, outdoor adventure, and personal skills. The biennial national Law Enforcement Exploring conference provides competition, training, demonstrations, program exchanges, and career information in this field. An annual mock-trial competition provides a national challenge for Explorers interested in the legal field.

Scouting Anniversary Celebrations, during February, include observance of the BSA's February 8 birthday, Scout Sabbath, and Scout Sunday. Unit activities feature blue and gold banquets, courts of honor, and open house meetings.

Cub Scouts, Boy Scouts, Varsity Scouts, and Explorers participate in Scouting Environment Day in April and Scouting Energy Day in October. Explorers and older Boy Scouts have a wide variety of exciting outdoor experiences available at the four national high-adventure areas located in Minnesota (with satellites in northern Wisconsin, Manitoba, and Ontario), Florida, Maine, and New Mexico. Volunteer leaders may attend the Philmont Training Center in New Mexico each summer for a weeklong training conference.

NATIONAL GOOD TURNS

The Good Turn remains an important part of Scouting. It can be a simple daily act of assistance from an individual youngster, or a coordinated national effort. Scouting for Food is the current national Good Turn.

PUBLICATIONS

The Boy Scouts of America publishes three magazines for its members: *Boys' Life*, for all boys, once a month, *Exploring*, a magazine for young men and women and their Exploring leaders, four times a year, and *Scouting*, for all registered adults in Cub Scouting, Boy Scouting, and Exploring, six times a year.

In addition, handbooks for all phases of the Scouting program are published, as well as more than 100 merit badge pamphlets for Boy Scouts, leader books, training pamphlets, several program helps booklets for unit leaders, and other literature for use by youth members, adult leaders, and parents.

FINANCIAL SUPPORT

The national council is supported largely through the annual fees paid by all members and service fees paid by local councils, an annual giving campaign among national employees and selected volunteers, income from the sale of Scouting equipment, bequests, and special gifts. Local councils are supported by communities through the United Way, the annual sustaining membership enrollment (SME), friends of Scouting, special events, investment income, bequests, endowment gifts, and special contributions.

On the unit level, chartered organizations that use the Scouting program provide meeting places and often furnish program materials and other facilities. Youth members help to pay their own way by paying dues to their pack, troop, team, or post treasuries and through approved money-earning projects.

1991 Printing

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

Civil Action No. Mon C 330-92

JAMES DALE,

Plaintiff,

v.

THE BOY SCOUTS OF AMERICA
and THE MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,

Defendants.

AFFIDAVIT OF JAMES DALE IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES DALE, being duly sworn, deposes and says:

1. I am the plaintiff in the above-captioned litigation and submit this affidavit in support of my motion for summary judgment.

2. I am a 23-year-old recent college graduate residing in Port Monmouth, New Jersey. From September 1978, when I became a Cub Scout, until my sudden expulsion in the summer of 1990, I was a member in good standing of Boy

Scouts of America ("BSA") and Monmouth Council, BSA ("Monmouth Council").

3. I became a Cub Scout at the age of eight because my older brother, who was already a Cub Scout, my mother, who had been a Den Mother, and my father, who was a Troop Committee member, encouraged me to become involved in Scouting. I was an enthusiastic Cub Scout, regularly attending meetings of my Cub Scout Pack in a local public school, and establishing friendships with other Scouts in my community. Although my brother ended his involvement with Scouting after several years, I liked being a Scout and decided to continue my involvement with Scouting as a youth member of BSA.

4. Scouting appealed to me for many reasons. Many of my friends were Scouts, and Scouting was a visible and significant presence in my community. Because BSA has a policy of including all boys -- from every race, religion, and socioeconomic class -- I was able through Scouting to interact with people from diverse backgrounds. BSA's policy of recruiting members from all walks of life taught me a great deal about tolerance of others. In addition, I admired the purposes for which BSA stands -- teaching young people outdoor and camping skills, developing their leadership abilities and sense of community responsibility, and providing them with the tools to make moral choices over the course of their lives.

5. As a Scout, I promised to live by the Scout Oath, which provides:

On my honor I will do my best
To do my duty to God and my country and
to obey the Scout Law;
To help other people at all times;
To keep myself physically strong, mentally
awake, and morally straight.

I believed that the Scout Oath stood for my commitment to live an honorable life, to set high standards for myself, and to do my best to serve others. In my more than twelve years as a member of BSA, I strove never to do anything inconsistent with the values embodied in the Scout Oath.

6. As a member of BSA, I also pledged to uphold the Scout Law, which provides:

A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent.

I understood the Scout Law to represent the high ideals Scouting encouraged each of its members to achieve. In all my years in Scouting, I always tried to live in accordance with the Scout Law and to adhere to the values embodied in it.

7. As I grew older, my commitment to Scouting deepened. In my adolescence, Scouting became the most important extracurricular activity in which I was involved. Scouting gave me the opportunity to meet and form friendships with other boys in my community; provided me with a sense of responsibility about my place in the community; enabled me to develop leadership qualities and gain self-confidence; allowed me to learn about camping and to enjoy the outdoors; and taught me how to deal with the ethical choices I encountered as an teenager.

8. Because of all the advantages I gained from being a Scout, and because of how committed I was to Scouting, I began to devote more time and effort to Scouting. During this time, I devoted approximately ten hours every week to Scouting activities. My pursuit of excellence in Scouting was rewarded with numerous honors and awards -- including all seven Scouting Achievement Badges, given in recognition of an advancement in Scouting rank: the Boy Scout Badge, the Tenderfoot Badge, the Second Class Badge, the First Class Badge, the Star Badge, the Life Badge, and the Eagle Scout Badge.

9. Scouting also offered me the opportunity to learn about various subjects and skills. During my Scouting career, I was awarded thirty Merit Badges -- signifying my completion of an intensive study course designed by BSA -- in the following areas:

Astrology
Camping
Citizenship in the Community
Citizenship in the Nation
Citizenship in the World
Communications
Environmental Science
Fish & Wildlife Management
Forestry
Leatherwork
Mammals
Pioneering
Personal Management
Reptile Study
Safety
Sports
Wilderness Survival

Basketry
Canoeing

Cooking
First Aid

Indian Lore
Lifesaving
Music
Personal Fitness
Orienteering
Rowing
Small Boat Sailing
Swimming
Wood Carving

I also received the Arrow of Light Award and the World Conservation Award, recognizing my awareness of the environment and my concern for the protection of wildlife. These achievements testify to my unfailing commitment to Scoutcraft and to BSA and to my status as an exemplary Scout. A true and correct copy of a summary of my Scouting achievements is attached hereto as Exhibit A.

10. My willingness to devote time and effort to Scouting was also reflected in the various leadership positions I held while I was a Scout. In 1982, I was appointed Assistant Patrol Leader and, later, Patrol Leader in my troop. Patrol Leaders, who are chosen by all members of their Patrol, are responsible for organizing Patrol events, motivating fellow youth members and keeping the Patrol diary. I was a Bugler from 1984 through 1988, and a Junior Assistant Scoutmaster from 1985 through 1988. My responsibilities as Junior Assistant Scoutmaster included supervising and supporting other youth leaders and instructing youth members of the troop. Being a leader provided me with an opportunity to share my enthusiasm for and commitment to Scouting with others.

11. In June 1983, I was admitted to the Order of the Arrow -- the honor camping association of BSA. In the following years, I took my obligations as a member of the Order of the Arrow very seriously, and devoted a great deal of my time to fulfilling those responsibilities. As a result of my commitment to and hard work in the Order of the Arrow, I achieved the status of Ordeal Member and Brotherhood Member, and, in 1986, was elevated to the status of Vigil Honor -- the highest honor that the Order of the Arrow bestows upon its members for service to lodge, council, and Scouting.

12. From 1984 through 1988, I held a number of offices in the order of the Arrow, including: Ceremonies Chairman, where my responsibilities included inducting new members into Lodge, Ordeal and Brotherhood membership and challenging them to live up to the Scout Oath and the Scout Law; Banquet Chairman, where my responsibilities included coordinating the annual Lodge banquet and arranging for speakers at that event; Vigil Honor Chairman, where my responsibilities included reviewing the application of potential Vigil Honor members and inducting the few applicants selected into Vigil Honor membership; and Camping Promotions Chairman, where my responsibilities included recruiting new BSA youth members and encouraging them to take advantage of Monmouth council's activities and resources. In my capacity as Camping Promotions Chairman, I often used audiovisual and printed materials provided by Monmouth Council and BSA in my recruitment efforts.

13. In order to further improve and develop my leadership abilities, I attended various leadership training programs conducted by BSA, including Brownsea Junior Leader Training; an Order of the Arrow National Leadership Conference, held at Rutgers University in 1986; the annual leadership retreat for Order of the Arrow, Na-Tsi-Hi Lodge No. 71; and other leadership programs coordinated by Monmouth Council and BSA. The Order of the Arrow National Leadership Conference was an intensive program, conducted for selected youth leaders from across the country. The program lasted for several days, and included various training sessions, interaction with national leaders of the Order of the Arrow, ceremony competitions, Indian pageants, and camping activities.

14. I received additional honors in the Order of the Arrow, including three First Place honors for portraying the Character Meteu -- a key character in many Order of the Arrow ceremonies -- and a First Place honor in the Team Ordeal Ceremony, awarded to a team of which I was Chairman. Meeting my responsibilities as Ceremonies Chair and as a member of the Ordeal Ceremony Team was very important to me. I spent a great deal of time creating my costumes for Order of the Arrow Ordeal Ceremonies, including hours of research about authentic Native American dress and rituals. I often used personal funds and materials to make my costumes, and I spent considerable time and effort working on costumes for my Lodge and for other members of the Order of the Arrow as well.

15. As a result of my outstanding Scouting record, I was asked to speak on behalf of BSA at Scouting functions, including important fundraising events. On October 22, 1987, I was the featured youth speaker at the Joshua Huddy Distinguished Citizenship Award Dinner, an annual dinner held to solicit support for Monmouth Council. At the dinner, I spoke about what Scouting meant to me, my devotion to Scouting, and the many advantages I derived from being a Scout. A true and correct copy of the speech I delivered on October 22, 1987, is attached hereto as Exhibit B.

16. My career as a youth member of BSA culminated on July 19, 1988, when I was awarded my Eagle Scout Badge after completion of my Eagle Scout Project at Holmdel Park Activities Center. I was particularly proud of getting my Eagle Scout Badge because that achievement is attained by less than three percent of all Scouts. Men of great distinction, such as astronauts, U.S. Congressmen and business leaders

have been Eagle Scouts, and I was honored to be in their company. Because of my pride in my Eagle Badge, and in order to form friendships with other Eagle Scouts, I subsequently became a member of the National Eagle Scout Association.

17. In 1988, when I reached the age of eighteen, I was invited to put my leadership skills to further use by applying for adult me nbership in BSA as an Assistant Scoutmaster. A true and correct copy of my BSA adult membership application is attached hereto as Exhibit C. Assistant Scoutmasters are adults chosen to work with Scoutmasters in leading the activities of individual Scout troops. Assistant Scoutmasters are selected on the basis of their organizational and leadership abilities. My application for Assistant Scoutmaster was accepted and approved by Monmouth Council and BSA, and from that time I was employed as an Assistant Scoutmaster for Troop 73, which was supervised and controlled by Monmouth Council and BSA.

18. The control and supervision BSA and Monmouth Council exercised over the manner in which the Scouting program was implemented in Troop 73 was evident throughout my experience with Scouting, both as a Scout and Assistant Scoutmaster. For example, on one occasion BSA's district representative instructed the Scoutmaster of my troop to prohibit certain religious activities in the troop because they were inconsistent with the non-denominational policy of Scouting.

19. Like the Scoutmaster of my troop, as an Assistant Scoutmaster I worked under the control and direction of Monmouth Council and BSA, pursuant to the terms established by BSA in its publication The Scoutmaster

Handbook. I was reimbursed for expenses I incurred in fulfilling my responsibilities as Assistant Scoutmaster, and I received certain fringe benefits from BSA and Monmouth Council incident to my employment, including free BSA publications and free access to Scout camps. During my time as an Assistant Scoutmaster, I remained true to the values of Scouting that I had learned as a Scout, including honesty, trustworthiness, teamwork and commitment. As a leader, I tried to instill those values in the youth members in my troop. I strove as an Assistant Scoutmaster never to do or say anything inconsistent with the values embodied in the Scout Oath or the Scout Law.

20. As a Scout, and later as an Assistant Scoutmaster, I made a tremendous investment of time, energy and money to Scouting. I purchased uniforms, boots, tents, sleeping bags, mess kits, handbooks, belt buckles, patches, mugs, pens, knives, hats, and other equipment, and paid for camping trips and other Scouting activities in which I participated. I also had significant travel expenses because I often traveled to Scouting events throughout New Jersey and as far away as Toronto.

21. I attended troop meetings regularly throughout my Scouting years and frequently participated in special Scouting events, including the 1981 and 1985 National Jamborees. I also attended Scout Camp on numerous occasions at Quail Hill Scout Camp and Forestburg Summer Scout Reservation, where I was employed as a member of the Staff in 1985. I took time off from my summer jobs to attend Scout Camp, and forfeited the salary I would have earned had I not attended camp. I made this significant investment of time and energy in Scouting because I intended to be a Scoutmaster

after I graduated from college and believed that I would be a member of BSA and an adult leader for life.

22. I derived tremendous benefits and privileges from my investment in Scouting. I was proud to be an Eagle Scout and felt that my association with BSA had a positive impact on my status in the community. My Eagle Scout Award was recognized by my high school, my church and my community. The Middletown Township Fire Department presented me with a Certificate of Recognition, as did the Veterans of Foreign Wars of the United States and the Board of Chosen Freeholders of Monmouth County. The Mayor's office recognized my "Outstanding Service Rendered to the Community," and both the New Jersey General Assembly and the New Jersey Senate presented me with a Citation extending commendations and praise for reaching the rank of Eagle Scout. True and correct copies of the certificates and awards with which I was presented after becoming an Eagle Scout are attached hereto as Exhibit D.

23. The fact that I had been awarded the Eagle Scout Award was reported in several local newspapers, some of which published my picture, and my high school displayed articles about my achievement on the school bulletin board.

24. Because of the pride I had in my Scouting achievements, and because of the value I placed on being an Eagle Scout, I included information about my Scouting career on all my resumes, job, school and scholarship applications. I often spoke about my Scouting experience, and on at least one occasion, a prospective employer inquired specifically about my Scouting experience. I believed that my long-standing involvement in Scouting indicated to those considering my applications that I had gained a sense of community

responsibility and leadership ability, and was an important consideration in their evaluation of me.

25. I believe that the attributes and qualities I acquired through my involvement in Scouting enabled me to achieve success in other areas of my life. At the Marine Academy of Science & Technology -- a military academy in Sandy Hook, New Jersey, that I attended from 1984 until my high school graduation in June 1988 -- I achieved the military rank of Lieutenant Commander, the second highest cadet rank in the Naval Junior Reserve Officers' Training Corps, and the position of Company Commander. I was a member of the National Honor Society, and was one of the five students ranked at the top of my class academically.

26. The sense of civic responsibility instilled in me by Scouting inspired me to become more involved in my community and in my church. From 1985 to 1988, I was a member of King of Kings Lutheran Church youth group, and I assisted in teaching Sunday School at that church from 1985 to 1986.

27. In January 1993, I graduated from Rutgers College of Rutgers University ("Rutgers"), New Brunswick, New Jersey, with a Bachelor of Arts degree in Communications and Sociology. At Rutgers, I was a repre ntative of the student council and a member of The Cap and Skull Society, a group of eighteen seniors chosen from the entire graduating class of approximately 2,000 students for their leadership abilities and academic achievements. I received a four-year academic merit scholarship from the Citizen Scholarship Foundation, and was on the Dean's List two times.

28. During my tenure as a Scout, BSA and Monmouth Council made training courses available to troop leaders, such as the Wood Badge Training Course for adult Scouters and the Brownsea Training Program for youth members in leadership positions. Monmouth Council conducted district and council program events open to all troops, maintained troop rosters, supplied the year-round support services of commissioners and local council staff people, and provided a room where Order of the Arrow meetings regularly took place. Monmouth Council also ran a retail outlet that sold Scouting equipment and paraphernalia.

29. Throughout my Scouting years, BSA supplied recruiting posters and flyers to Scout troops for distribution in the community. BSA also provided many other program materials to my troops, including extensive literature and audiovisual presentations, some of which were used in the leadership training programs I attended. I regularly received from BSA an Eagle Scout newsletter, an Order of the Arrow newsletter and Scouting Magazine, a publication for adult BSA members, and I had a subscription, at half cost, to Boys' Life, a BSA publication for youth members. When I was an Assistant Scoutmaster, BSA and Monmouth Council provided me with the resources necessary for me to fulfill my responsibilities to BSA, including handbooks, training materials, magazines, annual activity planning packets, books and equipment.

30. In keeping with the Scouting philosophy that Scouting was for all boys, BSA and Monmouth Council frequently engaged in recruiting and other forms of solicitation to induce membership among the general population of young males in New Jersey. These recruiting

efforts included Scout fairs open to the public, displays of Scouting activities at schools, fairgrounds and churches, door-to-door canvassing, and distribution of fliers and billboards.

31. As a Scout, I was directly involved in these recruiting efforts: I sold Scout fair tickets to the general public and participated in activities and competitions at Scout fairs open to the public, where there were BSA recruitment and information tables. I was also involved in efforts to raise funds for Monmouth Council, including Easter candy sales campaigns and fundraising events, such as the Joshua Huddy Distinguished Citizenship Award Dinner, where I was the featured youth speaker.

32. I participated in "School Nights," when open troop meetings were held at schools to encourage students to join Scouting. School Nights are one of the special privileges afforded Monmouth Council and BSA in the New Jersey public schools. In addition, many Scouting troops, including my Cub Scout Troop, hold their weekly meetings at local public schools throughout New Jersey.

33. During my Scouting years, BSA and Monmouth Council regularly used public lands -- including parks, schools and fairgrounds -- in providing Scouting services and programs in New Jersey and for recruiting and recreational activities carried on throughout the State. My Scout troops used local camping facilities at the following public facilities: Allaire State Park; High Point State Park; Liberty State Park; Washington Crossing State Park; Turkey Swamp County Park, Monmouth County; Gateway National Recreation Area, Sandy Hook Park; Poricy Park, Middletown Township; Cheesequake State Park; Monmouth Battlefield State Park,

which was part of BSA's Historic Trails program at Quail Hill Scout Camp; and other community, state and national parks in New Jersey. In addition, my troops conducted Scouting events organized by Monmouth Council at the Freehold County Fairgrounds, Brookdale Community College and the Allaire Airport.

34. In 1981, I attended the National Boy Scout Jamboree (the "National Jamboree"), held at Fort A.P. Hill, Virginia, with my father. Four years later, I was selected as a Delegate to the 1985 National Boy Scout Jamboree, also held at Fort A.P. Hill. The National Jamboree, which is held every four years in order to promote the values of Scouting, is the largest camping event for youth in the world. The 1985 National Jamboree was the 17th largest community in Virginia and included a bus system, a postal service, fire stations, and daily newspaper. At the National Jamboree, I interacted with tens of thousands of Scouts and Scout leaders from around the nation and around the world.

35. At the National Jamborees I attended, there were U.S. Army personnel on the staff. In fact, I fulfilled certain requirements for the Machinery Merit Badge under the supervision of a Staff Sergeant in the U.S. Army. Many of the scheduled activities at the National Jamborees involved exhibits and programs administered by the U.S. military, including performances by marching bands, sports exhibitions, field kitchen demonstrations, and drill displays. The contribution of the U.S. armed forces was not limited to the participation of U.S. Army personnel in Scouting activities. At the National Jamboree, and at all the Scout Camps I attended, it was my experience that the U.S. government supplied surplus food -- including cheese,

peanuts, peanut butter and jam -- and other materials, such as tents, shovels, barrels and jeeps.

36. During my Scouting experience, my troops often participated in events with other troops from both within and outside Monmouth Council, including camping activities, Scout fairs and Klondike Derbies. Not all of my Scouting experience took place within the troops of which I was a member. I attended the National Jamboree without my troop, and on several occasions I attended Scout Camp without my troop. In addition, as a member of the Order of the Arrow, I worked regularly with members of other troops in planning ceremonies and other activities. As a delegate of my Lodge and Monmouth Council, I attended yearly 4-B Section Order of the Arrow Conclaves, where I interacted with members of many other troops from many other councils. I considered the opportunity to associate with Scouts from outside my troops to be one of the most valued privileges of my membership in Scouting -- a nationwide organization of more than 4 million.

37. As an undergraduate student at Rutgers, I first acknowledged, both to myself and to my friends and family, that I am gay. Although in retrospect I recognize that I had been gradually moving towards this realization throughout my adolescence, it was not until my first year in college that I came to think of myself as gay. Because of the Scouting

values of honesty, pride and self-confidence instilled in me, I did not hide the fact that I am gay from my friends on campus. Indeed, one of the campus organizations in which I became involved was the Rutgers University Lesbian and Gay Alliance (the "Alliance"). As a result of the leadership skills I had gained in Scouting, I eventually became co-president of the Alliance.

38. In early July 1990, I was interviewed by a reporter for the Newark Star-Ledger in connection with a seminar I attended at Rutgers on the psychological and health needs of lesbian and gay teenagers. An article entitled "Seminar addresses needs of homosexual teens," which identified me as Co-president of the Alliance, appeared in the Sunday, July 8, 1990 edition of the Newark Star-Ledger along with my picture. A true and correct copy of the July 8, 1990 Newark Star-Ledger article is attached hereto as Exhibit E.

39. On August 5, 1990, with no advance warning, I received a letter from Monmouth Council revoking my membership in Scouting. The letter from Monmouth Council was dated July 19, 1990 -- just days after my name and photograph appeared in the Newark Star-Ledger. A true and correct copy of the letter from James W. Kay dated July 19, 1990 is attached hereto as Exhibit F. The letter constituted the first communication, written or otherwise, between me and any representative of BSA or Monmouth Council regarding their decision to revoke my membership. Although it stated no reason whatsoever for the revocation, the July 19 letter advised me that I was entitled to review by the BSA's regional review Committee (the "Review Committee") of the revocation of my membership. The July 19 letter referred me to the "Procedure for Requesting Review of Registration Decision," attached to the letter (the "Review Procedure"), which provided that I had a right to attend a hearing before the Review committee concerning my revocation. A true and correct copy of the document explaining the Review Procedure, attached to the July 19 letter from James W. Kay, is attached hereto as Exhibit G.

40. On or about August 8, 1990, I sent a letter to Monmouth Council requesting an explanation for the revocation of my membership in Scouting. A true and correct copy of my letter to Monmouth Council is attached hereto as Exhibit H. By letter dated August 10, 1990, Monmouth Council responded that my membership had been revoked because of my sexual orientation. A true and correct copy of the letter from Monmouth Council dated August 10, 1990 is attached hereto as Exhibit I. The letter referred me to "the standards for leadership established by the Boy Scouts of America," which "specifically forbid membership to homosexuals." See Ex. I. At no time prior to receiving the August 10 letter had I seen or heard of the "standards for leadership," or any BSA policy forbidding membership to homosexuals.

41. On or about September 30, 1990, in a letter to the Regional Director of BSA's Northeast Region, I requested review of Monmouth Council's decision and stated my intention to attend the hearing before the Review Committee, as the Review Procedure provides. A true and correct copy of my September 30 letter to BSA's Regional Director is attached hereto as Exhibit J. I also requested a copy of the "standards for leadership established by the Boy Scouts of America," referred to in Monmouth Council's August 8 letter (the "Standards for Leadership"), in order to prepare my response to the revocation of my membership in Scouting.

42. By letter dated October 5, 1990, the Assistant Regional Director of BSA acknowledged receipt of my request for a hearing before the Review Committee. A true and correct copy of the October 5 letter from BSA's Assistant Regional director is attached hereto as Exhibit K. The

October 5 letter neither enclosed, nor referred to my request for, the Standards for Leadership.

43. On or about October 16, 1990, I wrote to the Assistant Regional Director of BSA and repeated my intention to attend the hearing before the Review Committee, as provided under the Review Procedure, and again requested a copy of the Standards for Leadership. A true and correct copy of my October 16 letter is attached hereto as Exhibit L.

44. Despite the clear provision of the Review Procedure entitling me to be present at the hearing before the Review Committee, and despite my repeated invocation of my right to be present at that hearing, the Review Committee convened in my absence, without notice to me, and summarily affirmed the revocation of my membership in Scouting. By letter dated November 27, 1990, the Assistant Regional Director of BSA notified me of the Review Committee's decision and informed me that I was entitled to review by a National Council Review Committee. A true and correct copy of the November 27 letter from BSA's Assistant Regional Director is attached hereto as Exhibit M.

45. On or about December 18, 1990, I, through my attorneys, wrote to the Regional Director of BSA objecting to the summary affirmance of the revocation decision and requesting a hearing before the Review Committee so that I could present information and argument in defense of maintaining my membership in Scouting. A true and correct copy of my attorneys' December 18, 1990 letter to the Regional Director of BSA's Northeast Region is attached hereto as Exhibit N. In that letter, my attorneys urged BSA's National Council on my behalf to reverse the decision to revoke my membership and to reinstate me as a member of

Scouting. My attorneys further urged the National Council to reverse BSA's policy of excluding homosexuals from membership and objected to the Review Committee's failure to observe its own review procedures.

46. By letter dated December 21, 1990, Legal Counsel in BSA's National Office informed me that because I was "apparently an avowed homosexual and the Boy Scouts of America does not admit avowed homosexuals to membership in the organization, no useful purpose would apparently be served by having [me] present at the regional review meeting." A true and correct copy of the December 21, 1990 from BSA's National Office is attached hereto as Exhibit O.

47. On or about July 9, 1992, I, through my attorneys, again requested in writing that BSA abandon its policy of excluding homosexuals from membership in Scouting and reinstate me as an Assistant Scoutmaster in Monmouth Council. A true and correct copy of my attorneys' July 9, 1992 letter to BSA is attached hereto as Exhibit P. By letter dated July 22, 1992, BSA denied my request for reinstatement. A true and correct copy of BSA's letter to me dated July 22, 1992 is attached hereto as Exhibit Q.

48. BSA's letter of July 19, 1990 instructed me to "sever any relations" with Scouting. This meant that I was fired from my position as Assistant Scoutmaster, and stripped of all my Scouting honors, my much-valued Eagle Scout status and my right to wear my Scouting uniform. After more than half a lifetime devoted to Scouting, I was devastated by my expulsion from BSA and the loss of the privileges that accompanied my BSA membership. I was distraught that after being publicly recognized for my Eagle Scout award, I was no longer an Eagle Scout. My plans to become a Scoutmaster

and to maintain my connection to Scouting throughout my life were destroyed, and I was particularly dismayed that I could no longer serve the troop of which I was an Assistant Scoutmaster.

49. BSA never informed me or my parents -- and we never knew prior to the sudden revocation of my membership in Scouting -- that BSA had a policy against admitting or retaining homosexual members. BSA's policy of excluding homosexuals from Scouting membership is not contained in the BSA membership application and cannot be found in any BSA handbook, literature, training materials, audiovisual materials or recruiting materials with which I am familiar.

50. The Boy Scout Handbook, authored by BSA, sets forth the requirements for membership in Scouting. According to the Boy Scout Handbook, membership is open to any boy who is the right age, submits an application and health history, and completes the Scout joining requirements, including demonstrating the Scout Salute, describing the Scout Badge, and understanding the Scout Oath, the Scout Law and the Scout Motto. BSA's policy of excluding homosexuals is not mentioned in The Boy Scout Handbook, the Scout Oath or the Scout Law.

51. I am informed by my attorneys that BSA claims that its policy of excluding homosexuals is implicit in the part of the Scout Oath requiring Scouts to be "morally straight" and the part of the Scout Law requiring Scouts to be "clean." Nothing I learned in my twelve-year Scouting career supports that claim.

52. During my Scouting years, I was never told that the phrase "morally straight" in the Scout Oath referred to sexual

orientation or that gay people were not "morally straight." I never understood and never knew other Scouts to understand "morally straight" to refer to any moral values other than those which the Scouts actively teach, such as trustworthiness, honesty, integrity, independence, compassion, and commitment. I lived by those values throughout my years as a Scout and, as an Assistant Scoutmaster, tried to teach them to younger Scouts. Throughout my Scouting career, I never did or said anything inconsistent with my obligation as a Scout to be "morally straight." Being gay is not inconsistent with being "morally straight."

53. During all my time as a member of Scouting, I was never told that the term "clean" in the Scout Law referred to sexual orientation or activity of any kind, or that gay people could not be "clean" within the meaning of the Scout Law. I always understood and thought that other Scouts understood the term "clean" in the Scout Oath to refer primarily to cleanliness of mind and body. My understanding was that "cleanliness of mind" meant that a Scout should not use foul language or think ill thoughts about others. I never interpreted the term "clean" in the Scout Law to refer in any way to sexual orientation, and I was never aware of any other Scout who interpreted "clean" in the Scout Law to refer in any way to sexual orientation. While I was involved in Scouting, I never did or said anything inconsistent with my obligation as a Scout to be "clean." Being gay is not inconsistent with being "clean."

54. I believed that I could be a member of Scouting for life, on the sole condition that I continue to satisfy the membership requirements as they were explained to me and

as set forth in BSA's published materials, including The Boy Scout Handbook. I was led to believe that I would be a Scoutmaster if I continued to satisfy these membership requirements, as I had throughout my tenure as a Scout and Assistant Scoutmaster. I wanted to become a Scoutmaster and intended to maintain my membership in and connection with Scouting as an adult.

55. As a result of BSA's promises and omissions, I spent years of my life expending time, money and energy in service to Scouting -- years that I could have devoted to an organization that would have welcomed me as a lifetime member.

56. BSA and Monmouth Council have selectively invoked a policy of discrimination against "known or avowed" homosexuals. In my more than 12 years of experience in Scouting, I have never known BSA to actively seek information regarding the sexual orientation of its members. Ironically, to my knowledge, the only gay Scouts singled out for exclusion are those, such as I, who -- in part as a result of their Scouting training -- become leaders in their community and are open and honest about their sexual orientation.

57. During all my time as a member of Scouting, I was never told that the exclusion of homosexuals was essential to the purposes of Scouting. I never thought, and I was not aware of any other Scout who thought, that the exclusion of homosexuals was essential to the purposes of Scouting. Based on my twelve years as a member of Scouting, I do not believe homosexuality to be inconsistent with the purposes of Scouting. Indeed, BSA's policy of excluding homosexuals goes against both the spirit of diversity that is the essence of Scouting and what Scouting teaches about tolerance and respect for others. Because BSA actively recruits from every racial and religious group, every

socio-economic class, and every background, BSA's exclusion of homosexuals is also inconsistent with the Scouting policy of being open to all boys.

/s/ James Dale
James Dale

Sworn to before me this
9th day of September, 1993
/s/ Kevin W. Brown
Notary Public

Selected Exhibits to Affidavit of James Dale

July 19, 1990

Mr. James R. Dale
4 Lisa Lane
Port Monmouth, New Jersey 07758

Dear Mr. Dale:

After careful review, we have decided that your registration with the Boy Scouts of America should be revoked. We are therefore compelled to request that you sever any relations that you may have with the Boy Scouts of America.

You should understand that BSA membership registration is a privilege and is not automatically granted to everyone who applies. We reserve the right to refuse registration whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth.

If you wish to have this decision reviewed by a BSA regional review committee, please write to the Regional Director within 60 days of the date of this letter, explaining you version of the facts supporting your claim that your registration as a BSA member should be reinstated. The procedures for a review of this decision are attached.

Sincerely,

James W. Kay
Council Executive

JWK:jcf
Encl.
Copies Paul Ernst
Charles Ball

James R. Dale
P.O. Box 38
New Brunswick, NJ 08903-0038

8 August 1990

James W. Kay, Council Executive
Monmouth Council, Boy Scouts of America
P.O. Box 188
Oakhurst, NJ 07755-0188

Dear Mr. Kay,

I was surprised to receive your letter of July 19 requesting that I sever all relations with the Boy Scouts of America. I received your letter on August 5, 1990.

I would like to know on what grounds you made this decision. The attached "procedure for requesting review of registration decision" states that "within 60 days, you must request in writing a review of this decision. . . . In your request you may include your version of what occurred . . . ." Since I have no idea of "what occurred," I ask that the 60 day period for requesting a review of the decision be deferred until you notify me of the basis for your decision.

Sincerely,

/s/ James R. Dale
James R. Dale

August 10, 1990

Via Certified Mail

Mr. James R. Dale
PO Box 38
New Brunswick, New Jersey 08903-0038

Dear Mr. Dale:

This is in response to your letter of August 8. I can only assume that the delay in your receiving the previous letter was due to the Post Office and the fact that the address in our membership files was for 4 Lisa Lane.

The grounds for this membership revocation are the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals.

I remind you that you are entitled to a review of this decision by a BSA regional review committee. Because of the delay in delivery of the first letter, you may assume that you have 60 days from the date of this letter to write to the Regional Director, supporting your claim for registration. You have a copy of the procedures for a review of this decision.

Sincerely,

James W. Kay
Council Executive

JWK:jcf

Copies Rudy Flythe, Regional Director
Northeast Region, MA
Box 350
Deyton, New Jersey 06810

Fred L. Emer, Director of Registration
National Council, BSA

BOY SCOUTS OF AMERICA

National Office

1325 Walnut Hill Lane
P.O. Box 152079
Irving, Texas 75015-2079

December 21, 1990

Mr. Glenn Gordon, Esq.
DAVIS POLK & WARDWELL
1 Chase Manhattan Plaza
New York, NY 10005

RE: JAMES R. DALE

Dear Mr. Gordon:

Thank you for your letter of December 18, 1990, regarding the referenced individual. It has been referred to me for reply.

As your client is apparently an avowed homosexual and the Boy Scouts of America does not admit avowed homosexuals to membership in the organization, no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting.

We will, however, consider the points you raise at a national review of this matter, if you wish.

Please advise the undersigned if you wish to have this done.

Thank you.

Very truly yours,

/s/ David K. Park
David K. Park
Legal Counsel
nfc

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

AFFIDAVIT OF GERALD DICK IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY)
: ss.:
COUNTY OF MONMOUTH)

GERALD C. DICK, being duly sworn, deposes and says:

1. I am the father of James Dale, plaintiff in the above-captioned litigation, and I submit this affidavit in support of his motion for summary judgment.

2. I have lived in Port Monmouth, New Jersey since 1976, when I moved there with my wife, Doris -- to whom I have been married for twenty-eight years -- and our two sons, Robert and James. I am currently employed at the Communications and Electronics Command at Fort Monmouth, New Jersey, where I manage airborne/navigation communications equipment. I hold the rank of Lieutenant Colonel in the United States Army Reserve.

3. I joined King of Kings Lutheran church when I moved to Port Monmouth in 1976, and am an active and committed member of the church community. I attend church regularly and also participate in Adult Fellowship social activities organized through the church. Recently I began volunteering to drive elderly members of the congregation to church services.

4. My ties to my community are important to me, and I have always tried to foster a sense of community responsibility in the members of my family. I have received recognition from my superiors at Fort Monmouth for my commitment to community service, and I regularly volunteer my time to the American Legion, the U.S. Coast Guard Auxiliary, and the Fort Monmouth Woodcraft Shop. My family and I initially became involved in the Scouting programs offered by Boy Scouts of America ("BSA") because we believed that BSA was an organization devoted to encouraging community responsibility, developing leadership skills, and teaching outdoor and camping skills to young people.

5. My first experience with BSA was as a youth member of a Boy Scout troop in Nassau County, New York, where I achieved the rank of Second Class. I did not become involved with BSA again until my older son, Robert, became a Cub scout in 1974.

6. Parental involvement is crucial at all levels of Scouting. Parents help arrange for transportation, hold Cub Scout meetings in their homes, often attend pack and troop meetings, and serve as advisors and role models for their sons and the other boys involved in Scouting. Because both my wife and I recognized the critical role of the parent in the Scouting program, we immediately became involved in Scouting when Robert became a Cub Scout -- my wife as a Den Mother and I as a Committee member.

7. James followed in his older brother's footsteps and became a Cub Scout in 1978. He was excited about joining the Cub Scouts because we had been Indian Guides together, and he had always enjoyed our outdoor experiences. I

became the Assistant Pack Leader for James' Cub Scout Pack, and helped organize meetings, daily outings and other activities for the boys.

8. At the time James became a Cub Scout, James' brother, Robert, was already a Boy Scout. Although Robert's enthusiasm for Scouting dwindled and he left the BSA program after only a few years as a Scout, James became progressively more involved in Scouting. Because of James' increasing involvement, I also became more active in Scouting and took on additional responsibilities. When James became a Webelo, I became his Webelo Den Leader. The Webelo camping trips I took with James were memorable, and we valued our time together in the outdoors. When he became a Boy Scout, I became an Assistant Scoutmaster. In 1983, James and I were nominated and inducted into the Order of the Arrow together, in a ceremony that signified our commitment to excellence in Scouting.

9. Over the years, as James devoted more and more time to Scouting, so did I, attending countless troop meetings and camp-outs. Eventually I became involved with Scouting at the District level as a Scouting Commissioner, acting as a liaison between the Monmouth Council office and various Scoutmasters, Assistant Scoutmasters, and Den Mothers. I also went on an annual basis to Camp Builders Weekends at Forestburg Summer Scout Reservation ("Forestburg"), and Quail Hill Scout Reservation, Monmouth Council camps. During these weekends, fathers of other Scouts and I would do camp repairs and maintenance to ready the camp for the arrival of the summer campers. Then, during each summer camping season, while James attended Scout Camp at

Forestburg, I would generally spend a week participating in the camp program and assisting as an adult leader.

10. I devoted so much of my time and effort to Scouting because I recognized how much James had gained from his Scouting experience, and I felt a responsibility to make sure that other boys had the opportunity to share in the benefits and privileges that Scouting has to offer. As a result of James' success in Scouting, I became committed to helping improve the Scouting program in my community. I attended District Commissioner meetings and I helped Monmouth Council find troop leaders and start new Scout troops and packs. In performing these duties, I relied on the voluminous materials provided by BSA to help me with my fundraising, recruiting and organizational efforts -- including a Fast Start packet, materials on how to organize a jamboree, audiovisual materials and BSA publications.

11. My considerable involvement in the BSA program paled in comparison, however, to James' commitment to Scouting. James was driven to be the best Scout he could possibly be, and he spent many years of his life focusing on that goal. James didn't need my encouragement in Scouting; in fact, it was I who tried to keep up with him in pursuing Scouting activities.

12. By the time James became active in the order of the Arrow, his Scouting responsibilities were taking up vast amounts of his time each week. Not only was he attending his regular troop meetings and Scouting events, he was also organizing Order of the Arrow ceremonies, preparing for Order of the Arrow competitions, and attending Order of the Arrow meetings and events. James often devoted at least ten hours a week to Scouting, and frequently spent considerably

more time than that. For years in our house, it seemed as though if James was not at a Scouting event or meeting, he was on the telephone planning one. Yet, despite the fact that James' Scouting responsibilities and duties demanded an extraordinary amount of time, James was always an A student and also managed to work part-time to earn money to spend on his own interests -- including Scouting.

13. Neither James' commitment to Scouting nor my own involvement with BSA was limited to an investment of time and energy; we both made a significant financial commitment to BSA as well. I purchased uniforms and camping gear for myself, took time off from work to help out at Forestburg, and spent money on gas in order to travel around Monmouth County to meetings and events. My wife and I paid for James to attend Scout camp each year, sometimes for more than one session a year. James spent considerably more money on Scouting -- most of it money that he earned himself in his part-time or summer employment. James purchased many uniforms, countless pairs of boots, sleeping bags, mess kits, all kinds of Scouting materials, handbooks, cold-weather gear and other equipment. James had significant travel expenses, too: he drove his car around the county to meetings and events, paying for gas and maintenance, and travelled to Scouting events throughout New Jersey and as far away as Virginia and Canada. Scouting was a significant part of both James' life and mine, and we both spent a great deal of time and money on Scouting.

14. Scouting was also a part of my life at work. There is a building on the main post at Fort Monmouth devoted to Scouting, and I see Scouts and Scouters around the military post on a regular basis. I was often asked to help arrange transportation for Scouts, and am aware that the National

Guard has assisted BSA by providing support to enable BSA members to attend Scouting events.

15. James wanted to be the best Scout in Monmouth Council, and he achieved his goal year after year. His Scouting achievements were a source of great pride to both James and his family. We celebrated with him each of the many times his troop, Monmouth Council or his Order of the Arrow Lodge chose him to be their representative at a National Boy Scout Jamboree, Monmouth Council Event, Order of the Arrow Conclave or Scouting fundraising event. We watched James mature as he learned to coordinate complicated events and to frame his opinions forcefully, in a way that would persuade the adult members of BSA of his position on a given topic. We saw James put what he learned about leadership, excellence and community responsibility in the Scouting program to good use in other areas of his life: he rose in the ranks at the military academy where he attended high school; he excelled academically; he held down several different part-time jobs; and he participated in the church youth group, eventually assisting in teaching Sunday School.

16. When James was awarded the Eagle Scout Badge, his mother and I organized and paid for his Court of Honor, the ceremony at which the award is presented. Many in our community, including our church, community organizations and the mayor's office publicly recognized James' achievement at this ceremony, which marked the culmination of his Scouting career. The fact that James had earned his Eagle Award was reported in several newspapers, announced in his high school, and praised by friends and acquaintances throughout our community.

17. Because James had been unwavering as a youth member in his enthusiasm for and commitment to Scouting, I was not surprised that he accepted immediately when asked to take on an adult leadership position in Monmouth Council after he turned eighteen. Although James left for college at Rutgers College of Rutgers University ("Rutgers"), New Brunswick, New Jersey, he was approved for and accepted a position as Assistant Scoutmaster, and strove to fulfill his commitment to his troop whenever he came home from college on weekends and vacations. He worked as a staff member at Forestburg even after leaving for college, and he stayed in contact with the boys in his troop who had come to rely on him for guidance and advice. James made clear -- both to the people in Scouting with whom he worked as an Assistant Scoutmaster and to our family -- that he viewed his commitment to BSA as a lifetime commitment, and that he intended eventually to become a Scoutmaster and to hold other adult leadership positions in the Scouting program.

18. Some time after he arrived at Rutgers, my son told my wife and me that he is gay. We admired his forthrightness and his courage in coming to us, and we made clear to him that we supported and loved him, and that his many achievements were in no way diminished in our eyes by his sexual orientation. We were proud that James became active in several campus organizations, including the Rutgers Lesbian and Gay Alliance, and we were not surprised: James had been trained throughout his Scouting career to be honest, to be active in his community, and to strive for leadership positions. It did not occur to me or to my wife that James' candidness about his sexual orientation would in any way jeopardize his BSA membership; in all the years we had been involved in Scouting, we had never been

informed that BSA had a policy against admitting or retaining homosexual members.

19. When James received a letter from BSA in August 1990 telling him that his BSA membership had been revoked, both James and I were enormously shocked and distraught. James was extremely upset that he had been expelled from an organization to which he had devoted so much time and energy, and to which he felt such loyalty. James had focused on his Scouting experience for so long and so successfully that it had become an essential part of how he defined himself and how others saw him. Scouting had also become a large part of my life, but I felt strongly that if BSA no longer wanted my son as a member, I did not want to be a member either. James' expulsion from BSA was a devastating experience for him and for our family; the expulsion was also fundamentally unfair and inconsistent with everything I had come to expect from the Scouting program.

20. BSA's policy of excluding homosexuals from membership is not contained in the BSA membership application and cannot be found in any BSA handbook, literature, training materials, audiovisual materials or recruiting materials with which I am familiar. In all my experience as an adult member of Scouting, including when I was trying to recruit new troop leaders, I never heard of this exclusionary policy. As an adult leader in the Scouting program, it would theoretically have been my responsibility to communicate and enforce BSA's exclusionary policy; however, because this policy was never communicated to me, I could not and did not communicate it to others.

21. The Boy Scout Handbook, authored by BSA, sets forth the requirements for membership in BSA. According to

the Boy Scout Handbook, membership is open to any boy who is the right age, submits an application and health history, and completes the Scout joining requirements, including demonstrating the Scout Salute, describing the Scout Badge, and understanding the Scout Oath, the Scout Law and the Scout Motto. BSA's policy of excluding homosexuals is not mentioned in The Boy Scout Handbook, the Scout Oath or the Scout Law.

22. I am informed by my son's attorneys that BSA claims that its policy of excluding homosexuals is contained in the part of the Scout Oath requiring Scouts to be "morally straight" and the part of the Scout Law requiring Scouts to be "clean." Nothing I learned during my involvement with Scouting supports that claim.

23. At no time during my Scouting years was I ever told that the phrase "morally straight" in the Scout Oath referred to sexual orientation or that gay people were not "morally straight." I never understood and never knew other Scouts or Scouters -- adult members of BSA -- to understand "morally straight" to refer to any moral values other than those which the Scouts actively teach, such as trustworthiness, honesty, integrity, independence, compassion, and commitment. I have always believed that my son lives up to the values in the Scout Oath, and am proud that he continues to live up to them today, even though he is no longer a BSA member.

24. During all my time as a member of BSA, I was never told that the term "clean" in the Scout Law referred to sexual orientation or activity of any kind, or that gay people could not be "clean" within the meaning of the Scout Law. I always understood and thought that other Scouts and Scouters understood the term "clean" in the Scout Law to refer primarily

to cleanliness of mind and body. My understanding was that "cleanliness of mind" meant that a Scout should not use foul language or think ill thoughts about others. I never interpreted the term "clean" in the Scout Law to refer in any way to sexual orientation, and I was never aware of any other Scout who interpreted "clean" in the Scout Law to refer in any way to sexual orientation. I believe that James has always lived up to the ideals articulated in the Scout Law, and that he continues to set an example for others even though he is no longer a BSA member.

25. During all the years of my involvement with BSA, I was never told that the exclusion of homosexuals was essential to the purposes of Scouting. I never thought, and I was not aware of any other Scout or Scouter who thought, that the exclusion of homosexuals was essential to the purposes of Scouting. BSA's policy of excluding homosexuals is inconsistent with what Scouting taught James and me about tolerance and respect for others.

26. My son James was an exemplary, much-decorated and extraordinarily committed member of BSA. He would, I am certain, have gone on to be a great asset to Scouting -- an organization from which he gained so much.

/s/ Gerald C. Dick
Gerald C. Dick

Sworn to before me this
8th day of September, 1993

/s/ Ursula Buki
Notary Public

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF MICHAEL ADAM KIVETZ

STATE OF NEW JERSEY)
) ss.
COUNTY OF SOMERSET)

1. I, Michael Adam Kivetz, reside in Somerset County in the State of New Jersey. I make this certification in support of the summary judgment motion of plaintiff James Dale.

2. I was a registered youth member of Boy Scouts of America ("BSA") from approximately 1971 to 1981, and have been a registered adult member of BSA since 1990. Currently I am the Blue Mountain Valley District Representative to the Advancement Committee for the Watchung Area Council, Boy Scouts of America, in Union County, New Jersey (the "Watchung Area Council").

3. I have been involved in Scouting since the age of 7 when I joined the Cub Scouts in Toledo, Ohio. After completing my term as a Webelo, I became a Boy Scout at the age of 11.

4. As a Boy Scout, I earned 24 merit badges and received the Ner Tamid religious award. I also received troop level awards, including the Scoutmaster's award and recognition as Scout of the Year and Outstanding Scout. While a Boy Scout, I held the positions in my troop of Patrol

Leader, Assistant Patrol Leader, Senior Patrol Leader, and Junior Assistant Scoutmaster. I became an Eagle Scout in late 1978.

5. I have been a member of the Watchung Area Council since May 1990 and have been active as a member of the Advancement Committee of Watchung Area Council since September 1991 -- first as an Assistant, and later as Chairman for the Blue Mountain Valley District (the "District"), one of the geographical districts within Watchung Area Council.

6. At the Council level, my responsibilities as District Representative to the Advancement Committee include reporting the events and activities of the District to the Council at large, and discussing Council-wide policy and events with representatives from other Districts. At the District level, my responsibilities include discussing events, activities, and plans for the District with Scoutmasters and Den Mothers, and participating in District "Round-Up" Meetings where we discuss the various Scouting activities going on in the District. At the level of the Scout troops within the District, my responsibilities include performing reviews of all Eagle Scout candidates, providing initial reviews for Eagle Scout projects, and participating in final reviews with the members of the troop committee of the prospective Eagle's troop after the project is completed. I am the sole representative of the Watchung Area Council in these reviews, and act as the disinterested party -- the reviewer who does not personally know the Scout himself.

7. When evaluating a candidate for his Eagle Scout badge, I ensure that the Scout has met all of the qualifications for the Eagle Scout badge set by BSA. These qualifications

include receipt of 21 merit badges, the following of which are required: Citizenship in the Community; Citizenship in the Nation; Citizenship in the World; Communications; Safety; First Aid; Emergency Preparedness or Lifesaving; Environmental Science; Personal Management; Personal Fitness, Swimming, or Sports; and Camping. The remaining merit badges are elective. The Scout must also have been active for six months after attaining the rank of Life Scout, must have held a leadership position within a troop, such as Patrol Leader, and must have completed an Eagle Scout project.

8. In evaluating a Scout for his Eagle Scout badge, I also interview the Scout personally and consider his responses in deciding whether to recommend him for the Eagle Scout badge. Advancement Guidelines, Council and District Functions (the "Advancement Guidelines"), a publication of BSA, gives guidance in formulating questions for this subjective part of the evaluation process. The Advancement Guidelines suggest that a Scout be asked what he has learned about the values of Scouting, including his understanding of the Scout Oath and Scout Law. When asked to discuss the values he has learned in Scouting, I expect a Scout to respond that he has learned to be a leader, engaged in self-discovery, advanced in some skill, or otherwise become active in pursuits that have a positive impact on his community and his life. The Advancement Guidelines do not suggest that Scouts be asked whether they have learned about morality in Scouting. This reflects the idea that Scouts learn about morality principally from their parents and religious leaders. In my experience, Scouting does not teach about morality per se; rather, Scouts learn morality through Scouting in the context of learning to be good citizens and leaders.

9. Nothing in the Advancement Guidelines indicates that sexual orientation should be a consideration in the admission of a boy into the Scouting program, in the evaluation of a Scout, or in the consideration of a Scout for his Eagle Scout badge or other advancements in Scouting. Indeed, sexual orientation is completely unrelated to the criteria that we consider when evaluating a Scout.

10. The consideration of a Scout's sexual orientation would be inconsistent with the goals of the Scouting organization as I understand them, which include: teaching boys leadership skills and personal skills; promoting their learning about a wide array of topics; promoting their concern about the world and their consideration of others in the world by doing a "good turn" every day; encouraging their development of goals and efforts to achieve them; helping boys learn about themselves; and, particularly, promoting a respect for and tolerance of others.

11. During the period in which I have been a registered member of BSA, I was never aware that BSA had a policy of excluding homosexuals from membership until October 1991, when I attended a general meeting open to the committee members of the Watchung Area Council. At that meeting, a representative of the Watchung Area Council announced that BSA has a policy of excluding homosexuals from membership. Prior to then, no one involved in Scouting had ever told me that such a policy existed, nor had I ever read about such a policy in materials provided to me by BSA. Nothing that I have ever learned during my involvement in the Scouting program suggests to me that homosexuals should not be eligible for membership in BSA. Further, I

have never known it to be one of the central purposes of BSA or the Scouting program to exclude homosexuals.

12. Until the October 1991 general meeting of the Watchung Area Council described above, I was never told of BSA's policy of excluding homosexuals. I have never been told that the phrase "morally straight" in the Scout Oath refers to sexual morality or that homosexuals are not "morally straight." I do not understand and do not know other Scouts to understand "morally straight" to refer to any moral values other than those which the Scouts actively teach, such as those listed in the Scout Law. I have never interpreted the phrase "morally straight" to refer in any way to sex or sexuality, and I do not personally know any other Scout or Scouter who interprets "morally straight" to refer in any way to sex or sexuality.

13. At no time during my BSA membership have I been told that the word "clean" in the Scout Oath refers in any way to sex or sexuality, or that homosexuals could not be "clean" within the meaning of the Scout Law. I have always understood, and have known other Scouts and Scouters to understand, the word "clean" in the Scout Law to refer primarily to physical cleanliness. To the extent that I was taught or understood that "clean" refers to cleanliness of mind, I was taught or understood this to mean principally that a Scout should be considerate of others' needs and think accordingly. I have never interpreted the word "clean" in the Scout Law to refer in any way to sex or sexuality, and I have never been aware of any other Scout or Scouter who interpreted the word "clean" in the Scout Law to refer in any way to sex or sexuality.

14. Nothing in the materials provided to Scouts by BSA even remotely suggests that homosexuality is unclean or immoral. Indeed, in my experience, sexuality in general is not an issue in BSA. I had never heard any mention in the Scouting context of homosexuality until the October 1991 general meeting of the Watchung Area Council described above.

15. I was completely shocked when I heard about BSA's policy of excluding homosexuals. It is antithetical to what I had learned in Scouting since the age of 7 about tolerance and respect for others. BSA's policy of excluding homosexuals is also antithetical to the Scouting policy of being open to all boys. BSA actively recruits from every racial and religious group, every socio-economic class, and every background. The policy of excluding and expelling one specific group of boys is contrary to the spirit of diversity that is the essence of BSA.

16. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

/s/ Michael Adam Kivetz
Michael Adam Kivetz

Dated: August 13, 1993

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF REVEREND DONALD K. HUMMEL IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY)
) ss.:
BERGEN COUNTY)

Donald K. Hummel certifies:

1. I am an ordained Roman Catholic priest and an adult volunteer member of Boy Scouts of America ("Boy Scouts"). I presently serve as Membership Committee Chairman of the National Catholic Committee on Scouting and as chaplain for Northeast Region three, covering New Jersey and Pennsylvania. The National Catholic Committee on Scouting oversees all Scouting programs carried out under the auspices of the Catholic Church in the United States.

2. I became a youth member of Boy Scouts in 1957 when I became a Cub Scout at the age of eight. I was a Boy Scout in Troop 6 in Caldwell, New Jersey and earned the Eagle Scout badge. I remained an active youth member of Boy Scouts until I turned eighteen years old. I am a Vigil Honor member of the Order of the Arrow, the honor camping society of Boy Scouts.

3. After I was no longer eligible for youth membership, I applied to become an adult volunteer leader. I have held

almost every volunteer leadership position in the Cub Scout, Boy Scout and Explorer programs, including assistant Scoutmaster and Scoutmaster. Over the years, I also have been active at the local council level, holding numerous volunteer positions including Executive Board Member, assistant Council Commissioner and Council Commissioner.

4. I have attended numerous training courses in Scouting, including Wood Badge, an intensive course of instruction in Scouting for adult leaders. I also have served on the staff of the Wood Badge course and other training courses. Starting in September 1994, I will be a course director for Wood Badge. I have attended the Philmont Training Center several times and have given seminars on Scoutings' relationship with the Catholic Church. I also have served as Catholic chaplain at Philmont for the past two summers.

5. The Catholic Church participates in Scouting and supports Scouting because of the values Scouting seeks to instill in young people. Fundamental among those values are belief in God, reverence toward God and recognition of one's duty to God. It is a direct result of these positive values and experiences that I find myself both a Roman Catholic priest and a Scout leader.

6. Boy Scouts' commitment to religious principles is evident in the Declaration of Religious Principle, stated in the Bylaws:

> The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout Oath or Promise the member declares, "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law." The recognition of God as the ruling and leading power in the universe and the grateful acknowledgment of His favors and blessings are necessary to the best type of citizenship and are wholesome precepts in the education of the growing members. No matter what the religious faith of the members may be, this fundamental need of good citizenship should be kept before them. The Boy Scouts of America, therefore, recognizes the religious element in the training of the member, but it is absolutely nonsectarian in its attitude toward that religious training. Its policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life.

All adult members must subscribe to Scoutings' policies and principles, including the Scout Oath and Law and the Declaration of Religious Principle, in applying for adult membership.

7. Because the values of the Scout Oath and Law accord with the beliefs and teachings of the Catholic Church, the Church has endorsed and supported Scouting programs for decades. The National Council of Boy Scouts of America was endorsed by Pope Benedict the XV in 1919, and the first Catholic Committee on Scouting was organized in 1923.

8. The National Catholic Committee on Scouting is represented on the Boy Scouts of America's National Religious Relationships Committee, an ecumenical body responsible for planning religious activities at Scouting events, reviewing prayers and chaplaincy programs, reviewing

the religious content of Scouting literature, reviewing and approving religious emblem programs developed by churches for the use of youth members, and reviewing all other religious aspects of Scouting in the United States. Over 30 denominations are represented on the Religious Relationships Committee.

9. The mission of the National Catholic Committee on Scouting is set forth in The Mission and Plan of Organization of the National Catholic Committee on Scouting:

> The National Catholic Committee on Scouting . . . is a church committee of concerned Catholic laypeople and clergy who see as their mission the constructive use of the program of the Boy Scouts of America as a viable form of youth ministry with the Catholic youth of our nation. The committee, which is advisory to the Boy Scouts of America, seeks to sustain and strengthen the relationship between BSA and the Catholic church in the United States.

10. The Committee is composed primarily of Scout chaplains and chairmen appointed by the bishops in their respective dioceses, regional chaplains and chairmen, members at large, and a Bishop Advisor. The Committee seeks to maintain the Church's role in Scouting by developing, monitoring, evaluating and promoting the religious emblems programs (awards earned for giving special service in the observation of religious faith) for Cub Scouts and Boy Scouts; creating and promoting programs of religious activities for youth; and developing training programs for Scout chaplains.

11. The National Catholic Committee on Scouting is one of a number of religious associations dedicated to providing support to Scouting programs. Others include the National Association of Presbyterian Scouters, the National Association of United Methodist Scouters and the Association of Baptists for Scouting. In addition, the Church of Jesus Christ of Latter Day Saints has adopted the Scouting program as its primary youth ministry program for boys.

12. These religious groups participate in Scouting because of its emphasis on duty to God, reverence, and living a moral, clean life. The strength of the relationships between Scouting and religious organizations can be measured by the number of Troops chartered by churches and other sectarian organizations. For example, in 1990 religious groups accounted for 33,994 of the 52,360 Troops chartered in the United States, almost 65%. Half of all Troops, Packs and Posts are sponsored religious groups.

13. The chaplaincy program is an example of the cooperative roles religious groups take in educating Scouting youth. Members of the clergy serve as a chaplain for individual Troops or to provide religious services at Scout camp. Chaplains conduct religious services, lead denominational and nondenominational prayer, counsel and serve as role models for individual Scouts, and work with Scouts on their religious emblems.

14. During my tenure with Boy Scouts, I have served as chaplain at Scout camp on many occasions. The role of chaplain provides a unique opportunity to contribute to Scouts' spiritual welfare and growth. As a chaplain at Scout camp, I have conducted religious services, told inspirational stories,

and provided counseling to Scouts of my own and other faiths.

15. At national and international jamborees, nondenominational prayer services developed by the Religious Relationships Committee, as well as sectarian services, are held daily. At the national jamboree held in August of this year, more than 200 chaplains were in attendance.

16. The Catholic Church and affiliated Catholic organizations such as the Knights of Columbus are Scouting's third largest religious sponsors nationally, behind only Methodists and Mormons, and second only to Methodists in New Jersey. More than 600,000 Catholic youth are presently registered in Scouting programs.

17. As part of their sponsorship of Scouting programs, churches make their buildings available as meeting places for Scouts and select adult volunteers to lead church-sponsored Packs, Troops and Posts.

18. Scouting's view of morality is consistent with the values of the Catholic Church. Scoutings' emphasis on being morally straight teaches Scouts to "try to know what is right and true, and to love what is good and choose it." A Scout is Reverent, annexed hereto as Exhibit A at 9. Scoutings' emphasis on living a clean life teaches Scouts to be clean in thought, word and deed. A Scout is asked to reflect on whether he has kept unclean conduct out of his life:

> Do I take pleasure in impure thoughts? Say impure things? Listen to impure conversations? Did I touch others or let them touch me in an impure manner? Did

> I want to look at impure books, magazines, pictures? Have I neglected to keep my body clean and healthy?

Exhibit A at 62.

19. Scouting views homosexual conduct as immoral and as inconsistent with the Scout Oath's requirement that a Scout be morally straight and the Scout Law's requirement that a Scout be clean in thought, word and deed. This view accords with the Church's beliefs and teachings on homosexuality. (See Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons, October 1, 1986, annexed hereto as Exhibit B, at 4.) This shared belief is also a basis for the close affiliation between the Church and Scouting.

20. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: November 3 , 1993

/s/ Donald K. Hummel

Selected Exhibit to Certification of
Reverend Donald K. Hummel

A SCOUT IS REVERENT

A MANUAL FOR SCOUTS OF CATHOLIC FAITH
(excerpts)

* * * *

CHAPTER 1

SCOUTING FOR CATHOLICS

A Catholic Interpretation of the Scout Oath and Law:

Sometime during your first six months in Scouting you should discuss with your parents or guardians the meaning and obligations of the Scout Oath and Law.

The Scout Oath

On my honor I will do my best; Our honor is a quality we possess because of our dignity as human beings and children of God. Our "best" means to give all we have. It means to keep striving to do what we know is right, and in the Oath it means we will try to be good Scouts by fulfilling our Scout duties as expressed in the Scout Law.

To do my duty to God and my country and to obey the Scout Law; Our duty to God and country means chiefly two things: obedience and loyalty. The duties we owe to the Church, to our country, to parents, to one another and to ourselves come from the Word of God. The Scout Law sums

up all the qualities a Scout should have and without which he cannot be a good Scout.

To help other people at all times; Our Lord told us that love of our neighbor was like the first law of love of God. Early Christians were known by the love they had for one another. Real Christian charity or love prompts us to want to help others at all times. Our Scout training will give us skills and knowledge that will put us in a better position to do this.

To keep myself physically strong, mentally awake, and morally straight; Scouting offers us many opportunities to grow physically. To be alert and ready requires us to give special care to those two gifts of soul—intellect and will—that makes us like unto God. "Morally straight" means we must try to know what is right and true, and to love what is good and choose it.

The Scout Law

The Scout Law is really a definition of a Scout. Wearing the uniform does not make the Scout. In fact, the boy who keeps the Scout Law, even if he has no uniform, is the real Scout far more than the one who wears the uniform, but does not keep the Law. This is the Scout Law you promise to obey in the Scout Oath:

A Scout is trustworthy. Character is what a man is. Reputation is what people think about him. A youth of character is worthy of trust. No one is worthy of trust who does not recognize his dignity and the dignity of all men as children of God.

A Scout is loyal. Because our first loyalty is to God, a Scout is loyal to all to whom loyalty is due—his parents, his Church, and his country.

A Scout is helpful. Christ has told us that the good turn we do for others He will consider as done to Him. Our motive, or the reason why we are helpful, is that we see Christ in everybody. If Christ was willing to die for everybody, a Scout certainly should be ready to render help. The whole Scout program gives us an opportunity to be helpful.

A Scout is friendly. The basis and motive of this point of the Law is Christian charity. We are all children of the same Father, and brothers of Jesus Christ. Recognizing this, a Scout should be a friend to all, and a brother to every other Scout.

A Scout is courteous. A Scout should respect the image of God in everyone. The meaning of love as a Scout should be taken from the words of Christ himself— "I have come not to be served, but to serve."

A Scout is kind. This point of Law refers mostly to animals. They exist for our use. They have life and feeling and God has given them to us as a trust; as such we must use them well, never abusing or mistreating them.

A Scout is obedient. Jesus Christ gave us an example of perfect obedience throughout His life. This will be a difficult point of the Law for a Scout to keep because it will mean discipline and giving up his own will at times. He should obey, not because the command pleases him, but because the one giving it has the right to do so, is someone in authority, and is right in doing so. Disobedience brought death and sin into the world; obedience brought our salvation. Real victory

comes from obedience—first to God, then, to all He has placed in authority as long as they deserve our obedience.

A Scout is cheerful. Joy should be one of the marks of a child of God. A Scout will have joy in his heart and manifest it outwardly by his cheerful manner.

A Scout is thrifty. Thrift teaches self-respect, making us unwilling to be a burden to others. Far from being a burden, we are able by thrift to help them. A Scout is deeply concerned with preserving our natural resources.

A Scout is brave. He can face danger even if he is afraid. He has courage to stand for what he thinks is right even if others scorn him.

A Scout is clean. He keeps clean in body and thought; he stands for clean speech, clean sport, clean habits, and travels with a clean crowd.

A Scout is reverent. He is reverent toward God. He is faithful in his religious duties and respects the convictions of others in matters of custom and religion.

* * * *

AN EXAMINATION OF CONSCIENCE FOR SCOUTS.

1. **A Scout is trustworthy.** Did I tell lies? Say mean things about others? Injure others in word? Pretend to be other than I am?

2. **A Scout is loyal.** Did I deny that I was a Catholic? Neglect my prayers? Willfully endanger my faith by dangerous reading or dangerous associations with others? Do I support the Church?

3. **A Scout is helpful.** Was I jealous or envious? Did I willfully waste time, others' or mine? Refuse to help others?

4. **A Scout is friendly.** Did I try to be a friend to everyone? Was I angry? Stubborn? Proud? Did I fight or quarrel? Make others fight? Lead others to sin by my example?

5. **A Scout is courteous.** Did I make fun of others? Did I treat the elderly, the deaf, the blind, or lame without respect? Did I misbehave in church? Did I look down on others? Did I try to "get even" with others?

6. **A Scout is kind.** Was I unkind or mean to others? Did I disrespect others? Wish evil on others? Hate others? Was I unkind to animals?

7. **A Scout is obedient.** Did I disobey my parents? Teachers? Was I mean towards my parents or teachers? Did I refuse to listen to those in authority over me?

8. **A Scout is cheerful.** Am I content with what I have? Did I wish to take or keep wrongfully what belonged to another, or make others' lives unpleasant by being grouchy?

9. **A Scout is thrifty.** Did I cheat? Steal anything? What? Help or tell another to steal? Take or keep stolen goods given to me by others? Spoil property? Fail to return found articles? Waste time or talents?

10. **A Scout is brave.** Did I deny any teaching of the Church? Take God's mercy for granted, or despair of His mercy? Hate certain religious practices? Was I superstitious? Do I believe in dreams, charms, or fortune tellers?

11. **A Scout is clean.** Do I take pleasure in impure thoughts? Say impure things? Listen to impure

conversations? Did I touch others or let them touch me in an impure manner? Did I want to look at impure books, magazines, pictures? Have I neglected to keep my body clean and healthy?

12. **A Scout is reverent.** Have I used God's name irreverently? Have I cursed? Have I missed Mass on Sundays or Holy Days? Have I missed praying frequently or not kept in touch with God by prayer every day?

* * * *

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF ADAM S. BOGNER IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY)
) ss.:
MONMOUTH COUNTY)

Adam S. Bogner certifies:

1. I am a volunteer adult member of Boy Scouts of America ("Boy Scouts"). I am fully familiar with the purposes and methods of Scouting.

2. I was an active member of Boy Scouts of America as a boy. I spent one year as a Cub Scout in Maryland before my family moved to New Jersey. When I turned 11 I joined Troop 38 in Monmouth Council, which was sponsored by the Jewish Community Center in West Deal, New Jersey. The next year I moved to Troop 145, which is sponsored by the Old First Methodist Church in West Long Branch, New Jersey. I achieved the rank of Eagle Scout and became a member of the Order of the Arrow, Boy Scouts' honor camping organization, in the Council's Na-Tsi-Hi Lodge. I remained an active youth member in Boy Scouts until my eighteenth birthday.

3. When I was 18 years old, I applied to be an adult volunteer Boy Scouts leader and have continued to be an

adult volunteer leader for the past 13 years. From 1980 to 1987, I served as an assistant Scoutmaster of Troop 145. Since 1987, I have served as Scoutmaster of the Troop.

4. I have taken both the Scoutmastership Fundamentals course and the Wood Badge course, an advanced training course for Scout leaders. I regularly attend the monthly Roundtable meetings held for adult leaders in the District. In August 1993, I completed Wood Badge Staff Development training, which qualified me to serve as a Wood Badge instructor.

5. In addition to serving my Troop as Scoutmaster, I have volunteered at the District level to train other volunteer leaders and to work on District events. I have served as an instructor for the Scoutmastership Fundamentals and Wood Badge courses. For the past few years I have taken significant responsibility for the Klondike Derby, an annual District winter event in which each patrol takes a sled to a number of different sites at which the patrol is called upon to demonstrate Scouting skills or ideals.

6. Like all other adult volunteer members of Boy Scouts, I have received no compensation or other material reward for my time devoted to Scouting. I receive no fringe benefits, workers' compensation protection or any other forms of remuneration for my volunteer service.

7. Scouting is a volunteer movement which seeks to educate boys and young adults in the responsibilities of citizenship, provide growth in moral character and enhance the development of physical, mental and emotional fitness. Boy Scouts offers the Cub Scout and Boy Scout programs to boys between the ages of eight and 18.

8. The values that Scouting aims to instill are those expressed in the Scout Oath or Promise and the Scout Law. The Scout Oath States:

> On my honor I will do my best
> To do my duty to God and my country
> and to obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong,
> mentally awake, and morally straight.

The Scout Law provides:

A Scout is: . . . Trustworthy.
. . . Loyal.
. . . Helpful.
. . . Friendly.
. . . Courteous.
. . . Kind.
. . . Obedient.
. . . Cheerful.
. . . Thrifty.
. . . Brave.
. . . Clean.
. . . Reverent.

All Scouting activities are guided by and aimed towards fostering these values. The Scout Oath and Scout Law are so basic to the Scouting experience that many men are able to recite them from memory decades after they attended their last Scout meeting.

9. I volunteer my time because I believe in the goals of the Scouting Movement. Boy Scouts' Mission Statement describes these goals:

> It is the mission of Boy Scouts to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetimes in achieving their full potential. The values we strive to instill are based on those found in the Scout Oath and Law.

The Boy Scouts Mission Statement is annexed hereto as Exhibit A.

10. It is these goals that led me to volunteer my time in Scouting. I believe Scouting offers the whole package of good, clean fun and a values-based education. Scouting does more than develop good campers, it develops good citizens.

<u>The Boy Scout Program</u>

11. The emphasis on values that distinguishes Boy Scouts from other recreation youth programs is apparent the first day a boy joins a Boy Scout Troop. He must sign an application which states that he has read the Boy Scout Oath and Law and promises to live up to them. The boy's parents certify in the application that they reviewed the application and "reflected upon the importance" of the obligations their son was about to undertake. The Scout Oath and Law are indicative of the route Scouting has taken to educate its members. The Oath and Law represent a list of positive attributes to aspire to, rather than a litany of admonitions against immoral conduct. This idea is a constant throughout the program. A Boy Scout application is annexed as Exhibit B.

12. To become a Boy Scout, a boy must meet several membership requirements. He must have completed the fifth grade, be between the ages of 11 and 18 years old, or have received the Arrow of Light Award and between 10 1/2 and

18 years old. He must also find a Scout Troop near his home; submit a completed Boy Scout application and health history signed by his parents; repeat the Pledge of Allegiance; demonstrate the Scout salute, sign, and handclasp; show how to tie the square knot; understand and agree to live by the Scout Oath, Law, motto, slogan, and the Outdoor Code; complete a child protection program with his parents; participate in a Scoutmaster Conference; and register and pay the national registration fees. These requirements are discussed in the Boy Scout Handbook, attached at Exhibit C, at pages 2 through 4.

13. When a boy joins Boy Scouts, he joins a Troop. The Troop is the basic Boy Scouting group and may include anywhere from 15 to 30 boys under the supervision of adult volunteer leaders -- the Scoutmaster and assistant Scoutmasters.

14. At the same time the boy joins a Troop he also joins a Patrol, a group of between three and eight boys. The boys in a Patrol participate together as a team. I try to place boys who were already friends in the same patrol. Each Patrol has its own name, its own meetings and its own leader. The boys choose their Patrol name and their Patrol leader, and design their Patrol flag and emblem. The boys in a Patrol come to be close friends. See Exhibit C at 535-41. In Troop 145, we have three Patrols.

15. The Patrol and Troop provide official and short-term leadership opportunities to develop leadership qualities in boys who are natural leaders as well as those who are not. Besides a Patrol Leader, other officers include a junior assistant Scoutmaster, a Senior Patrol Leader, an assistant Senior Patrol Leader, a Troop guide, a scribe, a quartermaster,

a bugler, a Troop historian and a librarian, who have specific duties and leadership responsibilities within the Troop and their Patrols. Regardless of how natural a leader a boy is, he will be given the opportunity to develop those skills in his Troop and Patrol participation.

16. Troops usually meet once every week or two weeks in a room provided by the sponsoring organization, such as a church basement or all-purpose room. Troop 145 meets in room set aside for the Troop in the Old First Methodist Church basement or in a larger room. The Troop's room reflects the character and history of Troop 145; the Scout Oath, the Scout Law, and the Outdoor Code, advancement charts and awards hang on the walls, Scouting paraphernalia is displayed and the Troop 145 and American flags occupy an area of prominence at the front of the room.

17. Troop 145 meets on the first and third Thursdays of the month from September through June and at least once each month in the summer months. The Patrols meet in the second and, fourth weeks of the month. The Troop goes on a camping trip once a month, generally for both Friday and Saturday nights. Once or twice a year the camping trip may be replaced by a day trip to some point of interest. While the Troop primarily camps on its own, at the Fall camporee, a winter weekend at Forestburg, and, in alternate years, the Spring camporee, the Troop camps with other Troops in the District. The Troop also participates in the District's Klondike Derby and, in alternate years, the Council's Scout show, at which the Troop mans a booth demonstrating Scout skills or Scout ideals. The Troop also performs service projects several times over the course of a year, such as an annual cleanup of a local cemetery and a borough lake.

18. In addition to weekend camping, the Troop spends a week each summer at the Council's summer camp, Forestburg Scout Reservation. Every other year, the Troop also has spent a week camping on its own in Maine.

19. Each boy and adult leader is expected to wear his uniform to the meeting. The uniform gives the boy a sense of identity with other Boy Scouts and with Boy Scout values, and reminds him that he is expected to live up to these values. Sometimes wearing the uniform is difficult for the boys because of negative peer pressure from neighborhood children, so the wearing of the uniform takes on a special commitment by the boys to their Scouting program. He can take pride in his uniform in that it displays his achievements in learning Scout skills and leadership qualities. In describing the role of the uniform in reinforcing the brotherhood of Scouts, the Scoutmaster Handbook observes that when a Scout

> wears his uniform it reminds a boy that he is a Scout and that people will expect him to act like one. The uniform is an outward sign that he believes in certain values and is willing to stand up for them.
>
> His uniform gives him a reason to take pride in the way he looks, and in the badges and awards he displays that testify to his achievements in skill and leadership.
>
> His uniform gives him a feeling of belonging, not only to his patrol and troop, but to a worldwide organization whose beliefs and program he shares with millions of others.

Scoutmaster Handbook at 76, annexed hereto as Exhibit D.

20. The Troop meetings are planned at a monthly meeting of the Patrol Leader's Council, consisting of the boy leaders of the Troop, which I and an assistant Scoutmaster attend as advisors.

21. Troop meetings usually begin with an opening ceremony which includes a recitation of the Scout Oath or the Scout Law and the Pledge of Allegiance. The ceremony helps to focus the boys on the meaning of the Oath and Law and to identify Troop meetings as something other than mere recreation.

22. The opening ceremony is followed by an instructional period, where the boys work on advancement requirements, plan a campout, or develop a service project. Scoutmaster's conferences and Boards of Review may be scheduled for Scouts who are ready to advance in rank.

23. The Troop meeting usually includes preparation for an upcoming camping trip or Troop activity. A single activity may require a whole month of weekly meetings to prepare. For example, a camping trip may require instruction on camping and pioneering skills and patrol coordination on food purchases and equipment checks.

24. The lessons of the instructional period are practiced in patrols. The patrols are then given assignments to perform a task using the skills just learned. When each patrol has completed the task, they come together and compare results.

25. The Troop meeting concludes with a closing ceremony, an announcement of upcoming events, presentation of merit badges, and brief inspirational remarks known as the Scoutmaster's Minute. The Scoutmaster's Minute often focuses on a point of the Oath or Law. The

closing ceremony includes a recitation of the Oath or Law, whichever was not used in the opening ceremony. The meeting ends with a recitation of the Scoutmaster's Benediction:

> May the Great Master of all Scouts be with us until we meet again.

See Exhibit D at 225-27; Woods Wisdom, annexed hereto as Exhibit E, Ch. V at 31.

26. Scouting uses ceremonies as an integral part of every Troop meeting because they signal to the boys that Scouting is more than fun and games or camping and knot tying. The ceremonies underscore the boys' development and achievement, and emphasize the importance of their Scouting experiences. In addition to the opening and closing ceremonies of the Troop meeting, a Troop may hold other ceremonies such as an investiture ceremony to introduce a boy into the Troop or an installation ceremony for a new Patrol Leader, signifying the importance of each new step forward a Scout takes. These ceremonies may include candles to represent the 12 points of the Scout Law or the three parts of the Scout Oath, and involve discussion of what it means to live by the Scout Oath and Scout Law.

27. Two or three times a year the Troop meeting is replaced by a ceremony called a Court of Honor. Troops hold Courts of Honor to recognize advancements in rank and earning of merit badges. A Court of Honor is a very special event in the development of a Scout. The Patrol Leaders' Council, the Scoutmaster and the assistant Scoutmasters provide an impressive ceremony for the Scouts and his family to recognize his advancement as a Scout. The ceremony

typically involves a flag ceremony, lighted candles or other symbols of Scouting ideals and includes a recitation of the Scout Oath and the Scout Law. The Scout and his family come away from the Court of Honor with a sense of accomplishment and a renewed understanding of what it takes to further develop as a good Scout. Troop 145 holds its September Court of Honor around a campfire at Sandy Hook, a particularly impressive setting.

28. Besides attending Troop and Patrol meetings, Scouts go camping. Scouting was designed to occur in the outdoors, giving boys an opportunity to meet the challenges of nature. Through the Outdoor Program, Scouts develop self-confidence, resourcefulness, and a sense of teamwork within the Troop and Patrol. These skills are developed in preparation of the campout at the weekly meeting and put into practice at the campsite. Scouts also become aware of the wonders of nature and their obligation to protect it under the Scout Oath and Law. For example, environmental conservation may be described as fulfilling one's duty to country by protecting its resources or as an example of being "thrifty" -- not wasting precious environmental resources. Again, Scouting takes a positive approach to educating Scouts in conservation, discussing the issue in terms of a responsibility to the Earth and each other rather than an admonition against littering. Exhibit E, Ch. I - Nature.

29. The use of camping to achieve the aims of Scouting is so fundamental to Scouting that an honor camping organization, the Order of the Arrow, was established to promote this aim. The Order of the Arrow Handbook describes the relationship between camping and the Scout Oath and Law:

> Camping is a method of Scouting, but camping is not Scouting's purpose. Scouting aims to build character, citizenship, and fitness . . . . Scouts who camp will sooner or later come face to face with practical applications of the Scout Oath and Law. Cheerfulness, trustworthiness, courtesy, helpfulness, and all the central virtues or Scouting are necessary in camp and society.

Order of the Arrow Handbook at 9, annexed hereto as Exhibit F.

30. The Order of the Arrow also relies heavily on ceremony to emphasize the importance of its goals. The hallmark of Order of the Arrow Ceremonies is its use of Native American lore and costume.

Advancement

31. The Boy Scouting advancement program is a course of study through which a boy progresses by learning to live up to Boy Scouts' values, learning new skills and achieving personal growth objectives, while receiving recognition as he does so by being awarded badges and other symbols of progress.

32. Boy Scouts advance to each of the six ranks, Tenderfoot, Second Class, First Class, Star, Life and Eagle, through a four step process of learning, testing, reviewing and recognition. For example, a boy starts the process by satisfying the requirements of a merit badge or other award needed to satisfy his next rank requirement. He then is tested by a merit badge counselor, who determines if he has satisfied the requirements. Upon satisfying all requirements for the rank, he is reviewed by a Board of Review, who confirms that

he successfully completed the rank requirements. If so, the boy is recognized for achieving his new rank in a Court of Honor ceremony.

33. The most basic badge is called Tenderfoot. After a Boy Scout has completed the requirements for the Tenderfoot badge, he must participate in a Scoutmaster Conference and appear before a Board of Review before receiving his badge. Exhibit D at 98, 102-03. This procedure will be followed for every subsequent rank advancement as well.

34. The Board of Review for all ranks except Eagle is composed of members of the Troop Committee, the group of parents and adult leaders who select the Scoutmaster, support the Troop's advancement and outdoor activities, handle the Troop budget and otherwise support the Troop. Exhibit D at 12. The Board of Review does not re-test the boy, but confirms that he has fulfilled the requirements, discusses important goals for the boy as a Scout and generally attempts to improve the Scout's ability to communicate with adults. The Board concludes by sending the boy out of the room, voting as to whether the boy has met the requirements for the rank, and then advising the boy of the vote. A unanimous vote is required. Exhibit C at 591; Exhibit D at 98.

35. A boy joining Boy Scouts at age 11 will ordinarily earn both his Tenderfoot and Second Class badges in his first year. At the Second Class Scoutmaster Conference, the Scoutmaster, among other things, asks the boy what showing Scout Spirit means. Exhibit D at 103. Showing Scout spirit means living up to Scouting's ideals as embodied in the Scout Oath and Scout Law. Exhibit C at 549-61.

36. There are more than one hundred merit badges a Scout can earn in every topic from Cooking, Camping, Wilderness Survival, Citizenship in the Community, Safety, Handicap Awareness, Oceanography, First Aid and Insect Study to Indian Lore. Earning the badges enriches a boys leisure time, improves his fitness, stimulates his personal growth, and teaches him about nature, science, hobbies, sports and citizenship. Exhibit C at 598-608.

37. In earning merit badges, a Scout learns by doing. For example, to earn the Citizenship in the Community merit badge, a boy must describe all facets of his community: history, culture, places of employment and municipal services, the structure of government and a community issue of concern, to name a few. In addition, the boy must visit a meeting held by a community or governmental office and report his findings. In this way, the boy learns about community affairs by participation. He then reports to a merit badge counselor, who reviews what he has learned. Thus, the boys' knowledge is reinforced by testing and he develops his communications skills through his interaction with the adult merit badge counselor.

38. Once a boy turns 18, he is no longer eligible to be a Boy Scout. A Scout must satisfy all rank requirements for Eagle before his 18th birthday or he is not entitled to the rank.

Scoutmasters and Assistant-Scoutmasters

39. A Scout Troop is operated by the boys under the guidance of an adult volunteer leader -- the Scoutmaster. The Scoutmaster is assisted by one or more adult volunteers called assistant Scoutmasters. Many times a Troop will draw Scoutmasters and assistant Scoutmasters from the parents of

Scouts. The principal functions of the Scoutmaster and assistant Scoutmasters are to help the boy leaders to organize and run the Troop, to act as counselors to the boys individually, and to provide good role models for the boys.

40. Boy Scouts has adopted as one of the eight basic "methods" of Boy Scouting the development of a close relationship between the Scout and an adult role model in the person of the Scoutmaster. Adult leaders set a positive example for the boys by living the Scout Oath and Scout Law themselves. Boy Scouts believes that providing a close personal relationship with an adult outside the home helps boys in the difficult process of maturing to adulthood. Exhibit D at 75. In many cases these relationships have played a critical role in molding the directions of the lives of Scouts.

41. As the leader of the Troop, the Scoutmaster's role is "helping boys grow into good men." Exhibit D at 21. The Scoutmaster is responsible for getting to know each Scout personally as soon as the boy joins the Troop, and for developing a close relationship with the boy through individual Scoutmaster conferences, informal talks, and the activities of the Scouting program itself. I speak to each boy who joins Troop 145 when he first arrives with his parents to discuss the boy's and the parents' obligation to the program and to give them an idea of what to expect from Scouting.

42. The assistant Scoutmasters assist the Scoutmaster and take over the Scoutmaster's duties when the Scoutmaster is absent. Since Scouting policy requires that at least two adults be present at every event, the active participation of assistant Scoutmasters is critical to a successful Troop. The role of the assistant Scoutmaster is particularly important ink

connection with overnight camping trips, when the Troop is responsible for its own food and shelter.

43. Because of the critical roles of the Scoutmaster: and assistant Scoutmaster, the selection of people to fill these roles is the most important function of the Troop Committee, the group of adult volunteers that serves as governing board of the Troop. The position of Scoutmaster or assistant Scoutmaster is limited to those who meet a host of formal and informal criteria. The Troop Committee seeking a Scoutmaster looks not only at the candidate's age, sex, religious beliefs, education, emotional health and moral values but also at the candidate's maturity, judgment, leadership qualities, ability to work with boys, ability to win the confidence of parents, ability and willingness to devote the necessary time, relevant knowledge and experience, and a number, of other factors. The Troop Committee Guidebook lists "high moral standards" as the most important characteristic to have in a Scoutmaster or assistant Scoutmaster. See Troop Committee Guidebook at 34-36, annexed hereto as Exhibit G.

44. Many times a Troop Committee finds a Scoutmaster by reaching out to a parent or other adult in the community with whom the Committee is acquainted. In seeking out leaders in this way, a Committee looks only to those with a reputation for meeting the Boy Scouts' standards for moral character and other necessary qualities.

45. A young man who had been a Boy Scout in good standing may be a poor choice to take on the responsibility of an assistant Scoutmaster. The Troop may seek to deal with this sort of situation by informally discouraging the submission of an application for the position. Indeed the

making of a formal application often is the last step in the process at the local level, not the first. The applicant will be asked by the Troop Committee to complete the application only after it has decided to accept him for the position.

46. As a Scout leader I am aware that Scouting views homosexual conduct as immoral, and as inconsistent with the requirement of the Scout Oath that a Scout be "morally straight" and the requirement of the Scout Law that a Scout be "clean," and that Scouting does not accept known or avowed homosexuals as adult volunteers.

47. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: November 4, 1993

/s/ Adam S. Bogner
Adam S. Bogner

Selected Exhibits to Certification
of Adam S. Bogner

BOY SCOUTS OF AMERICA MISSION STATEMENT

It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.

The values we strive to instill are based on those found in the Scout Oath and Law:

SCOUT OATH

On my honor I will do my best
To do my duty to God and my country and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong, mentally awake, and morally straight.

SCOUT LAW

A Scout is:

Trustworthy
Loyal
Helpful
Friendly
Courteous
Kind
Obedient
Cheerful
Thrifty
Brave
Clean
Reverent

[LOGO OMITTED]

BOY SCOUT HANDBOOK
(excerpts)

1992 Printing

* * * *

BECOMING A SCOUT

In order to become a Boy Scout, you must:

* Be a boy who has completed the fifth grade, or who has earned the Arrow of Light Award, or be 11 years of age but not yet 18.
* Find a Scout troop near your home.
* Complete the Boy Scout joining requirements.

Your Age

You can become a Boy Scout right away if you are the right age. If you are not yet old enough, you can join Cub Scouting, the branch of Scouting for younger boys. Cub Scouts have a great time with other guys their own age. As you enter the fourth grade, you may move into your Cub Scout pack's Webelos den. There you will learn all you must know to become a Boy Scout. You don't need to have been a Cub Scout or Webelos Scout to become a Boy Scout. Your leaders will teach you the skills you need to be a successful Scout.

[PICTURES OMITTED]

Finding a Troop

If you don't know where a Scout troop meets, ask Scouts in your neighborhood or school. They will invite you to their next meeting. You can also call the Boy Scouts of America in

your area. If their number isn't listed in your phone book, write to the national office at the following address:

Boy Scouts of America
1325 West Walnut Hill Lane
P.O. Box 152079
Irving, TX 75015-2079

The national office will put you in touch with a nearby troop. Even if you live where there is no troop, you can take part in the Boy Scout program by becoming a Lone Scout. There are people at the national office who can tell you how this works.

Joining Requirements

At your first troop meeting, your Scoutmaster will explain the following joining requirements of the Boy Scouts of America:

* Submit a completed Boy Scout application and health history signed by your parent or guardian.
* Repeat the Pledge of Allegiance (page 468).
* Demonstrate the Scout salute, sign, and handclasp (pages 564-565).
* Show how to tie the square knot (also known as the joining knot) (pages 132-133, 141).
* Understand and agree to live by the Scout Oath (pages 549-551), the Scout Law (pages 553-561), the Scout motto (page 562), the Scout slogan (page 563), and the Outdoor Code (pages 55-59).
* Describe the Scout badge (page 565).

* With your parent or guardian, complete the exercises in the pamphlet *How to Protect Your Children from Child Abuse and Drug Abuse*.
* Participate in a Scoutmaster conference (pages 589-590).

[PICTURE OMITTED]

When you have completed these, welcome! You are a Scout! Your Scoutmaster will give you a certificate of membership, and you can proudly wear the Boy Scout badge and uniform. You may also subscribe to *Boys' Life*, the monthly magazine that is full of exciting articles for and about Scouts.
Became a Boy Scout on _____ 19 _____

_____
Scoutmaster's signature

SCOUT OATH

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

[PICTURES OMITTED]

SCOUT LAW

A Scout is TRUSTWORTHY. *A Scout tells the truth. He keeps his promises. Honesty is a part of his code of conduct. People can always depend on him.*

A Scout is LOYAL. *A Scout is true to his family, friends, Scout leaders, school, nation, and world community.*

A Scout is HELPFUL. *A Scout is concerned about other people. He willingly volunteers to help others without expecting payment or reward.*

A Scout is FRIENDLY. *A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs that are different from his own.*

A Scout is COURTEOUS. *A Scout is polite to everyone regardless of age or position. He knows that good manners make it easier for people to get along together.*

A Scout is KIND. *A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not harm or kill anything without reason.*

A Scout is OBEDIENT. *A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.*

A Scout is CHEERFUL. *A Scout looks for the bright side of life. He cheerfully does tasks that come his way. He tries to make others happy.*

[PICTURE OMITTED]

A Scout is THRIFTY. *A Scout works to pay his way and to help others. He saves for the future. He protects and conserves natural resources. He carefully uses time and property.*

A Scout is BRAVE. *A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at him or threaten him.*

A Scout is CLEAN. *A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean.*

A Scout is REVERENT. *A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.*

THE SCOUT MOTTO

The Scout motto is BE PREPARED. A Scout prepares for whatever comes his way by learning all he can. He keeps himself strong, healthy, and ready to meet the challenges of life.

THE SCOUT SLOGAN

The Scout slogan is DO A GOOD TURN DAILY. Good Turns are helpful acts of kindness done quietly, without boasting, and without expecting reward or pay. Doing at least one Good Turn every day is a normal part of a Scout's life.

* * * *

CHAPTER 19

[PICTURES OMITTED]

DEMOCRACY

Do you like to get together with your friends? Do you read all sorts of books and newspapers? Do you live in a home no one can enter unless they are invited? Those are your rights. You can also believe in any religion you want. You can write and say what you wish without fear of arrest. You can travel freely.

The rights you have are the same rights shared by everyone in our nation. They are freedoms that protect each person's opportunity to have a happy, productive, and safe life.

Americans have had these rights for more than 200 years. These rights are so much a part of everyday life in our nation that you may take them for granted. You might think that people have always enjoyed such freedoms, but they have not. Rarely in human history have the rights of every person been so respected.

Our nation sprang forth out of a desire for freedom. The colonists who settled the eastern coast of North America were ruled by the British government. It was a government that limited some of the freedoms the colonists believed they should have. For example, the Americans had to let British soldiers stay in their homes. They had to obey British laws and pay British taxes even though they had no legal way to

make changes when they felt those laws and taxes were unfair.

The colonists decided they would be better off if they formed their own nation and governed themselves. In 1776, they declared their independence from Great Britain. The 13 colonies became the first 13 states, and the United States of America was born.

The British did not want such valuable colonies to slip out of their control. They sent armies to put down the rebellion. The Revolutionary War dragged on for 8 bitter years. Many American and British lives were lost before a treaty was signed in 1783. It signaled the end of the war and Great Britain's recognition of the United States as an independent nation.

Representatives of the 13 states met to write the Constitution — the blueprint for building the government of the United States. The form of government outlined in the Constitution is *democracy*. *Demos* means "the people"; *cracy* means "power." In a democracy, every citizen has an equal say in the decisions of the government.

Even in the 1700s, there were too many people to meet together every time a law had to be made. Such "absolute" democracy works in a small group such as your Scout patrol, but not in a nation where people are spread across many states.

The Constitution solves that problem by making our democracy the "representative" kind. All adult citizens can vote for officials who will represent them in the government. A country ruled in this way is called a "republic."

[PICTURE OMITTED]

The Constitution also spells out the freedoms shared by every American. Some of the most important are explained in the first 10 amendments to the Constitution — the Bill of Rights.

The writers of the Constitution could not have imagined the kind of world that would exist 200 years in the future. But they were wise enough to design a government that could meet the needs of a growing, changing nation.

During the last two centuries, the strength of the Constitution has been tested many times. One of the most difficult issues was the question of slavery. When the Constitution was written, some people believed slaves did not have the same rights as free Americans. Many others thought slavery was wrong and that the Constitution should protect all people regardless of their race.

The argument became so bitter that in 1861 the states supporting slavery tried to break away and form their own country. Citizens of the other states fought against them in order to hold the nation together.

The nation was strong enough to withstand the Civil War, and the states were still united when the fighting ended. Constitutional liberties had been extended to all people. But those bloody years of war will always be a dark reminder that our freedoms have a high price. Throughout our history, hundreds of thousands of Americans have paid that price by sacrificing their lives to defend the Constitution and our nation.

There are times when America must have good soldiers. Our country also needs good teachers, engineers, scientists, writers, bus drivers, farmers, and merchants. America relies on capable coaches, pilots, computer programmers, and park

and forest rangers. It depends on people willing to protect the environment, care for the sick, shelter the homeless, and defend those in trouble with the law.

A strong democracy also must have informed citizens. Voters must understand the candidates and the issues in order to make wise choices. They must take the time to be sure their representatives in the government are acting in a responsible, ethical manner.

Finally, our nation needs young people like you who are doing something good with their lives. You are the future of the country, but you can contribute to the good of the nation right now. When you do your best in school and in Scouting, keep yourself fit, and work hard for the good of others in your family and community, you are strengthening the fabric of America. Make the most of yourself and you will become the kind of citizen our nation must have. That is what it means to be an American. That is the high goal the Constitution sets for us all.

THE AMERICAN'S CREED

In the words of William Tyler Page, *The American's Creed* sums up the ideals for which our nation stands. It points out the rights of all Americans and our duty to keep America great.

I believe in the United States of America . . .

Covering more than 3½ million square miles of land, the United States of America is a nation rich in natural resources. We can also count as a resource the millions of citizens who call America home. Each of us can contribute in our own

way to making life in our country good for ourselves and everyone else.

. . . as a government of the people, by the people, for the people; . . .

Our government is made up *of* all of us. Decisions are made *by* us through those we elect to office. The rights of the Constitution are *for* each and every one of us. The Declaration of Independence states that "all men are created equal." It doesn't matter where we live, how much money we have, the color of our skin, whether we are male or female, or the nature of our beliefs; we are all equal under the law.

. . . whose just powers are derived from the consent of the governed; a democracy in a Republic; . . .

It is our duty to vote in elections to select those who will represent our views in the government. To vote wisely, we must spend time learning about the candidates and the issues on which they will make decisions.

. . . a sovereign Nation of many sovereign States, . . .

Our national government headquarters is in the city of Washington in the District of Columbia. Congress makes federal laws, the Supreme Court interprets them, and the executive branch under the leadership of the president carries them out. In addition, 50 separate state governments enact laws to suit conditions in their sovereign states. "Sovereign" means each state controls its own affairs.

. . . a perfect Union, one and inseparable; . . .

Maintaining a union of 50 states has never been easy. There are still many problems that face us. But if we work

toward solutions and keep as a goal the shining vision of a perfect nation, we can continue to make our country the best place possible for all of us.

. . . established upon those principles of freedom, equality, justice, and humanity for which American patriots sacrificed their lives and fortunes.

Freedom. Equality. Justice. Humanity. We want every person on Earth to share those rights. To that end, many Americans have shared their wealth, their skills, their wisdom, and some have even sacrificed their lives. Their willingness to die for basic human rights should make us all more determined to live for those high ideals.

I therefore believe it is my duty to my country to love it; . . .

America is your country. Its soil feeds you. Its laws protect you and give you "the right to life, liberty, and the pursuit of happiness." Show your love for America with actions that make it a better country for you and for all citizens.

. . . to support its Constitution; . . .

The United States Constitution protects your rights as an American. By supporting the Constitution, you help preserve these rights. Support all the same rights for others, even when you do not agree with their actions.

. . . to obey its laws; . . .

Written by our representatives, the laws of our country, states, and communities govern much of what we do every day. By obeying laws, you strengthen them and maintain the protection they afford. By learning about laws and seeking to

improve them through Constitutional processes, you help keep your government responsive to the needs of its citizens.

. . . to respect its flag; . . .

The flag is the symbol of our country. When we show it our respect, we are showing our respect and love for all that is America — our land, our people, our way of life.

. . . and to defend it against all enemies.

America relies on its citizens to keep it safe. The men and women of the armed forces stand ready to defend the nation against threats from beyond our borders. But ignorance, prejudice, and apathy are enemies of our country, too. Do your part to defeat those threats by working hard at school. Defend the rights of others. Make your neighborhood, state, and nation good places in which to live.

[PICTURE OMITTED]

KNOW OUR COUNTRY'S GREATS

American history is full of dignity and heroism. Most of America's greats — pioneers, parents, Scoutmasters, teachers, and millions of others — make their contributions in quiet ways.

Some individuals have had the opportunity to perform deeds that changed our country and the world. Some did it by their statesmanship, others by their educational skills. Some with their books, others by their inventions. Some with speeches, others by sacrificing their lives.

Many of those we remember found fame with the support of many whose names are long forgotten. Great coaches win

only with the help of fine players. Generals gain fame only if they are leading dedicated soldiers.

You will find some of America's best-known greats pictured on pages 462-463. They represent not just the achievements of individual citizens, but also how the lives of all Americans are important to the United States of America.

Susan Brownell Anthony
Daniel Boone
Thomas Alva Edison
Dwight David Eisenhower
John Muir
Martin Luther King, Jr.
Sacajawea
Walter Reed
Eleanor Roosevelt
Harriet Tubman
Jim Thorpe
Alexander Graham Bell
Mark Twain
Albert Einstein
Benjamin Franklin
Matthew Henson
Robert E. Lee
Chief Plenty Coups
Henry David Thoreau
Padre Junipero Serra
Whitney Young, Jr.
I. M. Pei

* * * *

KNOW THE PLEDGE OF ALLEGIANCE

The Pledge of Allegiance to the Flag of the United States of America

I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

The Meaning of the Pledge of Allegiance

When you pledge allegiance to your flag, you promise loyalty and devotion to your nation. Each word has a deep meaning.

I pledge allegiance . . . I promise to be true

. . . *to the flag* . . . to the symbol of our country

. . . *of the United States of America* . . . a country made up of 50 states and several territories, each with certain rights of its own

. . . *and to the Republic* . . . a country where the people elect representatives from among themselves to make laws for them

. . . *for which it stands*, . . . the flag represents the country

. . . *one Nation under God*, . . . a country whose people are free to believe in God

. . . *indivisible*, . . . the country cannot be split into parts

. . . *with liberty and justice* . . . with freedom and fairness

. . . *for all*. For every person in the country.

[PICTURES OMITTED]

BILL OF RIGHTS

Congress of the United States, begun and held at the City of New York, on Wednesday, the fourth of March, one thousand seven hundred and eighty nine.

The Conventions of a number of the States, having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution:

Resolved, by the SENATE and HOUSE OF REPRESENTATIVES of the UNITED STATES OF AMERICA in Congress assembled, two thirds of both Houses concurring. That the following

Articles be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States; all, or any of which articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution, viz.

Articles in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the Original Constitution.

ARTICLE THE FIRST . . . After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which, the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, not more than one Representative for every fifty thousand persons. [Not Ratified]

ARTICLE THE SECOND . . . No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until and election of Representatives shall have intervened. [Not Ratified]

First Amendment

ARTICLE THE THIRD . . . Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the

press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Second Amendment

ARTICLE THE FOURTH . . . A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Third Amendment

ARTICLE THE FIFTH . . . No Soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Fourth Amendment

ARTICLE THE SIXTH . . . The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

ARTICLE THE SEVENTH . . . No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or Naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor

shall private property be taken for public use without just compensation.

Sixth Amendment

ARTICLE THE EIGHTH . . . In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Seventh Amendment

ARTICLE THE NINTH . . . In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact, tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Eighth Amendment

ARTICLE THE TENTH . . . Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Ninth Amendment

ARTICLE THE ELEVENTH . . . the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment

ARTICLE THE TWELFTH . . . The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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Special populations. Each of us must overcome challenges in our lives. Perhaps you or another Scout in your troop gets around in a wheelchair or with crutches. A few of your neighbors may experience impaired hearing or a loss of sight. Some people must adjust to developmental disabilities, as well.

We all wish we could have perfect physical health and mental awareness. However, illnesses and accidents can leave people of any age with impairments and disabilities. Someone in your family may have faced physical or mental limitations since birth.

While they may have special ways of overcoming certain conditions, people with disabilities are members of communities just like anyone else. They have much to offer. Be sensitive to their needs, but then look beyond their limitations and get to know the people they really are.

Ethnic groups. Everyone has an ethnic background. For native Americans, that means being part of the tribes that lived in North America before European explorers arrived. The ethnic origins of everyone else lie outside the borders of the United States. Your parents, grandparents, or other ancestors may have come from Africa, Asia, Europe, South America, or another part of the globe. Perhaps your family arrived in America hundreds of years ago. Maybe you've lived in the United States only a few months.

Americans try hard to make our nation a place where people of all backgrounds and races can live and succeed together. At the same time, we take great pride in our ethnic roots. Ethnic songs, clothing, languages, foods, and religious beliefs help give us each a special connection with our past. Ethnic festivals and holidays let us celebrate our own heritage and share in those of our neighbors.

Watch for posters in store windows telling of local celebrations and festivals. Read the newspapers for announcements of special events. You can have a good time learning about other cultures. By accepting the differences among us, you will realize the wonderful variety and strength that different ethnic groups can bring to a community.

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CHAPTER 21

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FAMILY

FAMILY. That's one of the best words we know. It means belonging, support, and love. For many Scouts, a family is made up of parents, brothers, and sisters all under the same roof. There may even be grandparents sharing the home, and cousins, aunts, and uncles living nearby.

But there are other kinds of families, too. Perhaps you live in a family with a single parent, or share time with a father and mother who live in different places. Grandparents and other relatives may live far away — even in other countries. Maybe your family has no parents at all, but

instead is made up of relatives or guardians who want the best for you.

Two parents, one, or none — what makes a family is not the number of people in it or whether they are related. It is the way they care for each other and share their lives with each other.

The family is where learning begins. How did you learn to speak? By imitating words you heard in your family. Much of what you know and who you are comes to you from long ago, passed down through the generations by your family. The language you speak, foods you eat, holidays you celebrate, and values you hold are all reflections of the people with whom you live.

Our families provide us with shelter, clothing, and food. They should accept us for what we are and help us become the best people we can. When we are with our families, we want to feel safe. We want to belong.

No family is perfect. There may be times when you feel that others in your family don't understand you. You may disagree with some of their ways of doing things. As you grow older, you want to develop more independence. All of the changes you are going through can cause strain at home. But you can make the most of family life. That takes work, especially on your part. It begins by learning how to listen.

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LISTENING

We are so eager to say what we think that we don't always listen carefully. For instance, your little sister may just be learning how to kick a soccer ball. When you come home

from school, she can hardly wait to tell you about it. At first you think that's boring — kicking a ball is no big deal for you. But then you stop and listen, because you realize she is seeking your support and wants to share her excitement with you. So you go outside with her and kick the ball back and forth. It's fun, and you can give her a few pointers on playing the game. By taking the time to listen, you are building her confidence and strengthening the bonds in the family.

Listening is just as important when someone is angry. Perhaps your father is angry with you because he thinks your room is a mess. Instead of getting mad yourself, wait until both of you are calm, and then look for a solution. Is there really a problem with your room? Then maybe you do need to talk about ways you can do better. On the other hand, he may have been tired or upset about something else and snapped at you. That can happen to anyone. By listening rather than returning his anger, you are helping to improve the situation.

THE FAMILY COUNCIL

Many families use a family council so that everyone can share in making decisions. They may talk around the dinner table during meals, or set a special time each week when they can sit down together. A family council can even be a single parent and an only child talking with each other.

The council is a good time to discuss family rules. For instance, your parent or guardian may expect you to be home at a certain time. If you will be late, how will you contact them? What will happen if you break their trust by not calling?

By having rules that set clear, reasonable limits, your family gives you the freedom to explore, but not to go too far.

When you respect the rules, you prove that you are a reliable member of the family. Your parents may respond to your maturity by having greater trust in you.

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A family council is an opportunity for you to share problems of your own. You might be having difficulty with a subject in school, or you don't understand why your friends are acting a certain way. The adults in your family and your older brothers and sisters have a lot of experience with life. It's easy to share the good times with them. They may be even more helpful and supportive when times are not so good.

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TIME TOGETHER

The demands of school, homework, friends, Scouting, and religious activities may fill most of your days and evenings. Older family members often have jobs and projects of their own. Even though you all live in the same house, you and others in your family may be rushing past one another with hardly a word.

Make a real effort to spend time together. On a weekend while helping with family chores, you can work alongside your parents and talk. Share with them what you are doing in school and in Scouting. Let them enjoy your excitement about life.

Go on walks as a family. Try bicycling together, or having picnics. Go together to visit exhibits, libraries, and museums. In fact, almost everything is better if you share it with the people you love.

Your Family and Scouting

When you join the Boy Scouts, your whole family becomes part of the Scouting family. Your relatives may attend special Scout gatherings, and they may even lend a hand in running the troop. Scout meetings, hikes, and campouts take you away from your house, but you bring home what you learn in your patrol and troop. You can share your new knowledge and enthusiasm with others in your family. Everyone wants you to have all the fun that Scouting has to offer. They want to see you reach the Scouting goals you set for yourself. By helping you, each of them receives some of the excitement and satisfaction of Scouting.

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CHAPTER 22

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PERSONAL DEVELOPMENT

MANY Scouts enjoy music. Perhaps you are able to play a trumpet, strum a guitar, or sing a song. You may like sports, too. Can you kick a soccer ball and run a good race? When you throw a baseball, is it right on target?

Every young person has many talents. You may be able to draw faces, airplanes, buildings, and cars. Math and science may seem easy to you. Maybe you have a knack for telling a funny story. At troop meetings, Scouts may respect you as a leader or as a good listener. Perhaps you are very gentle with animals and like to care for them.

You are a collection of wonderful abilities and ideas. Your skills and interests are your possibilities. They are hints of what you can become.

In addition to the gifts you have today, you also own the past. As a member of the human family, the history of all people is your history as well. The centuries of discovery, invention, and learning all belong to you. You can draw on that knowledge and wisdom any time you want it.

And the future is yours, too. Your curiosity and your ideas will make a difference. The world needs what you have to offer. It needs you to make the most of your skills. To do that, you must be open to the joy of learning.

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Choosing Friends

Part of good judgment is choosing friends. You spend a lot of time with the people you enjoy. You learn from them, have fun with them, and want them to like you.

Hang on to friends who have attitudes and values you admire. Seek out those with healthy interests. Share adventures with people who want to make the most of themselves.

However, don't limit your opportunity to meet someone new just because he or she is not exactly like your other friends. Differences of race, culture, and language can be the basis of many close bonds. Some people are shy, so it may be up to you to open the door to friendship. Visit with them at school. Invite them to join in with Scouting events, ball

games, and neighborhood activities. You will be surprised how eagerly others respond to your offers of friendship.

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Peer Pressure

The language you and your friends use is a clue to how you think about the world. Swear words, dirty jokes, and crude talk often are sued as weapons to hurt other people. Clean language is a mark of intelligence, kindness, and respect for other people.

Once in a while, you may discover that some of the people you know are using tobacco, alcohol, or illegal drugs. They may pressure you to use them, too. However, you know that real friends would not want you to do things that could harm your health or cloud your mind. If smoking, drinking, or drugs are a part of your circle of friends, you may need to find new friends who are more interested in making the most of their lives. Don't worry, they are out there. Look around and you will find them.

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SEXUAL RESPONSIBILITY

As you grow into manhood, your friendships will change. People around you are also changing. Girls you know are becoming young women. They are growing both physically and emotionally. Your relationships with them will become closer and more meaningful to you and to them.

You are maturing sexually, too. As a young man, you are capable of becoming a father. That is a profound responsibility with powerful consequences in your life and the

lives of others. It is a responsibility that requires your very best judgment.

Sex is not the most important or most grown-up part of a relationship. Having sex is never a test of maturity. True manliness comes from accepting the responsibility for your actions toward others and yourself in the following ways:

* *Your responsibility to women.* Whenever you like someone, you want the best for that person. A healthy relationship is supportive and equal. You owe it to the women in your life to keep their best interests in mind. You can have a terrific time together enjoying life and growing emotionally. However, the difficulties created by a pregnancy can be enormous. Don't burden yourself and someone you care for with a child neither of you is ready to bear.
* *Your responsibility to children.* When you are fully grown and have become secure in yourself and in your relationship with another person, the two of you may decide to marry and have a child. That is a wonderful choice full of challenges and rewards. By waiting until you are thoroughly prepared to be parents, you can give your own child a close, loving family in which to grow.
* *Your responsibility to your beliefs.* For the followers of most religions, sex should take place only between married couples. To do otherwise may cause feelings of guilt and loss. Abstinence until marriage is a very wise course of action.
* *Your responsibility to yourself.* An understanding of wholesome sexual behavior can bring you lifelong happiness. Irresponsibility or ignorance, however, can cause a lifetime of regret. AIDS and venereal diseases

spread by sexual contact may undermine your health and that of others. Having a baby before you are ready may drastically limit your future chances for education, occupations, and travel.

You owe it to yourself to enter adulthood without burdens. You owe it to yourself to enrich your life by learning what is right. Your religious leaders can give you moral guidance. Your parents or guardian or a sex education teacher should give you the facts about sex that you must know.

Learn by asking, remember? If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster. They have experienced much of life, and they are interested in what is best for you. Let them know your concerns.

CHILD ABUSE

Most relationships with others can be warm and open. That is because they are built on trust. A pat on the back, a hug of encouragement, or a firm handshake are ways we can show someone we care about them.

However, it is a sad fact that some adults use their size and power over children to abuse them. You need to know about child abuse so that you will understand what to do if you are ever threatened. You may also be able to help stop the abuse of a friend.

The following are the four kinds of child abuse you may encounter:

Neglect. Parents or guardians abuse by neglect if they willingly choose not to provide their children with the food, clothing, shelter, and care needed for a healthy life. Neglect is often caused by adults who are dependent on alcohol or drugs.

Emotional abuse. Children are emotionally abused when they are repeatedly told that they are no good or that they will never amount to anything. Lasting harm is done if children begin to believe those falsehoods.

Physical abuse. Physical abuse occurs when excessive force is used to punish a child. It may result in bruises, burns, cuts, broken bones, and sometimes death.

Sexual abuse. Any sexual activity between an adult and a child is sexual abuse. So is forced sexual activity between an older or larger youth and a smaller or weaker child. Many people think sexual abuse happens only to girls, but they are wrong. Boys may also be victims of molesters.

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What You Can Do

If you think you have been a victim of child abuse, you may want to talk with an adult you feel you can trust. Also, every state has a child abuse hotline you can call for help.

Be aware of the ways you treat people younger or smaller than yourself. Every child deserves respect. Serve as a good role model whenever you are in position of responsibility — for example, as a babysitter, a patrol leader, or someday as a parent. Sometimes it may seem easy to respond to the poor behavior of others by name-calling or physical force, but you should always use other methods to resolve conflicts. Talk with your Scoutmaster and parents about better ways to lead.

Protecting Yourself from Sexual Abuse

Most sexual abuse can be prevented if young people know and follow these three R's:

- Recognize
- Resist
- Report

Recognize. Recognizing a situation that may become sexual abuse can help you get away before you are in serious danger. An adult attempting sexual abuse may begin touching you in ways that are confusing. He or she may try to touch your groin area and pretend it was an accident. You may be asked to pose for photographs in your underwear or swimming suit, and then in no clothing at all.

Some adults or older youths may try to use your normal curiosity about sex as an opportunity to attempt sexual abuse. Sex is a normal bodily function that you need to understand. If anyone makes it seem dirty or secretive, you should be very cautious.

People who sexually abuse young people are called child molesters. A child molester may be anyone. Most often, the molester is known by his or her victim. The molester may be a member of the family, a schoolteacher, religious leader, or youth group leader. By knowing how a child molester operates, you can recognize what is happening regardless of who that person is.

Resist. Molesters look for victims who do not know enough to resist the abuse. You have the right to control your body. Anytime a person does something to your body that makes you feel bad or you know is wrong, you have the right to stop them even if you must be rude. You should be ready to run, scream, or make a scene in public in order to protect yourself. When faced with resistance, most molesters will stop.

Report. Anytime you feel that a person has tried to molest you or someone you know, you must report it. Talk to a trusted adult or call a child abuse hotline. Child abuse is an adult-size problem. By talking about it with adults you respect, you can let them solve it.

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BE PREPARED FOR LIFE

You may have grandparents who seem very young. With bright eyes and a quick step, they enjoy outdoor activities, hard work and a good life. You may also know younger people, even people your own age, who seem tired, bored, and just plain old. All they want to do is sit in front of the television and watch other people having fun.

Decide right now to put a Keep Off! sign on the rocking chair. Life is bursting with opportunities. The wise physical fitness habits you are developing now will keep your body in good shape through the decades to come. Just as important are habits to keep your mind alert, fresh, and healthy. A lifetime of reading, learning, and trying out new ideas does for your mind what exercise and sports do for your body. It's up to you to make the most of every moment of every day. You can jump at life, celebrate it, and live it well. You have one chance at this lifetime — one precious, golden opportunity. Savor every moment. Do nothing that is not of value. Live every second to the fullest.

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CHAPTER 24

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THE SPIRIT OF SCOUTING

It is easy to join a Scout troop, but it is not so easy to live up to the ideals of Scouting. For that, you need courage and determination.

In some ways, Scouting is like a game with rules you must follow to be a member of the team. The rules of Scouting are found in the Scout Oath, Scout Law, Scout motto, and Scout slogan. It is by following these rules that you can become a true Scout.

[LOGO OMITTED]

Scout Oath

On my honor I will do my best
To do my duty to God and my country
and to obey the Scout Law;
To help other people at all times;
To keep myself physically strong,
mentally awake, and morally straight.

THE MEANING OF THE SCOUT OATH

Before you pledge yourself to any oath or promise, you must know what it means. The paragraphs that follow will help you understand the meaning of the Scout Oath.

On my honor . . .

By giving your word, you are promising to make every effort to live by the high ideals of the Scout Oath. Your success is a measure of your honor. As a Scout, you must hold your honor sacred.

. . . I will do my best . . .

You have many talents, skills, and interests. Do your best with them, and use them for good purposes. Don't be satisfied with less than your best effort even when less is required of you. Measure your achievements against your own high standards, not against the performance of others. As a Scout and throughout your life, you will have opportunities to learn and to help many people. You will also be faced with challenges that may severely test you. Use your abilities to do your very best. That is what Scouting requires.

. . . To do my duty to God . . .

Your family and religious leaders teach you to know and love God and the ways in which God can be served. As a Scout, you do your duty to God by following the wisdom of those teachings in your daily life, and by respecting the rights of others to have their own religious beliefs.

. . . and my country . . .

As you study our country's history, you learn about the men and women who toiled to make America great. Most contributed in quiet ways. Others sacrificed their lives for our country. All of them did their part to build the nation we have today. Help keep the United States strong by obeying its laws. Learn about our system of government and your role as a citizen and future voter. Do all you can to help your family

and neighbors live happy, productive lives. The land itself is an important part of our national heritage. Work for the conservation of our natural resources. Teach others respect for the land. Your efforts really will make a difference.

. . . and to obey the Scout Law; . . .

The twelve points of the Scout Law are the rules of Scouting. They are also rules you can apply to your whole life. The Scout Law sets forth ideals to live up to. By using the Scout Law as a guide, you will know you are always doing your best. Others will respect you for the way you live. Most importantly, you will respect yourself.

. . . To help other people at all times; . . .

There are many people who need you. Your young shoulders can help them carry their burdens. A cheerful smile and a helpful hand will make life easier for many who need assistance. By helping whenever aid is needed and by doing a Good Turn daily, you prove yourself a Scout. You are doing your part to make this a better world.

. . . To keep myself physically strong, . . .

Take care of your body. Protect it and develop it so that it will serve you well for an entire lifetime. That means eating nutritious foods and being active to build strength and endurance. It also means avoiding drugs, alcohol, tobacco, and any other practices that can destroy your health.

. . . mentally awake, . . .

Develop your mind. Strive to increase your knowledge and make the greatest use of your abilities. Be curious about the world around you. Learn all you can both in class and

beyond school. With an open attitude and the willingness to ask questions, you will get the most out of your life.

. . . and morally straight.

To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

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SCOUT LAW

The Scout Law is the foundation upon which the entire Scouting movement is built. The points of the Scout Law are a guide by which every Scout tries to live.

The Scout Law is a statement of facts:

"A Scout is trustworthy ... loyal ... helpful ... friendly ... courteous ... kind ... obedient ... cheerful ... thrifty ... brave ... clean ... reverent."

By doing all you can to live up to the Scout Law, you are a Scout. If you should *willfully* break the Scout Law, you violate the spirit of Scouting.

The ideals of the Scout Law are very high. Strive to live by them, and you will excel on your own and as a part of your Scout troop, community, and nation.

The Meaning of the Points of the Scout Law

Each point of the Scout Law is expressed in a single word rich with meaning. You should understand that meaning so well that you can explain it in your own words. What follows will help you reach that understanding.

A Scout is TRUSTWORTHY. *A Scout tells the truth. He keeps his promises. Honesty is a part of his code of conduct. People can always depend on him.*

Your parents, teachers, and friends know that as a Scout you tell the truth and keep your promises. When your parents or guardian ask you to do something, they know you will do it. When your troop has a meeting, your leaders know you will be there. When you have said that you are going on a patrol campout, the other Scouts know you will be on time. People can depend upon you to do your best in every situation.

There will be times when your judgment fails and you make mistakes. Everyone does. Your baseball may smash a window. You may misread your map and come home late from a hike. If you quickly admit what you have done and make good on any damage, others will soon forget the incident. By learning from those mistakes, you can do better in the future.

A reputation for being trustworthy is important to you now and in years to come. It can help you get and keep jobs. Others will depend on your word. You prove you can be responsible with money. Trustworthiness will help you make and maintain good friendships.

A Scout is LOYAL. *A Scout is true to his family, friends, Scout leaders, school, nation, and world community.*

Loyalty starts at home. You show your loyalty by being the kind of person your family can trust and respect. Let them know through your actions that you appreciate what they do for you.

A chain is only as strong as its weakest link. The success of your patrol and your troop depends on the loyalty of each Scout in it — in the way you support your leaders and pitch in with the team, and in the way you act as a Scout.

Express your loyalty to the United States by respecting our flag and our government, and by participating in the democratic process. Another part of loyalty is seeing where things can be made better and then working toward that ideal. Our form of government allows each of us to voice our concerns and work within the system to make changes. Give real meaning to your loyalty by helping make our communities, states, and nation a reflection of the best America can be.

A Scout is HELPFUL. *A Scout is concerned about other people. He willingly volunteers to help others without expecting payment or reward.*

In pledging yourself to the Scout Oath, you promised "to help other people at all times." The Scout motto asks you to Be Prepared. The Scout slogan reminds you to Do a Good Turn Daily. These three ideals work together: you *promise* to help, you can help because you have learned how, and you *do* help because you care about all people.

As a Scout, prepare yourself to be helpful, then look for ways to help. Learn first aid, and you are ready to assist someone who is hurt. Know about your town, and you can help a stranger find the way.

A Scout's willingness to help is evidence of his attitude toward life. He wants the best for everyone, and acts to make that happen. A Scout may work for pay, but he does not expect to receive money for being helpful. A Good Turn done in the hope of getting a tip is not a Good Turn at all.

A Scout is FRIENDLY. *A Scout is a friend to all. He is a brother to other Scouts and all the people of the world. He seeks to understand others. He respects those with ideas and customs that are different from his own.*

Friendship is like a mirror. When you have a smile on your face as you greet someone, you are more likely to receive a smile in return. If you are willing to be a good friend, you will find that others enjoy being with you.

The moment you become a Scout, you join a brotherhood of friends that circles the world. Those in it are of different countries and colors and creeds, but they are all brother Scouts. They live up to Scout Oaths and Laws just as you do.

Making a friend is fairly easy if you are friendly yourself. Keeping a friend is more difficult. Every person is an individual with his or her own ideas and ways of doing things. To be a real friend you must accept other people as they are, show interest in them, and respect their differences.

Accept who *you* are, too. You don't have to be just like everyone else. Real friends will respect the beliefs, interests, and skills that make you unique.

A Scout is COURTEOUS. *A Scout is polite to everyone regardless of age or position. He knows that good manners make it easier for people to get along together.*

This is another way of saying, "A Scout is a gentleman." Good manners show that you respect the feelings and needs

of others. Open a door for someone. Offer your seat on a bus to an elderly person, a pregnant woman, or someone carrying a baby. Rise from your chair when a guest enters the room. Help your parents be seated at the family table. Greet others with a firm, sincere handshake. Say "please" and "thank-you" or "pardon me" and "sorry" whenever they are needed. Do your share of family chores in a pleasant way. The courtesy you practice as a Scout will stay with you throughout your life.

A Scout is KIND. *A Scout understands there is strength in being gentle. He treats others as he wants to be treated. Without good reason, he does not harm or kill any living thing.*

There is nothing weak about being kind. In fact, kindness is a sign of true strength. To be kind you must look beyond yourself to the needs of others. Take time to listen to the thoughts of other people. Imagine what it would be like if you were in someone else's place.

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. It is not difficult to be kind to those in need and those who cannot defend themselves. What may be harder is being kind to people you don't know or don't understand, and to people with whom you disagree. We live in a world that has more than its share of anger, fear, and war. Extending kindness to those around you and having compassion for all people is a good antidote to the poisons of hatred and violence.

Kindness is not limited to the ways we feel about people. Be kind to pets and wildlife. Develop a positive land ethic that respects the earth. Help protect our natural resources by practicing no-trace methods of hiking and camping.

A Scout is OBEDIENT. *A Scout follows the rules of his family, school, religion, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.*

Obedience begins in your home. Your family cares for you and wants you to be safe. Cheerfully follow any rules your family has set for you.

There are others besides family members to whom you owe obedience. When teachers give you homework, it is usually because the assignments will help you learn. When an employer gives you an order, it is usually for the good of the business. And when your Scout leader asks you to do a job, it is because your efforts will help your patrol and troop. Being obedient also means following city, state, and national laws.

However, obeying must be guided by judgment. If someone order you to cheat, steal, or do something else that you know is wrong, you have to say no. Obedience is based on trust. Those who give you orders trust that you will do what they ask. But you must also trust your own beliefs and obey your conscience when you know you are right.

A Scout is CHEERFUL. *A Scout looks for the bright side of life. He cheerfully does tasks that come his way. He tries to make others happy.*

Some people grumble when they are losing a game. On a campout, they become angry if the weather turns bad or the trail is long and dusty. Others are always cheerful. With a sense of joy and adventure, they jump at every opportunity life presents. Their good spirits make everything easier for them, their friends, and their families.

Adversity is a tremendous teacher. Even though it may test the limits of your cheerfulness, the way to become a top-notch camper is to get outdoors, rain or shine, do your best every time, and be willing to learn from your mistakes.

The same is true off the trail You can become a good athlete by playing against those who are better. You will become a better student by realizing your studies are a chance for discovery. And you will become a finer person if you approach all you do with energy and good cheer.

A Scout is THRIFTY. *A Scout works to pay his way and to help others. He saves for the future. He protects and conserves natural resources. He carefully uses time and property.*

Paying your way with money you have earned gives you independence and pride. When you dig into your own pockets to buy clothing, your Scout uniform, or your camp equipment, you learn the real value of those items. You will be sure to take good care of them.

Save some of your earnings in a bank account. Even if you have only a dollar or two to put aside each month, the habit of saving regularly is very important. Share with others, too. Volunteering your time and energy is just as valuable as giving money.

As a camper and backpacker, you will learn that you can live very well with no more possessions than the clothes you are wearing and the gear in your pack. As a Scout, you will also see that practicing conservation is a sign of thrift. Protect and conserve the earth's natural resources — its soil, water, forests, wilderness areas, and wildlife. Recycle papers, glass, and metal used in your home and community. Waste is an

enemy of thrift. When you act to stop it, you are doing your part to keep the earth beautiful.

A Scout is BRAVE. *A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at him or threaten him.*

Since 1910 when Scouting came to America, thousands of Honor Medals have been awarded to Scouts who saved lives as the risk of their own. They proved themselves ready when emergencies arose. They may have been afraid, but they each went to the aid of someone in serious trouble. Once they reached the victims, they had the skills to make successful rescues.

Lifesaving is not the only test of bravery. You are brave every time you do what is right in spite of what others might say. You are brave when you speak the truth and when you admit a mistake and apologize for it. You are brave when you refuse to let alcohol, tobacco, or drugs become a part of your life. And you show true courage when you defend the rights of others.

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A Scout is CLEAN. *A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.*

You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can't help getting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water.

There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.

Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults.

A Scout is REVERENT. *A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.*

The work *reverence* refers to a profound respect for God. The wonders of the world remind us of our God's creative power. We find it in the tiny lines of a leaf and the great mysteries of the universe. It exists in the kindness of people and in the teachings of our families and religious leaders.

We show our reverence by living our lives according to the ideals of our beliefs. The Scout benediction is "May the Great Master of all Scouts be with us until we meet again."

The United States Constitution gives each of us complete freedom to believe and worship as we wish without fear of punishment. All your life, you will encounter people who hold different religious beliefs or even none at all. It is your duty to respect and defend the rights of others whose beliefs may differ from yours.

* * * *

SIGNS OF A SCOUT

When you become a Scout, use the Scout sign, salute, and handclasp to show that you belong to the world brotherhood of Scouting. And, of course, you can wear the Scout badge and the Scout uniform.

Scout sign. The Scout sign marks you as a Scout everywhere in the world. Give it each time you recite the Scout Oath and Law. Held high, the Scout sign is a signal for attention. When a Scout leader raises his hand in the Scout sign, all Scouts should also make the sign and come to silent attention.

To give the Scout sign, cover the nail of the little finger of your right hand with your right thumb. Then raise your right hand, palm forward, with the three middle fingers upward. Those three fingers stand for the three parts of the Scout Oath. Your thumb and little finger touch to represent the bond that units all Scouts.

[PICTURE OMITTED]

Scout Salute. The Scout Salute signifies respect. Use it to salute the flag of the United States of America. As a sign of courtesy, you may also salute a Scout leader or another Scout.

To give the Scout salute, form the Scout sign with your right hand. Bring that hand smartly up to your head until your forefinger touches the edge of your hat or your forehead above the right eye.

[PICTURE OMITTED]

Scout handclasp. The Scout handclasp is a token of friendship. That is why it is made with the left hand, the hand nearest your heart. Give the Scout handclasp by extending your left hand to another Scout and firmly grasping his hand.

[PICTURE OMITTED]

Scout badge. The shape of the complete Scout badge, which is also on the First Class badge of rank, was adapted from the north point of an old mariner's compass. The design is often called a *trefoil*-a flower with three leaves. It is also known by its French name, *fleur–de–lis*–lily or iris flower. The shape resembles an arrowhead.

With slight changes, the trefoil badge is used by Scouts around the world.

The *trefoil* means that a Scout can point the right way in life as truly as a compass can in the field.

The *three points*, like the fingers of the Scout sign, stand for the three parts of the Scout Oath.

[PICTURE OMITTED]

The *two stars* symbolize truth and knowledge, and the outdoors in Scouting.

The *eagle with the shield* stands for freedom and a Scout's readiness to defend that freedom.

The *scroll* with the Scout motto is turned up at the ends. It is a hint that a Scout smiles as he does his duty.

The *knot* at the bottom of the scroll is a reminder to Do a Good Turn Daily.

Scout uniform. Wearing a uniform is part of the thrill of being a Scout. Put on your uniform and you feel ready for hiking, camping and other Scout activities. By dressing alike, you and all other Scouts show that you are equals in the spirit of brotherhood and that you stand for certain ideals.

Wear your uniform proudly. It is a steady reminder to you and to others that a Scout is a person who can be trusted to lend a hand when help is needed. Dressed as a Scout, you want to act as a Scout.

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The parts of a uniform. The Scout uniform consists of a cap or a broad-brim hat, a shirt, trousers or shorts, a belt, socks, and shoes or hiking boots. For cold weather, your troop will prefer the long-sleeve shirt with trousers. The favorite summer uniform is the short-sleeve shirt and shorts. Scouts involved in conservation projects may wear work pants or jeans with their Scout shirts.

Scouts throughout the world are recognized by their neckerchiefs. Each troop chooses its own color.

Uniforms build team spirit in your patrol and troop. The color and design of the Scout uniform make it the ideal clothing for many outdoor adventures.

How to wear a neckerchief. Roll the long edge of the neckerchief to about 6 inches from the tip. Place the neckerchief smoothly around your neck. Lay it over or under you collar, depending on the custom of your troop, and hold it in place with a slide. Troop custom will also decide whether you tie the ends of the neckerchief with a slipknot or square knot, or leave them free. Scout bolo ties may be worn under a open collar.

[PICTURES OMITTED]

How to get a uniform. The moment you join a troop and have been registered as a Scout, you can get a uniform from the nearest Scouting equipment distributor. Your

Scoutmaster will know the location. There you can buy your uniform, community strip or council shoulder insignia, troop numeral, and patrol medallion. If you need help finding money for a uniform, your Scoutmaster may suggest ways you can earn it. Your troop may also be able to let you use uniforms that older Scouts have outgrown.

Wearing your Scout uniform. Wear your complete uniform proudly and correctly at all Scouting events:

- ★ At patrol and troop meetings, hikes, camps, and rallies.
- ★ When you appear before a board of review or a court of honor.
- ★ When you take part in Scout service projects in your community and in the backcountry.
- ★ During Scouting Anniversary Week in February.

* * * *

THE FIRST WORLD JAMBOREE

By 1920, Scouting had spread around the world. To strengthen this world brotherhood, Baden-Powell invited Scouts from all nations to a world jamboree in London. He wanted young people from many countries to camp together, share their skills, and develop friendships.

The first jamboree was such a success that Scouting's leaders promoted the idea of more worldwide gatherings. With the exception of the World War II years, world jamborees have been held every 4 years.

Since 1937, the Boy Scouts of America has held one national jamboree between very two world jamborees. As many as 50,000 Scouts have attended each gathering.

[PICTURES OMITTED]

THE GROWTH OF SCOUTING

Through the years, the Boy Scouts of America has continued to grow. To serve the special needs and interests of Scouts, the BSA has developed a variety of programs.

Sea Scouting began in 1912 as a branch of Scouting for older boys. Eventually it became Senior Scouting, which proved to be very popular. Today, Exploring is the program for young men and women in the Boys Scouts of America.

The Lone Scouts of America merged with the BSA in 1924. An organization for boys who lived in sparsely populated areas of the country, the Lone Scouts had been founded by William Boyce.

In 1930, a younger-boy program, first called Cubbing but now known as Cub Scouting, began drawing boys from age 8 and up into the movement. Tiger Cubs, BSA, was added in 1982 to serve boys younger than 8 and their families. Varsity Scouting, added more recently, rounds out the program of the Boy Scouts of America.

From its beginning with a Good Turn by an unknown Scout, to the present with millions of Scouts across the nation, the Boy Scouts of America has had a colorful, exciting, and important history. Now that you are a Scout, what does the future hold for the organization? Well, that depends on you. Like that British Scout on a foggy London street, you never know when a simple act of kindness can have far-reaching effects on another person, an entire organization, or even the world.

SCOUTMASTER HANDBOOK
(excerpts)

* * * *

The Scoutmaster

To our growing roster of the troop's hard-working parts we now add the key link in the chain—the Scoutmaster.

We learned from visiting Scoutmaster Dan's troop meeting something of what a Scoutmaster does—and does not do. We heard the Scoutmaster summed up as the "person who quietly but effectively pulls it all together to get the desired result: helping boys grow into good men."

The Scoutmaster does this by guiding boys toward understanding. Understanding what—camping skills? No—understanding themselves.

The Scoutmaster works by training boy leaders to run the troop, and by managing, training, and supporting assistant Scoutmasters in their roles.

The Scoutmaster is the one—and only—troop leader who relates closely to each of the other links in the chain of troop operations: The Scouts, the junior leaders and the patrol leaders' council, the assistant Scoutmasters, the troop committee, and through the committee the chartered organization representative and the chartered organization.

The part played by the chartered organization is pivotal, of course, for they choose the Scoutmaster—and the person they choose will influence the lives, in one way or another, of every boy in the troop.

SCOUTMASTER POSITION DESCRIPTION

- Train and guide boy leaders to run their troop.
- Work with and through responsible adults to bring Scouting to boys.
- Help boys to grow by encouraging them to learn for themselves.
- Guide boys in planning the troop program.
- Help the troop committee recruit assistant Scoutmasters.
- Conduct Scoutmaster conferences.

ASSISTANT SCOUTMASTERS

The assistant Scoutmasters also play a strategic part, for they support the Scoutmaster and share the challenge.

Assistants should be assigned specific program responsibilities, such as new Scouts or older boys. Troops with an active "new Scout patrol"–made up of boys who have not yet earned the First Class rank or who have not yet entered the seventh grade–will assign an assistant Scoutmaster to work with that program. Troops with a Venture crew–for older Scouts specializing in more advanced outdoor action or sports–will name an assistant Scoutmaster to guide this program. (See page 26.) A Scoutmaster may have as many assistant Scoutmasters as desired, depending on the needs of the troop.

There is, of course, another important job an assistant Scoutmaster may occasionally be called upon to assume: Should the Scoutmaster be unable to serve, whether temporarily or permanently, an assistant Scoutmaster can step in.

* * * *

"HEY, I MADE ASSISTANT PATROL LEADER!"

Ever patrol needs a patrol leader, an assistant patrol leader, a scribe, a quartermaster, and other patrol positions of responsibility (treasurer, hikemaster, grubmaster, cheermaster). Most of these jobs give some patrol member a chance to lead—perhaps the first he ever had. Whether a boy is a natural leader or not, he deserves the opportunity to show what he can do, and to *improve* what he can do. The patrol method gives it to him.

"WE'RE ALL SET!"

If Scouts in the patrols and on the patrol leaders' council are sharing some of the troop leadership jobs, then the burden of the Scoutmaster and the assistants will be lighter, will it not?

Well, yes and no.

Running a troop requires a certain amount of planning, creating, directing, instructing, and arranging. When a well-trained group of boy leaders can share these responsibilities, the adult leaders can devote more time to such urgent concerns as counseling and guidance, troubleshooting, committee relationships, and contacts with parents. A Scoutmaster's work may not get lighter, but it can be aimed at a more appropriate target and become more productive.

Sometimes adult leaders will feel that maybe they should "give the kids a break," and personally jump in and do all that planning and arranging and so on. After all, they may tell themselves, they've had a lot more experience with that sort of thing, and they know they can do it faster and better than the boys can. OK?

STOP!

Remember what Scoutmaster Dan said back in chapter 1: "How can boys learn to lead if the adults do all the leading?"

"I VOTE YES!"

A patrol has often been described as a "vest pocket democracy." Each member votes to elect his patrol leader. The patrol leader represents his patrol on the patrol leaders' council. The troop elects a senior patrol leader. The patrol leaders' council, with the senior patrol leader as chairman, plans and runs the troop program.

Note those words: "votes" ... "represents" ... "elects." ... This is the vocabulary of democracy, and the democratic way of doing things together. Every boy in the troop, through his elected patrol leader, has a voice in deciding what the troop does.

Voting is a form of good citizenship, and building better citizens in of course one of Scouting's three aims. There's one more thing about voting: when you start this early in life, it can be habit-forming.

ONE MORE TIME!

Because those five reasons for using patrols, and the patrol method, are so important, we're going to recount them.

1 Friends. Patrols permit a Scout to be in the group his friends are in.

2 Small size. It means each boy gets involved because he's really needed.

3 Responsibility. Patrol jobs for everyone means all get a chance to learn and practice responsibility.

4 Adults helped. Boy leaders free adult leaders for their special responsibilities.

5 Democratic. Patrols provide real experience in the democratic way of doing things.

There is a sixth reason, of course—nothing else seems to work.

* * * *

CHAPTER 6

[LOGO OMITTED]

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THE AIMS AND METHODS OF SCOUTING

The Scoutmaster's number one job, in plain English, is to help the Scouts run a good troop, and thus to get what they joined to get: exciting outdoor action and fun.

But beyond this boy-level point of view are three adult-level aims that form the bedrock of the American Scouting movement. We call them simply the three aims of Scouting, for they represent the long-term Scouting outcomes we want for every boy who joins. They will therefore underlie everything we do. Here they are:

The Aims of Scouting

Aim I - To build character

Aim II - To foster citizenship

Aim III - To develop fitness

We start with number one, to build character. It's fairly safe to assume that no boy joins the Boy Scouts to get his character built. But building his character is, nevertheless, what number one asks us to do, and we need to know what we're talking about. Just what is character?

It's "a complex of mental and ethical traits," says one dictionary. It's "moral or ethical quality," says another. It's "qualities of honesty, courage, and integrity," says a third.

To these perfectly good descriptions we add four "self" qualities that Scouting, over the years, has been especially successful in developing in boys: , self-reliance, self-discipline, self-confidence, and self-respect. When a boy begins to develop these, he begins to develop character. And you can help him begin.

Turning to the second aim, fostering citizenship, we also start with the dictionary: Citizenship, says one dictionary, is "behavior in terms of the duties, obligations, privileges, and functions of a citizen." Another dictionary says it more simply: it's "the quality of an individual's response to membership in a community."

What, then, are some of the ways Scouting can encourage boys to honor these duties and respond as good citizens to membership in their communities?

The troop can carry out a service project for the local environment – litter cleanup, tree planting, stream improvement, wildlife habitat improvement, and the like.

The troop can take part in "get out the vote" drives at election times. Patrols (and troops) can hike to local historic sites and museums to learn about the history of their neighborhood, city, state, and country.

By serving as troop and patrol officers, Scouts can get something every citizen needs – practice in the art of leadership.

The troop can visit and learn about important community services such as fire and police departments, health and sanitation installations, public utilities, and road and park departments.

The wise Scoutmaster can guide Scouts not only to love their country, but to understand it, know more of its heritage and history, encounter the democracy that knits together its many cultures into a nation that welcomes them all. And thus to find joy in serving it.

It is growth in your Scouts to *that* level of citizenship in which you, as Scoutmaster, will find *your* joy.

The third aim, developing fitness, covers a broader territory, for Scouting recognizes four kinds of fitness: physical, mental, emotional, and moral.

Physical fitness means good general health and good health habits, rather than show-off muscles and blinding speed around the track. A boy doesn't have to be an Olympic superstar to be fit, but he does have to make sure he gets a balanced diet, gets better exercise than lifting a potato chip, watches his weight at least as much as he watches television, and gets enough sleep to carry him through a typical high-speed day. And of course he must stay far, far away from tobacco, alcohol, and drugs.

If a Scout has any physical limitations, encourage him to perform up to these limits, and if possible a little beyond them. But no boy should be made to feel inferior because he limps or stutters or wears strong glasses or a hearing aid.

Mental fitness means the ability to get all the mileage you can from the brainpower you were born with. Nor is this automatic: A whiz kid may squander his brilliance; a slow learner may surpass himself.

Scouting is loaded with activities that encourage and require mental fitness. What this aim asks is that leaders make certain such activities challenge Scouts to be curious, stay alert, ask questions, get the facts, and then make decisions.

Emotional fitness: What, emotional fitness in an 11-year-old? Believe it! People of any age, sex, or condition require emotional balance and stability. And that means such qualities as the skill and courage to adjust and learn to live with problems they can do little to solve, the self-control not to fly off the handle when something goes wrong, and the self-discipline not to be arrogant when something goes right.

Do boys need these qualities too? You bet they do. Does Scouting provide opportunities for helping boys become more emotionally fit? You bet it does – but we never know when they will appear. The Scoutmaster's job is to watch for them, and then – calmly – see what he can do to help.

Moral fitness: Morality, says the dictionary, concerns the "principles of right and wrong" in our behavior, and "what is sanctioned by our conscience or ethical judgment." Scouting has recognized the importance of moral fitness from the start: A Scout who took the Scout Oath in 1910, for instance, promised to do his best to keep himself "morally straight." A Scout who takes the Oath today promises the same.

In any consideration of moral fitness, a key word has to be "courage." A boy's courage to do what his head and his heart tell him is right. And the courage to refuse to do what his

heart and his head say is wrong. Moral fitness, like emotional fitness, will clearly present opportunities for wise guidance by an alert Scoutmaster.

There is much more to be said about Scouting's aims in a dynamic and changing world, in particular the problems to be faced by a Scout generation approaching the turn of our century. How can Scouting help this generation prepare for the ethical judgments they will have to make, and develop the courage they will need to make them?

We'll explore this more deeply in chapter 10, "Understanding Boys."

The Methods of Scouting

Earlier we called Scouting's three aims the "bedrock" of the American Scouting movement, and said they represented the "long-term outcomes we want for every boy." But we didn't say much about how these outcomes can be achieved. Now we're going to.

Meet the "methods of Scouting."

There are eight of them. They are not separate ideas or techniques that can be taken individually from the shelf, used as convenient, and returned when expedient. They are built in. They are firmly attached and inseparable parts of every Boy Scout troop, and everything it does.

If the three aims are the foundation of the house of Scouting, the eight methods are its building blocks. They're not the furniture—they're part of the house!

And here they are: Ideals. Patrols. Outdoors. Advancement. Personal growth. Adult association. Leadership development. Uniform. Let's meet them close up:

IDEALS

First, and with reason, are the Scouting ideals. These are the personal behavior guides and standards to which a boy commits himself when he becomes a Boy Scout: The motto, "Be Prepared," the slogan, "Do a Good Turn Daily," the Scout Oath:

> On my honor I will do my best
> To do my duty to God and my country and
> To obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong,
> mentally awake, and morally straight.

And the Scout Law:

A Scout is:	Trustworthy	Obedient
	Loyal	Cheerful
	Helpful	Thrifty
	Friendly	Brave
	Courteous	Clean
	Kind	Reverent

No troop meeting or outdoor activity should be planned or carried out without working in one or more of these ideals. They can be worked in anywhere—a ceremony, a Scoutmaster's Minute, a troop or patrol election, even a contest or game. The wise Scoutmaster, moreover, is always alert to make use of ideals at unplanned moments, such as a dispute, a behavior problem, or other negative situation. In such situations the appropriate ideal can be brought in to turn the negative into a positive—often especially effective if it is based on an incident witnessed by those present.

The ideals are thus much more than an assortment of noble abstractions. They are a practical, down-to-earth method—a method that does what it is supposed to do: It gets results.

* * * *

OUTDOORS

They don't put up tents or build campfires in church basements or school all-purpose rooms. The place for that is the outdoors. The place for almost any Scouting activity is in fact the outdoors.

Scouting was designed to be carried out mainly in the open, of course, and in all four seasons. Practically anything Scouts do can (and often should) be done outdoors. Not just camping and hiking, but sports, field trips, tours, advancement projects, troop and patrol meetings, rallies, even award ceremonies and parent affairs. Survey after survey has told us that the outdoors is where boys want their Scouting to be.

In the outdoors, perhaps for the first time, a boy can meet the natural world face to face and begin to develop a keener sensitivity toward our wildlife, forests, rivers, mountains, and open space–and the growing environmental dangers that threaten them.

For Scouting the outdoors is not just a place. It's a method–and from a boy's point of view the most popular one–of helping Scouting work. A leader once joked that perhaps Scouting should adopt a second motto: Get out and stay out!

The leader had a point.

ADVANCEMENT

The Boy Scout advancement program provides a ladder of skills that a Scout climbs at his own pace. As he acquires these skills he moves up through a series of ranks, for which he is awarded badges: Tenderfoot, Second Class, First Class, Star, Life, and Eagle. The higher he climbs, the more challenging his tasks–and the more rewarding.

Consider these achievements: He learns the skills that qualify him for Scouting's more rugged and exciting outdoor challenges–the great high-adventure bases around the country. He develops in body and mind, grows in self-confidence, and begins to help younger Scouts climb the advancement ladder. Most of all he discovers how it feels to go further–in so many ways–than he ever thought he could. Advancement is a natural outcome of planned, quality troop program.

The purpose of the advancement program, of course, is to spur a Scout to learn, to achieve, and to mature. That it does this so consistently makes it another important method that reinforces the Scouting aims.

Oh, yes–advancement also happens to be fun.

PERSONAL GROWTH

All of the Scouting methods help a boy grow as the result of his Scouting experience. But growth, personal growth, is itself a method–and a critical one.

The other Scouting methods "specialize," so to speak, in offering one or more particular benefits–character, fitness, leadership, skill training, citizenship, and so on. All of them contribute, in one way or another, to a Scout's personal growth as an outcome of his experience.

We have learned over time, however, that this quest for growth as an outcome has had the effect of making it a method as well. In striving in different ways to help Scouts grow, we have seen the striving itself become a way. So with personal growth, the outcome, we join personal growth, the method.

Not only a hit-but a double!

ADULT ASSOCIATION

Boys learn from the example set by their adult leaders. Troop leadership may be male or female, and association with adults of high character is critical at this stage of a young man's development.

LEADERSHIP DEVELOPMENT

More than one of Scouting's methods have proved effective in developing leadership in Scouts, and that's fine. Making sure boys get leadership experiences is one of the most valuable things a Scoutmaster does.

The more ways the Scoutmaster uses to plant leadership opportunities, the better the chance the seeds will grow.

Leadership opportunities can be used at both patrol and troop levels–jobs that are action-oriented and can provide built-in motivation for Scouts to lead successfully and move up to higher levels of responsibility.

Leadership opportunities can even offer short-term jobs, such as heading up a parents' night demonstration or a troop service project, for Scouts who may not have had other chances to lead.

Leadership development, remember, is not only for the Scouts who are leaders–but for the Scouts who aren't.

And that's the whole idea.

THE UNIFORM

The Boy Scout uniform is a tool with many edges.

Whenever he wears his uniform it reminds a boy that he is a Scout and that people will expect him to act like one. The uniform is an outward sign that he believes in certain values and is willing to stand up for them.

His uniform gives him a reason to take pride in the way he looks, and in the badges and awards he displays that testify to his achievements in skills and leadership.

His uniform gives him a feeling of belonging, not only to his patrol and troop, but to a worldwide organization whose beliefs and program he shares with millions of others.

A well-uniformed troop can build a sense of troop identity and spirit. It can attract new members, leaders, and parents.

The uniform is versatile: It's equally compatible for going to meetings, greeting the mayor, or climbing a mountain.

The community the uniform presents a welcome image: "Here are some local kids," it says, "who are doing some good things." A thought that could make anyone's day.

Has the uniform changed in style since 1910? Yes it has, but it still speaks the same language: outdoor adventure.

Can the Scoutmaster do anything to make this hard-working tool work even harder? Yes.

The Scoutmaster can set the example–and wear the uniform.

The Aims, the Methods, and You

So, for any who may have thought that Boy Scouting was little more than good-hearted adults taking a bunch of kids on a hike, welcome to the real world! By now you realize that Scouting is an organized national and worldwide program that strives in many ways to help boys to grow up right. It depends for its success on vigorous and exciting outdoor activities–and a first-rate Scoutmaster.

The outdoors draws them in–the Scoutmaster keeps them in.

Behind this program and leadership are Scouting's three aims: to build character, to foster citizenship, and to develop fitness. We called them the "bedrock" of the American Scouting movement, for they represent the basic outcomes we want for every boy.

We achieve these aims, remember, by using the eight methods we just met: ideals, patrols, outdoors, advancement, personal growth, adult association, leadership development, and uniforms.

Good luck with them!

* * * *

CHAPTER 10

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UNDERSTANDING BOYS

A new Scoutmaster is likely to approach his troop with self-confidence. He anticipates that his enthusiasm will excite his young charges to get the most they can out of Scouting. Learning about the characteristics of boys, how to motivate them, how to deal with their behavior, and how to help them with their problems will give the Scoutmaster the insights necessary to enjoy working with Scouts.

Unfortunately, the Scoutmaster may discover that he does not know as much about boys as he thought he did. He may discover that Scouts are not automatically motivated and enthusiastic. Their behavior may cause the Scoutmaster a great deal of frustration. In addition, the Scoutmaster may encounter problems never anticipated. In time, however, the Scoutmaster will grow to understand how to help boys achieve their potential.

Healthy Adolescent Development

Though adolescents have much in common, every troop will have members who are enormously different from each other, from the 11-year-old about to experience puberty to the 16-year-old who may have already completed puberty. You will also find enormous differences within the same boy. The physically developed 16-year-old may not be as socially developed as the 11-year-old, even though the 11-year-old looks like a child.

Some Scouts may even be physically disabled (also called physically challenged). Be prepared for variety and difference. Get to know each Scout as an individual who progresses and grows at his own pace. Regardless of *who* our Scouts are, in Scouting we can do much to help them become special individuals.

PHYSICAL/BIOLOGICAL ASPECTS

- Younger Scouts probably will not have entered puberty, but will be extremely curious about it and will be attracted to those peers who are more physically mature. Those whose bodies begin to mature early may appear extremely different from same-age peers.
- Older Scouts are experiencing or have experienced fast physical growth. Adult-like masculine features develop: facial features including hair, body contours, and sexual maturity. Remember that development can vary widely within the same age group.
- Older Scouts are concerned about body image and looks. They have more interest in personal grooming and want to look "normal."
- Older Scouts are concerned about sex and think about girls much of the time.

Accept all youth as they are. Your acceptance will reassure them that they are "normal." Remember the differences between youth when you plan Scouting activities. Younger Scouts are not physically strong enough and do not have enough endurance to do many of the things older Scouts can do.

Be accepting of their concerns about sex. Be very open and clear when talking with them. Remember how you felt and the questions you had when you were their age.

MENTAL CHARACTERISTICS

- Younger Scouts may reason very concretely. They may be most comfortable thinking and talking about specific experiences or objects and may have difficulty thinking about abstract ideas like planning for the future (campouts, path to Eagle), problem solving, or understanding someone else's point of view.
- Older Scouts will begin to have the capacity to think abstractly, to reason about imaginary situations, and to think about more than one idea at a time.

Remember that things you say may be interpreted differently by different Scouts, based on their reasoning processes. Don't expect adult-like reasoning from Scouts who are not prepared for it. Further, don't demean them when they are not capable of it. Ask Scouts if they understand, or ask them to repeat what was said or learned to make sure they really do.

There are things you can do to help Scouts mature. The opportunity to interact with older boys may help younger boys learn to interpret experiences in new ways. Provide times for discussion and reflection on experiences in which a variety of people share their views.

RELATIONSHIPS AND SOCIAL EXPERIENCE

- Younger adolescents may be more dependent on adults for guidance. They will also be more clannish with friends, preferring groups of friends to one-to-one

relationships. They will probably be more comfortable with same-sex peer relationships.

- Older adolescents will be increasingly oriented towards interdependent relationships among family, friends, and others, with increasing levels of responsibility towards them. They may tend to be socially oriented towards one-to-one relationships with other boys and, increasingly, with girls. There will be a growing need for freedom from the control of others. There will also be a growing need for responsibility, to fill the need to be treated like an adult, including taking care of themselves.

Use the patrol method in your troop to teach Scouts the skills they need to be responsible for themselves and others. Give Scouts as much responsibility as they are capable of handling and are willing to handle.

As a Scoutmaster, you're one of the significant adults in a Scout's life, and his relationship with you is important and changing. He needs the skills and experiences of Boy Scouting, plus adults who will support him as he deals with more challenging tasks. Accept him, take him seriously, acknowledge him as a person in his own right. Respect your Scouts in every way. Enjoy your time with them, and let them know you enjoy their company.

VALUES

- Fairness for the younger child may be defined as conformity to the needs of his social group or conformity to a rule or law.
- Central moral values for the younger child will be heavily dependent on the values of his family and immediate

community. Personal interests will be enormously influenced by age-mates.

- Older Scouts may begin to develop a personal philosophy of life, re-evaluating values and standards. They are aware of the differences between the standards of their group and those of their parents.
- Older Scouts combine advanced thinking ability with feelings and are able to see good and bad as relative, not absolute. They are entering the age of commitment to do good in the world. They are more concerned with the needs of others. They may lack opportunities for moral development.

Unlike physical development, where we wait out the changes, ethical development can be encouraged directly. The Scouting program provides boys with a safe place to struggle with issues. Teach them the skills to solve problems and resolve conflicts; give them time to reflect on their experiences and discuss their feelings.

Be consistent in what you say and do. Youths notice when adults have one standard for them and another for themselves.

Be open to Scouts' ideas of service to others and help them put these ideas into action.

Reinforce hope. Adolescents can get discouraged, may dislike themselves, and believe the world is a hopeless place. Some live in situations that are not safe and hopeful. You have many more years of experience that tell you there is a tomorrow, that "this, too, shall pass." Be respectful of their feelings, but encourage them to look forward and have hope. Be supportive and help them past the hard times.

EXPERIMENTATION

- Younger Scouts may be less interested in trying new things than older Scouts, especially new things that make them different from their peers.
- Older Scouts often need a wide variety of experiences. This translates into a thirst for adventures and risks. They learn about reality, their own and of the world around them, through new experiences. (This is one of the reasons drugs and alcohol are issues.)
- Older Scouts need to try out new roles.
- Older Scouts begin to think about vocations.

SOCIAL EXPERIENCES

The older boy finds much more meaning in social relationships. This new personal meaning teaches him how he wishes to be in relation to others – his best friend, girlfriend, employers, teachers. He has maximum loyalty to his group. The youngest teenagers congregate in groups of the same gender; older ones in groups of mixed gender; and the oldest in boy-girl couples.

The 14- or 15-year-old boy may still be more comfortable in large groups of boys and girls, while the 16- or 17-year-old may be in a relationship with one girl. In the Scouting program, you can provide an emotionally secure setting to practice social relationships – among troop members, with adults, and in the community.

Adolescence is not a holding pattern between childhood and adulthood or a series of problem stages to get through. There are natural developmental tasks each person must accomplish to become an adult. You'll be witness over and

over to these transformations as they take place in each boy's life. Celebrate this important time by providing the support, skills, experiences, and understanding that will enrich this passage for them.

Provide a variety of options in the troop program, making sure there are enough opportunities for excitement and new experiences. Allow Scouts to gravitate towards activities they are personally interested in. Let them try a variety of new things.

What You Can Do

There are a number of easy ways you can make Scouting an interesting, challenging, yet safe place to be, a worthwhile experience for troop members and an enjoyable one for you. These measures also create an atmosphere that prevents behavior and interpersonal problems, while it motivates Scouts to do their best.

Teenagers are not mysterious aliens who are impossible to understand; they're people like you, with similar needs, desires, hopes, and fears. In Scouting, adults work closely with troop members, helping them toward independence and achievement. *Help* is the key word, a word you'll encounter often as you read through this section.

Relax. Scouting is fun, and if you obviously enjoy it, your Scouts are more likely to enjoy it, too. If you approach Scouting not as a chore, but with excitement and charged-up anticipation, that will make a difference.

You'll be off to a good start if you see that fun and excitement are planned into all activities. Once you know there's great potential built in, you'll be able to relax and have a good time with your Scouts. Let your enjoyment and

anticipation shine through, even when working on routine preparations.

By maintaining your good attitude and persevering when problems arise, you can show your troop that difficulties can't stop a worthwhile experience. Sure, it's disappointing and frustrating when a car suddenly breaks down on a troop trip, but that's the time to get everyone involved in solutions and develop a plan for action. "Okay, we need to locate a mechanic, make arrangements for a later arrival at our destination, get an activity going while we wait," etc.

Provide new experiences. Help Scouts grow confident in working with unfamiliar challenges. They've joined the troop to be with their peers and to explore basic Scouting and life skills. New experiences include those activities your troop chooses for its program in planning sessions. How many of these Scouts have ever participated in an overnight camping trip? Planned a hike? Taught someone to read or swim or practice first aid? Give them the time and place to acquire new skills and to act at new levels of competence. Such achievement helps Scouts think positively about themselves and gives them confidence in you as their Scoutmaster.

Make your troop a safe place. Scouts need situations where they can take risks and try new challenges, but they also need to know they'll be protected from extreme consequences. While a Scout may look forward to an event, he may also picture himself in a worst-case scenario, lost in the woods, capsized in a canoe. And it isn't only the demanding outdoor activities that present challenges. Not knowing what to say when working with adults on a community project may be just as perplexing.

Think ahead. Your attention to standards of training and safety will give your Scouts a sense of readiness and well-being. Helping them acquire the social and interpersonal skills they need will boost their self-confidence.

Also, your troop should be a place where a boy is protected from emotional harm. **Corporal punishment and hazing are not permitted. Parents and unit leaders must work together to solve discipline problems.**

Assign responsibility. A Scout needs to be responsible for something and to be held responsible. With troop leadership roles, activities, and patrol business, there are enough jobs for every Scout to have a significant duty. Watch as the troop leaders assign jobs and help them distribute responsibilities. Then, see that each Scout has the support to ensure he'll have a good shot at success in his assignment.

Scouts need to be held responsible for what they do. Expectation for their performance should be clear, and troop leaders should check to see they're following through. If a Scout doesn't take care of his assignment, help him understand his responsibility to deal with the consequences.

Give Scouts freedom. Teenagers need to be able to make significant choices about their own lives. Give Scouts plenty of opportunities to make choices, individually and as a troop. Help them select activities and then get troop committee assistance in making plans and carrying them out.

Don't fall into the trap of controlling the Scouts' experiences and doing everything for them. Give them options, let them come up with their own ideas, help them make their own decisions. Presenting them with readymade plans for a camping trip won't compare to giving them a chance to toss ideas around. Would they prefer mountain

hiking? Maybe some of them have been longing to canoe a certain river. Do they have better ideas? How do they want to plan the details?

If they don't get to practice decision making and planning now, they may never learn the process of thinking ideas through, discussing them, and choosing what will work best.

Recognize Scouts as individuals. In Scouting, we officially recognize achievement through rank advancement. We also can recognize Scouts personally as significant individuals. Praise each boy for the worthwhile things he does, for his good ideas and initiative. Always treat him as if he is capable. And talk to Scouts as respectfully as you would to other adults.

Researchers tell us the average youth interacts with his parents 14.5 minutes a day. Twelve of those minutes involve negative interactions – being told what not to do or being criticized. Even if you're sure that most of your troop members have better-than-average relationships with their parents, all of them still need the friendly, positive interactions with adults that Scouting can provide.

Contribute to their sense of belonging. While you can't always control the way Scouts respond to one another, you can control your response. Establish a relationship with each Scout by giving him the three T's: Time, Talk, and Thought. If you spend time with him, if you talk with him, and if you think about him in a positive way, he'll begin to feel he belongs.

As much as possible, treat Scouts as partners. When it's appropriate, ask for their advice on troop matters, large and small. Affirm their contributions by thanking them and by communicating your understanding of their ideas. When you

establish this give-and-take atmosphere, your Scouts will begin acting as fully contributing members of the troop.

Recognize their need to know. Whether he's walking into a troop meeting or gearing up for a camping trip, a Scout will feel more secure if he knows where he's to go, what he's supposed to be doing, and how to do it. What he's "supposed to do" must be more than just sitting down and being quiet. You'll avoid many problems if troop members know how to take an active part in meetings and special events.

At the weekly troop meeting, the senior patrol leader knows he should check in early with the Scoutmaster and go over the agenda. The patrol members setting up the meeting room know they're to do that first. Other boys understand there's a game going on that they can join until the meeting starts.

When the troop is leaving for a camping trip, it should involve more than showing up and getting on a bus. They've been in on the planning, they know what to have in their packs, they have job assignments before departure. You can keep enthusiasm high but avoid chaos if they all understand how they're expected to organize and help.

Demonstrate self-control and be consistent. Very simply, practice what you preach and show what you know. Your Scouts need to rely on you to be consistent in your behavior and beliefs. Your actions also demonstrate what you expect of them. The most destructive influence on boys is adult inconsistency and hypocrisy.

Reflect with Scouts on experiences. This means you take time to talk with them about their experiences, ideas, plans, and desires. It's a conversation in which a Scout should feel free to voice an opinion without fear of criticism. When

several participate, they learn to understand themselves and one another.

The Scoutmaster's role is that of a guide rather than a lecturer. What did they think about while they were helping retirement home residents plant a vegetable garden? What memories and stories did they hear from the older people as they worked together? What good came from this, for the Scouts and the residents? Reflecting helps Scouts develop self-control, self-discipline, and initiative. They gain insight rather than simply completing activities. For more detail on the reflecting process, read "Teaching Ethical Values" later in this chapter.

RESPONDING TO PROBLEMS

The best way to deal with problem behavior is to prevent it. You've already become acquainted with several ways to prevent problems – the suggestions presented above. Those ideas will help create an environment for Scouts where fewer problems develop.

When problems occur, review those suggestions. Was there something positive you could have done beforehand to avoid the difficulty? Make this a learning experience for yourself as well as for your Scouts. Of course, some problems can't be prevented. There's no one way to respond to disciplinary problems you may encounter. Every situation is different and requires a different response. And you will need to respond, because problem behavior usually should not be ignored. There are some exceptions, but ignoring behavior may imply that you accept it.

Understand the problem first. Someone once said, "If you're going to put your foot down, you'd better like where

you're standing." It's always best to wait until you have all the information before you act on a problem.

Respond reflectively rather than reactively. Pause to get the facts, think it over, talk it over calmly. The exception is when there is an issue of safety and you must act quickly. Too often adults react to a disciplinary problem by using the same behavior they're trying to stop. A Scout loses his temper and shouts angrily; his Scoutmaster loses his temper and yells back at him. No one will benefit from this exchange. Try to think about the lesson your words and behavior are communicating. The goal should be to use the minimum amount of external control necessary to encourage the maximum amount of internal control on the part of the youth.

Use simple requests and questions to help a Scout get control of his behavior, rather than trying to control him yourself. Instead of saying "Stop that," you can ask, "Is that a good idea?" or "What will happen if you keep doing that?" A direct command should be the last resort or the emergency measure. Sometimes it may be necessary to say "Stop that" or to physically stop someone in order to prevent a catastrophe. Use a calm voice. Don't yell. Save that for the rare occasion when you'll need to get attention quickly.

If necessary, feel free to express disappointment with inappropriate behavior. However, do it in a way that says, by your language and tone of voice, that you care. The message we too often give young people is that we're disappointed because they inconvenienced us. What we want to communicate is we're disappointed because they are capable of better thinking and action.

Never criticize or degrade a Scout's character or personality. Saying "You messed up!" or "That's stupid!" gives a clear message that you see him as incompetent and incapable of thinking logically. That's insulting and defeats your purpose of helping him learn. Instead say, "If you knew better, you wouldn't do that," or "I'm disappointed because I know you can do better." Say it even if you suspect differently. Always assume he would do better if he had more knowledge or skill, or tried harder.

Inappropriate or harsh criticism can lead a youngster to self-hatred, a lack of confidence, and unwillingness to try new tasks and experiences. Constructive criticism, given with encouragement, a compliment, and a way to perform more effectively, will reduce bitterness and open up possibilities for him.

Don't discount his feelings. Sometimes adults say, "There's no reason to feel that way." That's called discounting, telling a boy he can't trust his own instincts. While his instincts may not be the same as yours, they are important. If a Scout is scared or angry, accept it and let him know you understand why. Then help him figure out a way to overcome it.

Help him reflect on his problem behavior. If you ask him questions about his actions, thoughts, and feelings, it helps you understand what's going on with him and helps him take the first step toward solving the problem. Within reason, allow the Scout to deal with the consequences of his behavior. Reflect with him about those consequences and help him plan what to do about them.

Teaching Ethical Values

Parents and Scout leaders expect young people to develop the qualities of integrity and compassion for others. They want them to know right from wrong. How can you teach ethical values? You will find continual opportunities arising from the activities and interactions of your troop members. After an activity or in the middle of a problem, it is a good idea to stop, sit down, and discuss what happened. We call this *reflection*.

* * * *

Helping Adolescents with Problems

Along the road to manhood, Scouts are likely to need help in handling problems they encounter. Adolescence is more perilous today than ever before. The reason is not so much a change in young people, but changes in the world around them. Today's social environment makes adolescence a difficult period during which young people may encounter problems ranging from a sense of rolelessness to child abuse.

ROLELESSNESS

For the first time in history, adolescents have no real place in society. On one hand, due to better health care, nutrition, and hygiene, boys reach puberty at a younger age than in the past. On the other, social changes keep them out of the workplace and in school, thus postponing the end of adolescence until much later. The resulting 10–15 years of physical maturity coupled with social dependence often create a sense of "rolelessness" or lack of purpose among the young. Scouting can help bridge this gap by making Scouts' experiences as adolescents as rewarding and productive as

possible. Scouting can reduce feelings of rolelessness by giving boys a sense of identity, developing their self-esteem, providing meaningful contacts with adults, and creating a sense of civic responsibility through community service.

HEALTH RISKS

The health risks of adolescence are a national concern. While mortality rates have decreased for other age groups, rates have increased for adolescents. The three leading causes of death among adolescents are accidents, suicide, and homicide. Accidents account for 60 percent of adolescent deaths. Motor vehicle accidents alone account for 37 percent of deaths in adolescence. Sports-related injuries occur at unacceptably high rates. A sizable increase in teenage suicides has occurred during the past 25 years.

Other health risks for adolescents are associated with substance use and abuse, sexual activity, and chronic disabling conditions. Substance abuse rates in American youth still surpass those in most other industrialized nations.

Teenagers are more sexually active than ever, yet many do not use any form of contraception. The result is more than 1.1 million pregnancies per year. Roughly half of these pregnancies are terminated by miscarriage

SIGNS OF A SUICIDAL TEEN

- Sudden behavior changes (insomnia, anorexia, hyperactivity/hypoactivity, withdrawal, substance abuse, delinquency, neglect of personal appearance)
- Inability to talk about the future (no plans for next week or next month)

- Suicidal intentions made known (discusses death, suicide, methods of committing suicide; gives away possessions)
- Changes in life situation (recent divorce of parents, loss of job, school problems, boyfriend/girlfriend problems)
- Depression (sadness, anxiety, boredom, inability to concentrate, listlessness; self-critical; frequently "masked" by aggressive, risk-taking, and/or delinquent behavior)
- Attempted suicide previously (accidents are often unrecognized suicide attempts)
- Lack of family and/or peer support (actual or perceived alienation)

or abortion. The trend is for girls who give birth to keep their babies rather than give them up for adoption. For boys, this increasingly means 18–21 years of financial responsibility for their child. Another result of increased teenage sexual activity is a corresponding increase in sexually transmitted diseases among teenagers. Particularly worrisome is the potential among sexually active teenagers for contracting the deadly AIDS virus, which may not result in symptoms for 5–7 years.

Finally, the ranks of teenagers with disabilities may be increasing. This is primarily due to technological advances that prolong the lives of children with chronic illnesses and save the lives of accident victims. This leaves many adolescents learning to adjust to disabilities at the same time they are learning adult roles and responsibilities.

Normally developing adolescents may be dealing with a variety of health concerns and problems. Many teenagers are concerned about their rate of development. They may suffer from the effects of being too tall, too short, or developing too

early or too late when compared to peers. In their desire to achieve a desirable physique, they may succumb to eating disorders or resort to steroid use. Some of their health problems appear related to their youth. They may be accident prone due to risk-taking behavior, the need to experiment, or failure to consider the consequences of their actions. They may be developing eating habits and lifestyles that will contribute to health conditions such as hypertension or high cholesterol later in life.

As Scoutmaster, you will have many opportunities to help Scouts develop healthy lifestyles, avoid health risks, and adjust to any health problems or disabilities they may have. The importance of nutrition, exercise, and safety should be emphasized in all troop activities. Scouting activities should be designed to help boys develop the healthy self-concept, self-esteem, and self-respect needed to make wise decisions and to assume responsibility for themselves in their personal lives.

Being involved in an active troop may help boys avoid temptations that might otherwise jeopardize their health and well being. Guest speakers can provide information on developing a healthy lifestyle, avoiding accidents, and making decisions regarding substance use. If Scouts ask for information regarding substance use or sexual activity, answer honestly and factually, but stay within your realm of expertise and comfort. If a Scout has serious concerns that you cannot answer, refer him to his family, religious leader, doctor, or other professional. If you become aware that a Scout is involved in substance use or abuse or is sexually active, you will need to involve the Scout's family or direct him to competent professionals.

* * * *

CEREMONIES

Ceremonies are used to recognize boys' achievements. Good ceremonies are impressive, brief, and dignified, and honor one boy at a time. Always get input from Scouts when planning a ceremony for greater appeal to boys.

A few props and techniques can spice up any ceremony. These can range from simple to elaborate, depending on the need and the money you have available for the event. Consider lighting, decorations, audiovisuals, and special troop props when planning ceremonies.

Ceremonies are used to open and to close a meeting or activity, to invest a new Scout, to install new leaders in office, at courts of honor, around campfires, and for a variety of other occasions.

Here's a good example of an effective troop ceremony.

First Class Ceremony

Scouts of First Class, Star, Life, and Eagle rank form a semicircle. Each holds a candle. As the room is darkened, the candles are lit from the lighted candle held by the most recent Scout to earn the First Class rank.

The First Class honorees are escorted to the center of the semicircle and face toward the semicircle. The parents are escorted to the left. (Escorts should be members of the honoree's patrol.)

Senior patrol leader: Before you is an open circle of Scouts who have earned the rank of First Class.

Since your investiture into this Boy Scout troop, you have learned much about Scouting.

You have learned hiking and camping skills and have learned to render aid and give service to others. More importantly, you have learned to take care of yourself in the out-of-doors and in day-to-day activities.

Scoutmaster: When you became a Boy Scout you learned the symbolic meaning of the Scout badge:

The *trefoil* represents the compass to point your way in life with duty to God.

The *three points* represent the three parts of the Scout Oath—duty to God and country, to others, and to self.

The *two stars* represent truth and knowledge.

The *eagle and shield* represent freedom and duty to country.

The *scroll* represents a smile in your daily life.

And the *knot* is a reminder to do a Good Turn daily.

(Present badge to parents to pin on son, then present special First Class certificate to Scout.)

You have experienced these symbolic meanings and now it is my pleasure to present you with the First Class badge and to recognize you as a First Class Scout. The image of this badge is emblazoned on the next three ranks of Scouting. So let the First Class badge be a constant reminder to you to continue your participation in Boy Scouting, and to share your newly learned skills with those Scouts following in your footsteps.

(Present candle to honorees.)

After you light your candle, you are to take your place in this open circle of distinguished Scouts.

SCOUTMASTER'S MINUTES

The Scoutmaster's Minute is often a story distinguished by its brevity and singleness of purpose. It may be an account from a newspaper article, a short poem, a personal experience, or something out of Scouting's history.

Such stories are often helped by building around a familiar object. A fishhook can be used to show how it is easy to get into something (like a habit) and how hard it is to get back out. A magnet can be used to deflect a compass needle, illustrating the effect of temptation on life's objectives.

Citizenship subjects are good material for Scoutmaster's Minutes. Here are a few sample Scoutmaster's Minutes.

Stick to It

(Hold up an envelope that has been delivered by the United States Postal Service.)

Fellows, the postage stamp you see on this envelope was given the job of making sure that this important piece of mail was delivered to me. The stamp is pretty small but, in spite of its size, it did the job.

In your patrols, each of you has the responsibility of "delivering the mail" in order that your patrol becomes a success. Like the postage stamp, it isn't your size that determines how well you do the job but, rather, how well you stick to it.

We can't all be good at all things. Some are better at physical skills, some at mental tasks.

Remember the stamp. It did the job in spite of its size by sticking to the job. Make up your mind that you can do the

same thing. Just determine to do your best—and stick to it until the job is done.

Your Development

(Show a roll or package of camera film.)

If you look at this exposed film before development, you cannot tell what kind of picture it will make. Film looks exactly the same after snapping the shutter as it did before.

But after development, the image appears on the film and you can see what the picture will be when it is printed.

As I look at you Scouts, I wonder how our exposure has been. You all look the same on the surface, yet I know there are differences within each of you. Like the film, you have been exposed to good and bad things that will make an impression when you develop.

Unlike the film, you have brains. You know what is inside yourself and can do something to make certain your development is good.

Follow the ideals of Scouting—the slogan, motto, Scout Oath or Promise, and Scout Law.

If you live according to these high standards, you can be sure your development will be good as you grow older, and you'll be able to enter manhood fully prepared to be a good citizen of our great nation.

Your Mark—Which Will It Be?

(Hold up a plaster cast of a track.)

Scouts, here you see permanent evidence that an animal (or bird) has passed along the way. Before we made the cast, the track was pretty temporary—a few hours of wind and rain

and all signs of the animal's passing would be erased. By making the cast, we preserved the track for future generations of Scouts to view.

Our lives can make a temporary or permanent mark on this world according to the way we live. Most of us probably never will be great leaders of nations or famous in the arts or sciences, but we can still leave a permanent mark on this earth by the things we do for others.

The daily Good Turn is one way to start making your mark, because as you give of yourself to others in unselfish service, you are making changes in their lives and in yours. Those who change the lives of others make a permanent mark in the world, because the good they do lives on long after they have passed along the way.

Has each of you done his Good Turn today? Have you decided to consciously seek out opportunities for service to others and not just wait until you happen to see a need?

Decide how to leave your permanent track as you pass through the years.

Our Flag and Our Oath

(Have three candles in a holder before you—one red, one white, and one blue.)

Have you noticed the strong bond between our flag and our Scout Oath? Let me show you. *(Light the white center candle.)* One of the colors in our flag is white. It is the symbol of purity, of perfection. It is like the first point of our Scout Oath, our duty to God.

(Light the red candle.) The color red in our flag denotes sacrifice and courage, the qualities of the founders of our

country. Red is the symbol of the second part of the Scout Oath, too. Our duty to other people requires courage to help anyone in trouble and the self-sacrifice of putting others first.

(Light the blue candle.) Blue is the color of faith. It represents the faith of our founding fathers and reminds us of the third part of the Scout Oath. Our duty to ourselves requires us to be true blue, to be strong in character and principle, to live a life with faith in the importance of being good.

Scouts, arise! Let's have lights out, please. Now, Scout sign. Let us dedicate ourselves with our Scout Oath.

* * * *

CHAPTER 14

[LOGO OMITTED]

[PICTURE OMITTED]

UNIFORMS AND INSIGNIA

The Scout uniform will help you achieve the objectives of Scouting. The uniform by itself can't make a good Scout or a good troop, but its use will improve both the Scout and the troop because it is a visible symbol of Scouting.

The Official Uniform

There is only one official Boy Scout uniform. It is pictured on this page, minus a pair of official shorts or trousers with the appropriate socks, green with a red tab around the top. There is no class "A" or class "B" uniform. Many troops choose to wear, in informal situations, a troop T-

shirt or perhaps the red or burgundy khit shirt. This is perfectly acceptable wear but is not an official uniform.

The official uniform is good for all occasions but especially for formal Scouting activities such as district or council events, courts of honor, or recognition functions. Badges of office or rank or special recognitions are worn only on the official uniform.

LEADER EXAMPLES

All uniforming begins and is maintained by the example of leaders. You, your assistants, and all boy leaders should be in full, correct uniform at all Scouting functions.

UNIFORM EXCHANGE

Many troops buy old uniforms in good condition from Scouts who have outgrown them or left the troop. These are resold to boys needing uniforms. They are known as "experienced" uniforms. It is important that no boy be deprived of Scouting because of lack of a uniform. The uniform is not a prerequisite for joining. However, it is a valuable tool that gives boys a sense of belonging.

INSPECTIONS

An excellent way to encourage proper uniforming is by regular uniform inspections. Formal inspections should be held at least twice a year. It's not a bad idea to have quick, informal inspections once a month. In these informal inspections, the senior patrol leader or each patrol leader inspects the Scouts for general appearance and full uniform. This should take only a few minutes. Use the Uniform Inspection Sheet as a guide.

WHERE TO GET UNIFORMS AND INSIGNIA

New uniforms, official equipment, and certain insignia can be purchased only from official Scouting distributors. These are retail stores that have been given a special franchise by the Boy Scouts of America to distribute these materials. Buyers must show that they are currently registered with the Boy Scouts of America to buy uniform parts and insignia. Other official equipment is available without evidence of registration.

Certain badges and insignia are available only through the council service center.

WHERE TO WEAR THE UNIFORM

The uniform is suitable for many occasions for both Scouts and leaders.

- Scouting activities. The uniform is appropriate for nearly all Scouting activities. It is especially appropriate where travel is involved and Scouts will be in front of the public. There may be activities within some Scouting functions that are not suitable for uniform wear, such as doing camp kitchen work or cleaning out a creek bed.
- Scouting Anniversary Week. Scouts should be encouraged to wear their uniforms during this week in February.
- Special Scout participation. Where Scouts act as color guards, march in parades, and escort distinguished visitors at functions, the uniform is in order.

WHEN NOT TO WEAR THE UNIFORM

The uniform is not appropriate for Scouts or Scouters under three kinds of conditions.

- When a commercial product or service is being sold, *even for Scout money-earning purposes*.
- When the activity would tend to dishonor or discredit the uniform.
- When the wearing of the uniform would tend to imply endorsement by Scouting of a product, service, or political candidate or philosophy. Scouts and Scouters are encouraged to take active part in political matters as individuals, but to do so in uniform would imply endorsement by the Scouting movement.

WOODS WISDOM TROOP PROGRAM FEATURES

(excerpts)

* * * *

Ceremonies

Boy Scout Investiture Ceremonies

Ceremony With Parents

(On an attractively draped table, place a long candelabrum with 12 white candles for the 12 points of the Scout Law. Behind the candelabrum place three longer candles — a white one in the center and a green one on each side — for the three parts of the Scout Oath. Use a red candle as a lighter. Position the U.S. and troop flags in their appropriate places. The chairman of the troop committee presides.)

Chairman: We are to welcome a new Scout and his parents to our troop tonight. Patrol Leader _____ *(name)* of the _____ Patrol, please bring forward Candidate _____ *(name)*. Senior Patrol Leader _____ *(name)* will please escort candidate's parents to the front. Thank you.

(Patrol leader accompanies candidate to the side of the table, where they turn and face the audience. The senior patrol leader and the candidate's parents follow and take places behind candidate and patrol leader.)

Chairman: It is now my privilege as chairman of the troop committee to pass this burning candle *(the red one)*, which represents the spirit of Scouting, to

Scoutmaster _____ *(name)* who will formally invest the candidate. *(Chairman lights candle; as he hands it to the Scoutmaster the room lights are turned off.)*

Scoutmaster: Thank you, Mr. _____ *(name)*. My happiest duty as Scoutmaster is to receive new boys and their parents into our troop family. Candidate _____ *(name)*, we are going to bring to light these candles representing the 12 points of the Scout Law. Let these ever be your guide in life. Patrol Leader _____ *(name)*, take this, the spirit of Scouting, and light our way. *(Patrol leader lights the first candle.)*

Patrol Leader: A Scout is trustworthy. *(Narrator with a good voice, who is behind a curtain or offstage with* The Official Boy Scout Handbook *and a flashlight, reads the explanatory text for his part of the Scout Law. Patrol leader and narrator carry on in this manner until the 12 candles are lighted and the 12 points of the Scout Law have been read. Patrol Leader then returns candle to Scoutmaster.)*

Scoutmaster: Thank you, Patrol Leader _____ *(name)*. Senior Patrol Leader _____ *(name)*, you will now bring to light the three central candles, which symbolize the three parts of our Scout Oath or Promise. Candidate _____ *(name)*, you are about to pledge yourself to a way of life that has guided millions of boys and men before you. It is not a promise to be taken lightly. Think well now before you take it. *(Scoutmaster pauses and allows*

5 or 6 seconds to elapse.) Are you ready to take this promise?

Candidate: I am.

Scoutmaster: Will the members of the troop please stand and give the Scout sign. Candidate _____ *(name)*, repeat after me the Scout Oath. *(Scoutmaster leads in the Scout Oath.)*

Scoutmaster: On my honor I will do my best. *(Candidate repeats.)*

Scoutmaster: To do my duty to God and my country and to obey the Scout Law. *(Candidate repeats. Senior patrol leader lights center white candle.)*

Scoutmaster: To help other people at all times. *(Candidate repeats. Senior patrol leader lights one green candle.)*

Scoutmaster: To keep myself physically strong, mentally awake, and morally straight. (*Candidate repeats. Senior patrol leader lights other green candle. Room lights should be turned on at this moment.*)

Scoutmaster (*to parents*): Here is the Scout Badge. Will you please attach it to the center of your son's left shirt pocket. Pin it on upside down. When your son has done his first Good Turn as a Scout, he may ask you to turn the badge right side up. (*Pin badge on pocket. If using cloth emblem, provide straight pin with which to fasten.)*

Scoutmaster: Now that your son is a Boy Scout, I'm sure you want him to get full value from the program. Here is an information folder welcoming you to our troop and telling you how you can help your son and the troop. I know we can count on you support. (*Present the information and shake hands with each parent.*)

Scoutmaster (*to new Scout*): Now that you are a Boy Scout, you have the privilege of presenting your mother with a miniature of your new badge. As you advance in Scouting, her badge will be changed each time you complete a rank. (*Give Scout miniature universal pin with pin already open. Scout pins miniature badge on mother's dress.*)

Scoutmaster (*to Scout*): As a new Scout in Troop _____, we expect you to uphold the ideals and program of the troop. You will be expected to live according to the Scout Law and the Scout Oath you took tonight and to be regular in attendance at troop activities including troop and patrol meetings, hikes, camps, and Good Turn projects. We know you will be a fine addition to our troop, and we welcome you. (*Scoutmaster gives Scout handclasp to new Scout.*)

Scoutmaster (*to troop members*): Troop, attention! We salute our new Scout. Troop, salute - one - two. Scouts be seated. (*The senior patrol leader escorts parents back to seats and patrol leader takes the Scout to his patrol, where they give their patrol cheer for the new member.*)

Scout Oath Ceremony

This informal Scout Oath ceremony takes place in the meeting room by the light of three candles, representing the three parts of the Scout Oath. Roll is called by the scribe;

each boy stands, answers the roll call, gives his rank, and sits down.

All stand for the Pledge of Allegiance, led by the Scoutmaster.

Scoutmaster then makes brief comments on the significance of the parts of the Scout Oath, while referring to their visible symbol, the lighted candles. Candidates' names are called and the prospective Scouts step forward. The troop stands and the candidates face them. All give the Scout sign. The candidates dedicate themselves to the high ideals of Scouting by repeating slowly the Scout Oath.

New Members remain standing to receive badges. They receive congratulations and three rousing "Hows" from the troop. Ceremony ends.

Circle Formation

(Senior patrol leader takes the candidate into an anteroom and blindfolds him. The U.S. and troop flags are placed in the center of the meeting room. The troop falls in, facing out, with their backs to the flags and their hands joined. The troop leaders are inside the circle.)

Scoutmaster: Be prepared!

Scouts (*in chorus*): We are prepared! (*This is the signal for the senior patrol leader to lead in the candidate, halting him outside the circle, opposite the Scoutmaster.*)

Scoutmaster: Senior Patrol Leader, who is with you?

Senior Patrol Leader: He is Candidate _____ (*name*), who wishes to join our troop and become a

Scout. He has met the requirements and is duly qualified.

Scoutmaster: Remove his blindfold. (*To candidate*): Candidate, you come from the darkness into the light of Scouting, and you see before you the Scouts of Troop _____ in an unbroken circle of comradeship, guarding the flags of their country, and their troop. How will you an outsider, secure a place in this circle?

Patrol Leader (*of the patrol the candidate is joining, from his position in the circle*): Sir, the _____ Patrol will open the circle and admit the candidate.

Scoutmaster: Good. In doing so, remember, you vouch for him. (*Senior patrol leader conducts the candidate to the opening the patrol leader has made by dropping his hand and leads him into the center of the circle in front of the Scoutmaster.*)

Scoutmaster (*to troop*): Unclasp hands, about face! (*Circle now faces in.*) (*To candidate:*) You have been admitted to our troop circle to be made a member of the greatest boys' movement in the world. Place your left hand upon the flag of your troop and raise your right hand in the Scout sign. (*Color bearer inclines troop flag toward candidate.*) Dedicate yourself through giving the Scout Oath. (*Candidate recites the Scout Oath, then drops his hand.*)

Scoutmaster: Now, where will I get a badge for this candidate?

Boy Scout (*previously designated, steps forward, salutes, and says*): Sir, I offer my Scout badge for this candidate.

(*This Scout may be a personal friend of the candidate or some Scout whom the candidate respects. If possible, he should be a Second Class or First Class Scout actually passing on his own Boy Scout badge. Candidate should face the audience. Scoutmaster nods to the donor who steps to the candidate and pins the badge on him.*)

Scoutmaster: Candidate, you have been given a badge that has been worn with honor and distinction by a Scout who has gone before you. This shows our friendship for you and the trust we place in you. By the authority vested in me by the National Council, Boy Scouts of America, I declare you a Boy Scout. (*The Scoutmaster brings his right hand down sharply on the candidate's left shoulder.*)

Scoutmaster: Fall out. (*The Scout shake hands with the new Boy Scout. His patrol leader then walks with the new Scout until they reach his place in the patrol.*)

The Light of Scouting

This ceremony requires 15 Boy Scouts and 15 flashlights. The candidate stands in the center of a circle formed by the troop and the flashlight bearers. The room is darkened. Starting with the Scout Oath and continuing through the 12 points of the Law, each Scout (one at a time) lights his light, points it to the ceiling, and recites his portion of the Scout Oath or Law. At a given signal, all lights are pointed at the candidate - but not in his eyes! The Scoutmaster tells him that he is now bathed in the light of Scouting. Inasmuch as the candidate intends to follow its gleam, he will now take the pledge. The candidate makes the Scout sign and recites the

Scout Oath, after which all lights are turned on and the boy joins his patrol.

Horseshoe Formation

During an evening troop meeting or campfire, have the prospective Scout stand before the Scoutmaster and the troop for the investiture ceremony. The ceremony should not be elaborate. A simple, dignified ceremony is far more impressive.

Each troop has its own traditions. If a troop is part of a church or a synagogue, the troop and the institution may have developed an investiture of a religious nature. The following ceremony is simple and may appeal to you.

The troop stands in horseshoe formation, with the Scoutmaster and the senior patrol leader (or assistant Scoutmaster) in the gap. The candidate and his patrol leader stand in front of his patrol. The senior patrol leader holds the Scout badge and the neckerchief that will be presented. The Scoutmaster gives a sign and the patrol leader brings the candidate to the center. At the same time a flag bearer carries the troop flag forward. The candidate and the Scoutmaster place their left hands on the staff of the troop flag and raise their right hands in the Scout sign. The troop comes to attention with the Scout sign.

Candidate (*looks at his Scoutmaster as he slowly and solemnly dedicates himself to the Scout Oath*): On my honor ...

Scoutmaster (*gives candidate his left hand in a firm grasp*): I trust you Scout _____ (*name*), on your honor, to keep this promise. You are now one of us and to remind you of this we present you with this

badge of our Scout world brotherhood and the neckerchief of our troop. (*Scoutmaster puts the neckerchief over candidate's shoulders and the senior patrol leader pins the badge on the candidate's shirt. The Scout turns around and salutes the troop. The troop salutes him. The patrol leader takes the new Boy Scout to his patrol, where he is received with the patrol yell and with the patrol medallion.)*

Note: If spectators are present, the candidate should face the audience during the final presentation.

Investiture 1

The notable thing about the investiture is its simplicity. There are many more elaborate, more impressive ceremonies, but they can be unsuccessful. Many fail because a Scout forgets his lines or the staging is too complicated.

Note how this ceremony is kept simple and natural, yet impressive from beginning to end.

(The troop is lined up along two sides of the room, troop officers are at the front of the room, parents are seated. The patrol leader accompanies the candidate into the shadowy room. Only one candle is burning.)

Patrol Leader (*replying to the Scoutmaster's challenge*): I bring Candidate _____, who has completed his Scout work and is ready to be received into the fellowship of our troop. (*The two walk together across the room and stop in front of a table holding a rough log candelabrum. The patrol leader steps back a pace and the candidate stands there, his eyes gradually adjusting to the dim light, aware that*

there are Scouts on either side and his parents and others in the darkness behind him. But his eyes are on the Scoutmaster and troop leaders who face him across the burning candle's glow.)

Patrol Leader (*steps from his position behind the table, picks up the lighted candle, and speaks directly to the candidate*): This candle represents the spirit of Scouting. As we welcome you into the fellowship of Troop _____, we want you to stop and think what it means to be a Boy Scout.

Sure, it's a lot of fun, but more than that it's getting along with other fellows. It's doing your part, helping others all the time, learning to lead, too. It's living up to the Scout Oath and Law - and believe me - that's a man's job! It's a Good Turn daily and the motto "Be Prepared." That's what the spirit of Scouting means to us in Troop_____. Now, listen to the Scout Law. (*Patrol leader hands burning candle to a Scout who steps up to the table.*)

Boy Scout (*lights the first candle on the log and turns to candidate*): _____ (*name*), a Scout is trustworthy. That means that everybody you live and work with can always trust your word. (*The Scout hands the spirit of Scouting candle to the Scout next to him and that boy lights the second candle, turns to candidate, and speaks simply but impressively about the meaning of loyalty. So it goes through 12 points of the Scout Law. Each Scout says only one or two sincere, forceful sentences. There should be none of the groping for*

words that so often spoils ceremonies. The twelfth Scout returns the candle to the senior patrol leader.)

Patrol Leader: _____ (*name*), you have heard the Scout Law. Will you do your best to live up to it?

Candidate (*his face glowing in the light of the 12 burning candles*): I will.

Patrol Leader: You will now be given the Scout Oath by our Scoutmaster, Mr. _____ (*name*). Please raise your right hand in the Scout sign.

Scoutmaster: Repeat each part of the Scout Oath with me, _____ (*name*), because it's your oath, your promise to live the life of a Scout. On my honor... (*Candidate picks up the words with him. As they repeat the Oath, the Scoutmaster lights the three candles that represent the three parts.*)

Candidate is asked to face the audience. The Scoutmaster steps forward, pins the badge on candidate's shirt, and, in a few words, tells what it means to be a member of the Boy Scours of America. The assistant Scoutmaster then puts a new troop neckerchief around the candidate's neck and says a word about what is expected of him as a member of Troop _____ – the best troop in town!

That is the cue for the patrol leader to pin a patrol medallion on the new Boy Scout's right sleeve and to tell him that (name) _____ Patrol (the best patrol in Troop _____) is glad to have him as a member. Then the patrol leader takes the new Boy Scout by the arm to where the other Scouts are standing in line. They shake hands and everything is informal.

Nothing is memorized. A little equipment, a properly set stage, and a few Scouts and leaders speaking from the heart are all that's needed to make this an evening the new Boy Scout will remember for a long, long time.

Flag Ceremony

(The US. and troop flags are placed at the end of room. Scoutmaster stands between the flags; senior officers line up behind him. Small table with three lighted candles is set before the U.S. flag. Scouts form a semicircle with opening in center of line. Senior patrol leader stands inside the circle. The guide and candidate stand in the rear of the room. Lights are out.)

Guide (*knocking from outside*): I have a boy with me who desires to become a Scout in Troop _____.

Senior Patrol Leader: Has the candidate completed his Scout requirements?

Guide: He has.

Senior Patrol Leader: Bring him inside our circle. (*Pause*) Does some member of the troop recommend this candidate?

Boy Scout: I recommend that he be admitted to our troop.

Guide (*to Scoutmaster*): Candidate _____ (*name*) is now ready to become a member of our Scouting family.

Scoutmaster: You may proceed with the installation.

Guide: The flag of the United States stands before you, made visible by the light of the three candles representing the three parts of the Scout Oath. In taking the Scout Oath and making it a part of yourself, you will

have a clearly lighted path that leads to good citizenship. Please grasp the flag staff in your left hand, raise your right hand in the Scout sign, and repeat the Scout Oath.

Candidate (*gives Scout Oath*): On my honor...

Guide (*to Scoutmaster*): Sir, Candidate _____ (*name*) is now ready to be invested as a Boy Scout of Troop _____.

Scoutmaster (*to candidate*): Please face the audience. (*Scoutmaster presents card and insignia, asks candidate's parent to present the badge, and says a few appropriate words.*) (*To senior patrol leader*): Senior patrol leader, I now turn over Boy Scout _____ (*name*) of the _____ Patrol to you as a member of the troop.

Senior Patrol Leader: Patrol Leader _____ (*name*) of the _____ Patrol will receive you as a member of his patrol. (*Patrol leader receives new Boy Scout, presents him with patrol emblem, and closes circle with new Scout in his patrol. Lights are turned on. Patrol members welcome him.*)

Investiture 2

The troop is assembled in horseshoe formation with Scoutmaster and assistant Scoutmaster in the gap.

The candidate with his patrol leader stands just inside the circle, opposite the Scoutmaster. The assistant Scoutmaster holds the staff and hat of the candidate. When ordered to come forward by the Scoutmaster, the patrol leader brings the candidate to the center.

Scoutmaster: Do you know what your honor is?

Candidate: Yes. It means that I can be trusted to be truthful and honest (*or words to that effect*).

Scoutmaster: Do you know the Scout Law?

Candidate: Yes.

Scoutmaster: Can I trust you, on your honor, to do your best to live up to the Scout Promise? (*Candidate then makes the Scout sign, and so does the whole troop while he gives the Scout Promise.*)

Scoutmaster: I trust you, on your honor, to keep this promise. You are now one of the great world brotherhood of Scouts. (*Assistant Scoutmaster places the hat on the new Scout's head and gives him his staff. With his left hand, the Scoutmaster shakes the candidate's left hand. The new Boy Scout faces about and salutes the troop. The troop salutes.*) To your patrol, quick march. (*The troop shoulders staves, and the new Boy Scout and his patrol leader march back to their patrol.*)

Installation and Rededication Ceremonies

Ceremonies of this nature have a variety of applications. Such ceremonies add a touch of formality or "officialness" to the happening. They add importance to the offices and elements of troops. It is important to tailor the ceremony to the specific event.

Patrol Leader Installation 1

The troop forms a circle of its patrol. The Scoutmaster speaks a few words about the importance of good patrol

leadership and announces the appointment of the new patrol leader of the _____ Patrol.

The new patrol leader is called forward. He places his left hand on the pole of the troop flag, above that of the Scoutmaster, salutes, and gives the patrol leader's promise: "I promise to do my best to be worthy of my office as patrol leader, for the sake of my fellow Scouts, my patrol, my troop, and the world brotherhood of Scouting."

The Scoutmaster pins the patrol leader's badge on the boy's left sleeve and presents him with a copy of *The Official Patrol Leader Handbook*, No. 6512. The youngest member of the patrol steps forward and gives him the patrol flag.

The troop gives a cheer for the new patrol leader, who steps back into his patrol where he is congratulated by his fellow Scouts.

* * * *

Scoutmaster's Minutes

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Laws and Men

Why do we have laws? What's the purpose of laws?

That's right, we need laws to govern society. To protect life and property and to make rules for the way our society works. If we had no laws, there would be nothing to stop a man from injuring someone weaker than himself or stealing from others. Laws are essential for any civilized society.

But you know, there are laws and laws. For instance, we speak of the law of nature. Is that some kind of written rule

that everything in nature must follow? Not really. It's more like a description of the way the natural world works. The law of nature tells us that predator animals like lions will kill and eat prey animals like wildebeests and antelopes – not because they are vicious but because that is nature's way of sustaining her creatures.

Then there's the Scout Law. Are the 12 points of the Scout Law something that must be obeyed or you'll go to jail? Of course not. The Scout Law is a different kind of law. It is a prescription for good character. But in its way the Scout Law is just as important as the laws Congress passes because the man who follows the Scout Law will be the best kind of citizen. That kind of citizen tries his best to obey not only the Scout Law but also the laws of his community, state, and nation. Let's now stand and renew our pledge to the Scout Law.

* * * *

A Scout Is Clean

(Hold up two cooking pots, one shiny bright on the inside but sooty outside, the other shiny outside but dirty inside.) Scouts, which of these pots would you rather have your food cooked in? Did I hear somebody say, "Neither one?"

That's not a bad answer. We wouldn't have much confidence in a patrol cook who didn't have his pots shiny both inside and out.

But if we had to make a choice, we would tell the cook to use the pot that's clean inside. The same idea applies to people.

Most people keep themselves clean outside. But how about the inside? Do we try to keep our minds and our language clean? I think that's even more important than keeping the outside clean.

A Scout, of course, should be clean inside and out. Water, soap, and a toothbrush takes care of the outside. Only your determination will keep the inside clean. You can do it by following the Scout Law and the example of people you respect – your parents, your teachers, your clergyman, or a good buddy who is trying to do the same thing.

* * * *

A Scout Is Kind

Scouts, our Law says, "A Scout is kind. A Scout understands that there is strength in being gentle. He treats others as he wants to be treated. He does not hurt or kill harmless things without reason."

Some of you may already be hunters. No doubt others will hunt as you grow older.

I have a question for you: Is a hunter following the Scout Law when he shoots wild creatures? (Get answers.)

It seems to me that the key words in this point of the Law are "without reason." A Scout does not hurt or kill harmless things without reason.

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ORDER OF THE ARROW HANDBOOK – BOY SCOUTS OF AMERICA

(excerpts)

* * * *

GUIDE FOR MEMBERS

All references to Scouts and troops include Varsity Scouts and teams.

Purpose and Principles

You may recall that Meteu recounted the legend of the Lenni Lanape Indians during the final part of the Ordeal Ceremony. Among the things he said: "In a great and honored Order, into which can be admitted only those who unselfishly desire to serve others, there must be a lofty purpose. You were selected for membership in the Order because your fellow Scouts saw your sincerity and acceptance of the high ideals of the Scout Oath and Law."

As a member of the Order of the Arrow, you must fulfill the trust and confidence bestowed upon you by your fellow Scouts with this mighty purpose: The essence of our existence is that we must be those campers—Boy Scouts, Varsity Scouts, and Scouters—who best exemplify the Scout Oath and Law in our daily lives and by such conduct cause others to emulate our actions. We who bear the Obligation of the Order of the Arrow, mindful of our high tradition, ponder that which is our purpose, and do pledge ourselves to cheerful service.

Purpose of the Order

To recognize those campers—Scouts and Scouters—who best exemplify the Scout Oath and Law in their daily lives and by such recognition cause other campers to conduct themselves in such manner as to warrant recognition.

To develop and maintain camping traditions and spirits.

To promote Scout camping, which reaches its greatest effectiveness as a part of the unit's camping program, both year-round and in the summer camp, as directed by the camping committee of the council.

To crystallize the Scout habit of helpfulness into a life purpose of leadership in cheerful service to others.

Mission of the Lodge

The reason for, or objective of, a lodge is critical to achievement of the purpose. Therefore, the following mission statement should be used as a basis for lodge operating practices and structure:

The mission of the lodge is to achieve the purpose of the Order of the Arrow as an integral part of the Boy Scouts of America in the council through positive youth leadership under the guidance of selected capable adults.

Principles of the Order

You were inducted into the Order of the Arrow "not so much for what you have done, but for what you are expected to do." For in taking the Obligation of the Order, you promised, on your honor, "to be unselfish in service and devotion to the welfare of others."

This is not an easy pledge to fulfill, for there are few who live a life of cheerful service in our world. For some, the

Order will be like a supernova, shining brilliantly for a brief time and soon crumbling to ashes. For others, the Order will kindle a flame of brotherhood, brighter than a thousand suns, lasting throughout eternity.

During your candidacy, you have impressed upon those fellow members who have lived closest to you the sincerity of your purpose to live in accordance with the high ideals of the Scout Promise. The judgment of your fellows can hardly have been mistaken.

Now the time to judge has come. You have entered our Brotherhood. The distinctive pocket emblem and sash are yours. Now you are to face another test, one administered and graded solely by yourself. Will you embrace the traditions and obligations of our Order?

Your election into our Order was indeed unique. There is no other organization in which members are elected by nonmembers. Any organization that inducts from the inside is prone to lose touch with society, but your election was based on the standards set by your fellow Scouts. Thus the Order, grounded in outdoor camping, will continue to be relevant to today's society.

Camping and the Order

Camping is a method of Scouting, but camping is not Scouting's purpose. Scouting aims to build character, citizenship, and fitness. When Scouts go camping, this growth just seems to follow. Patrol and troop camping are models and a testing ground for life in society. In a small group, each member is dependent on the others. Each learns to accept responsibility and to exercise good judgment. Even a stubborn or selfish person finds himself interacting with others in helpful and supportive ways. Scouts who camp will

sooner or later come face to face with practical applications of the Scout Oath and Law. Cheerfulness, trustworthiness, courtesy, helpfulness, and all the central virtues of Scouting are necessary in camp and in society. Life in the open is a natural teacher of these essential survival skills. Thus, we promote camping, and camping becomes more effective in achieving the aims of Scouting.

The principles of Scouting are central to any kind of successful camping. The Order of the Arrow arose in a Scout camp, and it keeps camping promotion as a major service. Arrowmen encourage Scouts to go camping. In camp we maintain the best traditions and the highest spirit.

Order of the Arrow Obligation

I do hereby promise, on my honor as a Scout, that I will always and faithfully observe and preserve the traditions of the Order of the Arrow, Wimachtendienk, Wingolauchsik, Witahemui.

I will always regard the ties of brotherhood in the Order of the Arrow as lasting, and will seek to preserve a cheerful spirit, even in the midst of irksome tasks and weighty responsibilities, and will endeavor, so far as in my power lies, to be unselfish in service and devotion to the welfare of others.

_____

(Sign your name)

_____

The Obligation

Although our many service projects are valuable to Scouting, the main benefit is less obvious. The Order's primary concern is the individual, and the Order's function is to spread the spirit of brotherhood and cheerful service. You do the work of the Order in your home, your troop, and your school, as you keep the fire of the Scout Oath alive in words and deeds. More than anything else, your own example of cheerful service to others accomplishes the Order's aim.

The Obligation of the Order is one way we remind ourselves of our special duties. Memorize it just as you did the Scout Oath and Law. Remember the three principles of the Order, and you will easily learn it.

"Wimachtendienk, Wingolauchsik, Witahemui" means "the brotherhood of cheerful service" or "brotherhood, cheerfulness, and service," the three principles of the Order. Thus the second sentence of the Obligation is an explanation of the first.

Your actions in living the Obligation as a member of your troop fulfill the primary goals of the Order. As you read, you will see how you can promote camping and camping traditions in your troop, how you can help your fellow Scouts, and how you can participate in the activities of the Order. But remember the main work of the Order is done by you, usually alone and without praise or reward. "He alone is worthy to wear the Arrow who will continue faithfully to serve his fellow man."

When Dr. Goodman and his Treasure Island camp staff started the Order in 1915, they realized that the Scouts who were to be chosen to set the example in their troops would need further encouragement and inspiration if they were to

fulfill their role in Scouting. They devised the Ordeal to give the new Arrowmen this inspiration in the form of an experience involving the ideals they were to follow:

- Eat you nothing but the scant food you'll be given. Learn by fasting, sacrifice, and self-denial to subordinate personal desires to the spirit's higher purpose.
- Your directions are the whispers, urgings, promptings, deep within your hearts and spirits. Therefore, till you take the Obligation, strictly keep a pledge of silence.
- Spend the day in arduous labor, working gladly, not begrudging, seek to serve, and thus be faithful to the high ideals and purpose of the Order of the Arrow.
- All your strength will be required when you face the isolation that a leader often faces. So tonight beneath the heavens sleep alone upon your groundsheet.

The Ordeal has a different meaning to each candidate who completes it. The physical tests are deeply significant. It is a time of deep searching and high resolve; a unique opportunity to experience all the richness and warmth of brotherhood. The candidate needs this experience not only for his own benefit, but also because his Obligation will require unusual devotion to the work of bringing this spirit to his own Scout troop.

The "induction sequence" is at the heart of the Order. The purpose of the induction is to encourage and inspire Arrowmen in the ideals of the Order and Scouting. It is by this method that we also pass along our traditions.

Your induction began with your election by your fellow Scouts. They selected you for your dedication to the ideals of Scouting. They look to you for leadership.

The term "induction sequence" is used in recognition of the fact that events in our induction must necessarily occur in a particular order, not at random. Following your election, you were called out. Then came your Ordeal, which began with the pre-Ordeal ceremony before an unlit fire, and ended with the Ordeal ceremony before a blazing campfire where you accepted the Obligation and received your Ordeal sash.

The next step in your induction is yours to carry out. Think about what you learned at your Ordeal and start applying it to your daily life. When you have made the principles of the Order part of your life, you are ready to complete your induction by "sealing your membership" in the Order of the Arrow through Brotherhood membership.

The purpose of Scouting is to build character, citizenship, and fitness. Camping is one of the most important ways these attributes are learned in the Scouting program. The Order of the Arrow arose in a camping situation, and has kept camping promotion as a major emphasis in order to further the aims of Scouting.

The native American cultures foster a love of the outdoors and nature. They use ceremonies to bind themselves together; to remind themselves of their obligations to themselves and each other. They set aside times for meditation, silence, isolation, fasting, and special duties to the tribe. The Order of the Arrow helps preserve this cultural perspective in camping promotion and induction. While we often celebrate our interest in native American culture with authentic dances and crafts, you do not need Indian attire, or an interest or ability in Indian lore or crafts to be a good Arrowman. Indian lore unto itself is colorful and interesting, but it is the inner strengths and fortitude of native Americans that we seek to place

emphasis on. To this end, the Order of the Arrow does more than place an emphasis on camping; it encourages the sort of Scout activity that fosters character development, citizenship training, and physical fitness.

The Ordeal is an adventure of the spirit; a time of deep searching and high resolve; a unique opportunity to experience all of the richness and warmth of brotherhood.

Order of the Arrow Official Song
Words by E. Urner Goodman

Firm bound in brotherhood, Gather the clan
That cheerful service brings To fellow man.
Circle our council fire, Weld tightly ev'ry link
That binds us in brotherhood, Wimachtendienk

* * * *

TROOP COMMITTEE GUIDEBOOK

Boy Scouts of America
1992 Printing
(excerpts)

* * * *

CHAPTER 5

Selecting and Recruiting Adult Leaders

Perhaps the single most important responsibility of the troop committee is recruiting adult leaders and volunteers. The quality of your troop's program will be in direct proportion to the quality and number of adult volunteers recruited. Let's review some recommended methods to accomplish that task.

Scoutmaster

A key function of your troop committee is the selection of the best possible person to be your Scoutmaster. Your Scoutmaster will be a role model for the boys and will reflect the character of the chartered organization. The Scoutmaster must be the kind of person that you would want your own sons to be influenced by and whose judgment will always be in the best interest of your boys.

To find the right person, it is strongly recommended that you use the following six steps:

STEP 1: After a briefing of the head of the chartered organization or the chartered organization representative by a representative of the Boy Scouts of America, a Scoutmaster selection task force is appointed. At least one task force member must represent the chartered organization. The other

members would be from the troop committee, interested parents, or influential community members.

STEP 2: Have a meeting of the selection task force and develop a prospect list. Consider members of the chartered organization, current assistant Scoutmasters, parents of troop members, or other names suggested by task force members.

It is a natural tendency to look for an individual who is perceived to have time on their hands or who loves the outdoors. Research has shown that these qualities alone do not necessarily give you the best candidate. What are the personal characteristics of a successful Scoutmaster? In descending order of importance; we have found the top 10 characteristics to be:

1. High moral standards
2. Commitment to the ideals of Scouting
3. Ability to relate to boys
4. Ability to keep a "cool head" under pressure
5. Organizing ability
6. Ability to relate to and interact with adults
7. Flexibility and the ability to compromise
8. Planning ability
9. A high energy level
10. Attention to detail

The task force should rate each prospect, using these personal characteristics as a guide. In cases where you are not sure, it is imperative that some discreet inquiries be made.

The top three prospects need to be agreed upon and ranked in order of preference: Who is number one? Who is our next best prospect? Who is third choice? Be careful not to exclude any prospects because the group "feels" that they are too busy or thinks that they are probably not interested. Give everyone the opportunity to say "no" for themselves. After the top prospects are reviewed and approved by the chartered organization head, three or four people should be appointed to visit the "number one" prospect to secure a commitment. The members of the visitation team should be persons influential in the community or those who have influence with the prospect: a close friend, job supervisor, co-worker, a respected business person, or a member of the clergy. If they are or have been active in Scouting, it enhances their credibility with the prospect.

STEP 3: Contact the prospect and arrange a convenient time to meet. This should be done by a member of the task force who knows the prospect well. The best place for this meeting is in the prospect's home, with spouse present.

STEP 4: Call on the prospect as a group.

Explain the purpose of the visit to the prospect. Members of the task force should tell of the satisfaction their Scouting experiences have given them, and should impress upon the prospect the needs of the boys in your community. Review the steps that have been taken, explain how the qualifications were reviewed, and let the prospect know that he or she was considered by all involved as the "number one prospect." Review the personal characteristics given

above and relate the prospect's own abilities to those needed to be a successful Scoutmaster.

You must give the prospect a realistic overview of the job: time demands, adult leadership support, relationship with the chartered organization, special problems the troop is facing, and other relevant information. It's important that the prospect has a true picture of the commitment you are asking for. After all questions have been answered, a member of the chartered organization extends the invitation to serve the organization as its Scoutmaster and pledges the organization's full support.

If the prospect cannot give a reply during the visit, a follow-up contact should be made within 24 hours. If the prospect declines, the process is repeated with the next candidate.

As soon as the new leader agrees to serve, the BSA representative makes an appointment to review the Fast Start training.

STEP 5: The task force members, troop committee, key members of the chartered organization, and others involved with the troop attend a "get acquainted" meeting with the new Scoutmaster.

The new Scoutmaster is formally registered, and the application is approved by the head of the chartered organization. The Scoutmaster is briefed on the general organization of the troop, procedures, meeting place, and program plans, and is introduced to the other adults involved in the troop. Handbooks, records, and materials are turned over. Arrangements are made for a press release, letter to parents,

introduction of the new Scoutmaster at a meeting of the chartered organization, and possibly an introduction to the Scouts' families at a family night program.

STEP 6: Set up Fast Start training. The BSA representative follows up on the appointment made for Fast Start training. The Scoutmaster is contacted and encouraged to attend the next Boy Scout leader roundtable, and arrangements are made for Scoutmastership Fundamentals and Youth Protection training.

Assistant Scoutmasters

The same standards used to determine the best prospect for Scoutmaster should also be used to qualify assistant Scoutmasters. The majority of successful troops have four or more assistant Scoutmasters. This is not an unrealistic goal. The guide, *Selecting Quality Leaders*, can help you through the selection process. The video presentation, *Ventures III: Selecting Quality Leaders*, is also a useful tool.

[PICTURE OMITTED]

Recruiting Committee Members

Experience has shown that troops with committees of seven or more members work more effectively and provide better troop program support. The minimum number of committee members required is three adults, 21 or older. If the committee is well run and active, you should have little difficulty getting others to join. But again, be sure that each member has a meaningful responsibility and is kept actively involved.

As with securing a Scoutmaster, to get qualified adults involved with your troop, you must first identify good people, select and rank the top prospects, and then use all available influence to recruit them.

Where do you find new committee members? The best source is parents of troop members. Parents have a natural interest in their sons having a successful Scouting experience. They are also an excellent resource for troop program assistance. The *Troop Resource Survey* should be completed by every troop member's parents. This task is the responsibility of the assistant Scoutmaster of the new Scout patrol.

The survey will inform the committee what professions, special interests, skills, and resources are available to your troop. For example, a parent who works at a printing shop could help the troop scribe produce a first-rate troop newsletter. Another parent might be a banker. Obviously, this person would likely be considered for the position of the committee treasurer. But their hobbies may be cycling and fishing. If asked, they may well be more than willing to work with the boys in either of these activities.

The troop committee secretary should have a copy of every troop resource survey conducted by the assistant Scoutmaster for new Scouts or by other committee members. At the monthly committee meeting, the Scoutmaster should be consulted as to what adult help and talents are needed for the coming month's program. A careful review of the collected resource surveys should begin the committee's search.

Not every parent will be able to serve on the troop committee or make a similar long-term commitment, but

every parent should have the responsibility to perform a short-term task sometime during the year. Baking cookies for a bake sale, providing transportation to camp-outs, giving skill demonstrations at troop meetings, and accompanying the troop on a hike are all examples of help that is expected by troop members' parents. Let the parents know that the troop will call on them occasionally for help. Keep parents involved!

Troop committee members should also use the troop resource survey with interested members of the chartered organization, personal friends, Eagle Scouts, and Scouting supporters in your community. Once your resources are identified, don't hesitate to use them.

Supreme Court, U.S.
FILED
FEB 28 2000
CLERK

No. 99-699

IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

JOINT APPENDIX
Volume II

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

MICHAEL W. MCCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109
Attorneys for Petitioners

EVAN WOLFSON
Counsel of Record
DAVID BUCKEL
JON W. DAVIDSON
BEATRICE DOHRN
RUTH HARLOW
LAMBDA LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585
Attorneys for Respondent

(Attorneys Listing Continued on Inside Cover)

CERTIORARI GRANTED JANUARY 14, 2000
PETITION FOR CERTIORARI FILED OCTOBER 25, 1999

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

SANFORD D. BROWN
CERRATO, DAWES, COLLINS,
SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728
Attorneys for Petitioners

THOMAS J. MOLONEY
ALLYSON W. HAYNES
SETH A. STUHL
KIERITH A. JONES
CLEARY, GOTTLIEB, STEEN
& HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

LEWIS H. ROBERTSON
231 Maple Avenue
P.O. Box Y
Red Bank, New Jersey 17701
(732) 842-6660
Attorneys for Respondent

TABLE OF CONTENTS

	Page
Relevant Docket Entries in the Superior Court of New Jersey, Chancery Division in *Dale v. The Boy Scouts of America and The Monmouth Council, Boy Scouts of America*	1
Relevant Docket Entries in the Superior Court of New Jersey, Appellate Division in *Dale*	5
Relevant Docket Entries in the Supreme Court of New Jersey in *Dale*	7
Complaint	10
Answer	30
Selected Exhibits to Certification of Ayala Deutsch, Attorney for Respondent	
Fact Sheet – Order of the Arrow (excerpts)	43
Fact Sheet – The Presidents of the United States and the Boy Scouts of America	46
Fact Sheet – What Is Boy Scouting?	56
A Representative Membership (1975) (excerpts)	64
Organizations that Use Scouting (excerpts)	69
Fact Sheet – Community Organizations and The Boy Scouts of America (excerpts)	93
The Chartered Organization Representative (excerpts)	99
Announcements of Meetings for Prospective Cub Scouts	102

Press Release Announcing School Night for Scouting by Monmouth Council 104

Fact Sheet – BSA at a Glance (1991) 106

Affidavit of James Dale in Support of Motion for Summary Judgment (Sept. 9, 1993) 112

Selected Exhibits to Affidavit of James Dale

Letter from James W. Kay to James R. Dale (July 19, 1990) 135

Letter from James R. Dale to James W. Kay (Aug. 8, 1990) 136

Letter from James W. Kay to James R. Dale (Aug. 10, 1990) 137

Letter from David K. Park, Esq. to Glenn Gordon, Esq. (Dec. 21, 1990) 138

Affidavit of Gerald Dick in Support of Plaintiff's Motion for Summary Judgment (Sept. 8, 1993) 139

Certification of Michael Adam Kivetz (Aug. 13, 1993) 149

Certification of Reverend Donald K. Hummel in Support of Defendants' Cross-Motion for Summary Judgment (Nov. 3, 1993) 155

Selected Exhibit to Certification of Reverend Donald K. Hummel

A Scout is Reverent – A Manual for Scouts of Catholic Faith (excerpts) 162

Certification of Adam S. Bogner in Support of Defendants' Cross-Motion for Summary Judgment (Nov. 4, 1993) 168

Selected Exhibits to Certification of Adam S. Bogner

Boy Scouts of America Mission Statement 184

The Scout Oath 184

The Scout Law 184

Boy Scout Handbook (1992 Printing) (excerpts) 185

Scoutmaster Handbook (1990) (excerpts) 232

Woods Wisdom Troop Program Features (excerpts) 274

Order of the Arrow Handbook – Boy Scouts of America (1992) (excerpts) 291

Troop Committee Guidebook – Boy Scouts of America (1992 Printing) (excerpts) 299

Certification of James W. Kay in Support of Defendants' Cross-Motion for Summary Judgment (Nov. 9, 1993) 306

Exhibits to Certification of James W. Kay

Charter of Boy Scouts of America 314

Bylaws of Boy Scouts of America 322

Rules and Regulations of the Boy Scouts of America 373

Certification of Dr. Ricky L. Slavings in Support of Defendants' Cross-Motion for Summary Judgment (Oct. 26, 1993) 443

Certification of P. Karl Rowley in Support of Defendants' Cross-Motion for Summary Judgment (Nov. 9, 1993) 450

Exhibits to Certification of P. Karl Rowley

Boy Scouts of America Position Statement (Mar. 17, 1978) 453

Boy Scouts of America Position Statement (June 6, 1991) 457

Boy Scouts of America Position Statement (Feb. 15, 1991) 458

Boy Scouts of America Position Statement (May 6, 1992) 459

Boy Scouts of America Position Statement (Jan. 1993) 460

Certification of Earl C. Wightman in Support of Defendants' Cross-Motion for Summary Judgment (Oct. 16, 1993) 462

Transcript of a Segment of the Joan Rivers Show of July 16, 1993 entitled "Gays in Uniform" 466

Transcript of Deposition of James Dale (May 10, 1993) (excerpts) 474

Selected Exhibits to the Deposition of James Dale

Speech by Jim Dick (May 10, 1993) 505

From an Eagle Scout to Persona Non Grata, *The New York Times* (Aug. 5, 1992) 510

Ex-Eagle Scout Sues Over Ban on Homosexuals, *The New York Times* (July 30, 1992) 513

Seminar Addresses Needs of Homosexual Teens, *The Star-Ledger* (July 8, 1990) 515

The Gay Boy Scout, *Philadelphia* (Jan. 1993) 519

Scoutmaster's Handbook (1972) (excerpts) 542

Expelled Scout Is Taking Lessons to Heart, *The Seattle Times* (July 10, 1992) 548

United Press International article (Apr. 30, 1981) 551

Homosexual Loses Bid to Become Scout Leader, *United Press International* (July 7, 1981) 554

Affidavit of Reverend George Wayne Freyberger in Support of Plaintiff's Motion for Summary Judgment (Jan. 3, 1994) 556

Affidavit of Reverend Richard Giffen in Support of Plaintiff's Motion for Summary Judgment (Jan. 4, 1994) 562

Affidavit of Bishop Thomas Gumbleton in Support of Plaintiff's Motion for Summary Judgment (Jan. 6, 1994) 567

Affidavit of Reverend William A. Hanson (Dec. 31, 1993) 573

Selected Exhibit to the Certification of Patrick G. Marette, Attorney for Respondent

Brief of *Amici Curiae* James E. Andrews as Stated Clerk of the Presbyterian Church (U.S.A) General Assembly, *et al.* in *The Presbytery of New Jersey of The Orthodox Presbyterian Church et al. v. Florio et al.*, No. 92-5339 (3rd Cir.)..... 578

Affidavit of Rabbi Alexander Schindler in Support of Plaintiff's Motion for Summary Judgment (Jan. 4, 1994)..... 596

Selected Exhibits to Affidavit of Rabbi Alexander Schindler

Resolution by Central Conference of American Rabbis (Apr. 9, 1992)..... 605

Resolution of the National Federation of Temple Youth (1992-93)..... 606

Affidavit of Bishop John S. Spong in Support of Plaintiff's Motion for Summary Judgment (Jan. 5, 1994)..... 607

Affidavit of Father Paul Surlis in Support of Plaintiff's Motion for Summary Judgment (Jan. 6, 1994)..... 614

Certification of Bishop Melvin Wheatley, Jr. in Support of Plaintiff's Motion for Summary Judgment (Dec. 30, 1993)..... 618

Certification of Dr. Michael Cahn in Support of Plaintiff's Motion for Summary Judgment (Dec. 21, 1993)..... 623

Exhibit to Certification of Dr. Michael Cahn

Resolution of Troop Commitee of Scout Troop 260 (Dec. 30, 1991)..... 630

Supplemental Affidavit of James Dale in Support of Motion for Summary Judgment (Dec. 31, 1993)..... 631

Certification of Mary Lou Goeke (Dec. 31, 1993)..... 635

Exhibit to Certification of Mary Lou Goeke

Letter from Dean R. Crafton to Mary Lou Goeke (Feb. 10, 1993)..... 637

Certification of Robert Gwinn (Jan. 5, 1994)..... 638

Exhibits to Certification of Robert Gwinn

Letter from Robert Gwinn to National Board of Boy Scouts of America..... 640

Resolution of Executive Board of Baden-Powell Council, Inc. (Apr. 29, 1992)..... 644

Resolution of Baden-Powell Council, Inc. (May 13, 1993)..... 645

Affidavit of William A. J. Kirkner in Support of Plaintiff's Motion for Summary Judgment (Dec. 30, 1993)..... 647

Certification of David A. Rice in Support of Plaintiff's Motion for Summary Judgment (Dec. 23, 1993)..... 658

Affidavit of Robert L. Smith, Jr. in Support of Plaintiff's Motion for Summary Judgment (Jan. 3, 1993)..... 665

Affidavit of Dr. Bryant L. Welch in Support of Plaintiff's Motion for Summary Judgment (Jan. 4, 1994) 675

Certification of Charles Albert Wolfe (Aug. 30, 1993) 685

Transcript of Deposition of Charles D. Ball (Mar. 18, 1993 (excerpts) 691

Selected Exhibits to the Certification of Steven M. Knecht, Attorney for Respondent

1991 Annual Report — Boy Scouts of America (excerpts) 698

United Way Threatens to Cut Aid to Boy Scouts, *The New York Times* (Dec. 17, 1993) 700

Scouts' Ouster of Gay Ends United Way Aid, *Chicago Tribune* (Dec. 18, 1993) 704

Go for the Eagle – A Guide to Achieving Scouting's Highest Rank (excerpts) 705

Certification of Reverend John Giffin (Jan. 27, 1994) 707

Certification of Rabbi Arthur Vernon (Jan. 26, 1994) 710

Certification of Reverend Jerald C. Joersz (Jan. 25, 1994) 714

Certification of Elder Jack H. Goaslind in Support of Defendants' Cross-Motion for Summary Judgment (Jan. 26, 1994) 719

Supplemental Certification of Reverend Donald K. Hummel (Jan. 26, 1994) 722

Certification of Reverend Sam Houston in Support of Defendants' Cross-Motion for Summary Judgment (Jan. 24, 1994) 724

Certification of Reverend Dr. Barry M. Walker (Jan. 25, 1994) 727

Certification of Dr. Park Dietz in Support of Defendants' Cross-Motion for Summary Judgment (Jan. 24, 1994) 731

Supplemental Certification of Dr. Ricky L. Slavings (Jan. 26, 1994) 736

Certification of Parvin L. Bishop (Jan. 26, 1994) 745

Supplemental Certification of David K. Park (Jan. 26, 1994) 748

Transcript of Deposition of James William Kay (Jan. 19, 1993) (excerpts) 750

The following opinions and statutory provisions have been omitted in printing this Joint Appendix because they appear at the following pages in the appendix to the printed Petition for a Writ of Certiorari:

Opinion of the Supreme Court of New Jersey 1a

Opinion of the Superior Court of New Jersey, Appellate Division 102a

Opinion of the Superior Court of New Jersey, Chancery Division 155a

N.J. Stat. Ann. §§ 10:5-4, 10:5-5(l), and 10:5-5(hh) 255a

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF JAMES W. KAY IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY)
) ss.:
MONMOUTH COUNTY)

James W. Kay certifies:

1. I am employed by Monmouth Council, Boy Scouts of America ("Monmouth Council") as Council Executive. I submit this certification in support of defendants' cross-motion for summary judgment.

2. I first became associated with Scouting in 1950 when I joined Boy Scouts of America ("Boy Scouts") as a Cub Scout. I remained a member of Boy Scouts, first as a Cub Scout and later as a Boy Scout, until the age of eighteen.

3. In 1960, after I turned 18, I applied for adult membership in Boy Scouts as an Assistant Scoutmaster. I became employed as a commissioned professional Scouter in 1965. I have been been employed successively in several different local Councils in various positions as a professional Scouter since then. I became Council Executive of Monmouth Council in 1988.

Boy Scouts' Organization

4. Boy Scouts is a volunteer movement dedicated to instilling values in boys and young people. Boy Scouting is for boys in the 11 to 18 group. The Tiger Cubs and Cub Scouts are for younger boys, and Exploring is for young men and women ages 14 through 20.

5. A separately incorporated subsidiary of Boy Scouts offers a curriculum called Learning for Life to schools for use during instructional time. Students studying the Learning for Life curriculum are not asked to take an oath or promise or to become members of Boy Scouts.

6. Boy Scouts charters local groups to form and maintain Packs, Troops and Posts. A sponsoring group may be a religious, civic, fraternal or educational organization or other group of citizens. Packs, Troops and Posts are self-financed.

7. Sponsoring groups are charged with providing suitable meeting places and activities, identifying adult leaders, and designating a Chartered Organization Representative, who acts as liaison between the local council and the Pack, Troop or Post. In order to serve as a Scoutmaster or in another adult leader position, an individual must become a registered adult member of Boy Scouts.

8. Boy Scouts volunteers at all levels serve without compensation or material reward of any kind. Boy Scouts volunteers receive no compensation, fringe benefits, workers compensation protection or any other forms of remuneration for their volunteer service.

9. Boy Scouts also charters local councils such as Monmouth Council, which are separate not-for-profit

organizations, to support local Scouting groups in a given geographic area. The geographic area covered by Monmouth Council is all but the westernmost portion of Monmouth County. Local councils are divided into districts. Monmouth Council is divided into three districts, each of which is overseen by a volunteer committee. The principal duty of each district is to work with sponsoring groups, the groups that actually conduct the Scouting program, in organizing and supporting Scouting groups.

10. Each Troop's sponsoring organization appoints one delegate to the local council, which elects an executive board. Each local council has at least three delegates to Boy Scout's National Council. Monmouth Council has three delegates to the National Council.

11. Each local council employs a small number of professional Scouters to assist its volunteers. For example, Monmouth Council employs four Scouting professionals to assist its approximately 2948 volunteer leaders.

12. Boy Scouts' policies are established by its Executive Board, a volunteer body elected by and from the National Council (which is itself a volunteer body made up of representatives from the local councils and at-large representatives). This Executive Board is charged by the Bylaws to be the final reviewing authority on all Scouting matters. Charter and Bylaws of Boy Scouts of America ("Bylaws"), annexed hereto as Exhibit A at art. III, sec. 1, cl. 1.

Sponsoring Organizations

13. Monmouth Council charters 77 Boy Scout Troops to various religious, civic, educational or other groups. The largest category of Boy Scout Troop sponsors in Monmouth

Council is religious groups. Thirty-five of the 77 Boy Scout Troops in Monmouth Council are chartered by the following religious organizations:

First Presbyterian Church, Atlantic Highlands
First Presbyterian Church, Red Bank
First United Methodist Church
First United Methodist Church, Oakhurst
Glendola Bible Church
Hamilton Methodist Church
Holy Family Roman Catholic Church
Knights of Columbus-Council #3402
Latter-Day Saints Church, Freehold Branch
Latter-Day Saints Church, Eatontown Ward
Lincroft United Presbyterian Church
Luther Memorial Church, Tinton Falls
Manasquan United Methodist Church
Matawan United Methodist Church
Memorial United Methodist Church
Mens Club United Methodist Church
NWS Earle Chapel
Old Brick Reformed Church
Old First Methodist Church
Old Tennent Presbyterian Church
Our Lady of Mount Carmel Roman Catholic Church
Presbyterian Church at Shrewsbury
Second Baptist Church
St. Agnes Catholic Church
St. Catharine's Roman Catholic Church
St. Elizabeth Roman Catholic Church
St. John's Episcopal Church
St. Paul's United Methodist Church
St. Rose of Lima Roman Catholic Church

St. Thomas More Roman Catholic Church
St. Veronica's Roman Catholic Church
United Methodist Church, Red Bank
United Methodist Churches Men's Club
United Methodist Men, St. Lukes UMC
Wayside United Methodist Church

Supporting Troops in Monmouth Council

14. Boy Scout Troops for the most part conduct the Scouting program on their own, and do not interact with the District, Council or National Council on a daily basis. Troops make their own arrangements for activities. Troops also make their own meeting arrangements with their chartering organization. The roles of the District, the Council and the National Council are to provide support in tasks the Troops cannot do easily themselves.

15. A District is a geographical area within the local council. Troops rely on the District to provide training and to coordinate District-wide activities. The District provides Troops with a Commissioner, a volunteer who gives direct coaching and consultation to the members of the Troop Committee and other adult leaders. District Committees are formed to help Troop leaders with training and to coordinate District-wide events. In addition to formal training sessions for various roles throughout the course of the year, the District holds monthly Roundtable meetings for Troop leaders to provide training, information and practical program ideas. On occasion, the District sponsors an event for all the Troops in a district, typically including an annual camporee and Klondike Derby.

16. The District also helps Troops recruit new members by, among other things, helping with the planning and

providing informational material for annual informational meetings open to interested boys and their parents considering being Scouts.

17. The Council supports Troops in Monmouth Council directly and through the Districts. Monmouth Council provides leader training through courses such as Wood Badge for adult volunteers and Brownsea training for youth leaders. The Council provides camping and program resources to advance the goals of Scouting, and maintains campsites at Forestburg Scout Reservation in Sullivan County, New York, and Quail Hill Scout Camp in Manalapan Township, New Jersey.

18. Forestburg and Quail Hill Scout Troops pay a registration fee for use of the camps, but the Council spends more to maintain the camps than it receives in registration fees. Both camps avail themselves of government surplus milk and cheese which is made available generally to non-profit camps.

19. The Council also helps Troops to recruit new members and to raise money to support Troop activities. Monmouth Council holds a bowl-a-thon, a golf tournament and the annual Joshua Huddy dinner to raise money for Council program support activities. It also coordinates an annual Troop popcorn sale to help Troops and the Council raise money.

20. The National Council of Boy Scouts supports Troops in Monmouth Council directly and through its support of the Council. The National Council maintains a system of governance for all Boy Scout Troops under the Bylaws and Rules and Regulations of Boy Scouts of America, annexed hereto as Exhibits A and B. The National Council produces such items as handbooks, uniforms, badges, pins and memorabilia for use by Scouts and adult leaders. The

National Council also provides youth and adult leader training materials and administrative support to the Council.

21. Scouts and adult leaders are responsible for purchasing their own uniforms, badges, handbooks, and camping gear. Troops typically provide the funds necessary to purchase Boy Scouts' program materials and badges.

22. The National Council provides informational materials, like posters and public service announcements ("PSA"). Local television stations may run Boy Scouts' PSAs during a time allocated for free use by non-profit organizations. In addition, the National Council supplies information sheets to the Council to be made available for Troops to inform prospective members about Scouting.

Dale's Membership

23. After Dale turned 18 years old, his youth membership in Boy Scouts automatically terminated.

24. Seven months after his 18th birthday, Dale applied for adult membership. In his application for membership as an adult volunteer, Dale stated that he would adhere to the principles and policies of the Boy Scouts, including the Declaration of Religious Principle, the Scout Oath and Scout Law. In thereafter publicly avowing that he was a homosexual, Dale demonstrated his failure to live by the Scout Oath and Law. Because Boy Scouts views homosexual conduct as inconsistent with the Scout Oath and Law, Dale's registration was revoked.

25. Dale's membership revocation was handled in strict confidentiality. No one outside the Boy Scout organization was notified by Boy Scouts of the decision. His ineligibility

would have remained a private issue had Dale not chosen to publicize his membership revocation.

26. Dale was not stripped of any awards he had earned as a youth. James Dale remains a former Boy Scout who attained the rank of Eagle Scout.

27. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: November 9, 1993

/s/ James W. Kay
James W. Kay

Exhibits to Certification of James W. Kay

CHARTER OF BOY SCOUTS OF AMERICA

SIXTY-FOURTH CONGRESS OF THE UNITED STATES OF AMERICA AT THE FIRST SESSION BEGUN AND HELD AT THE CITY OF WASHINGTON ON MONDAY, THE SIXTH DAY OF DECEMBER ONE THOUSAND NINE HUNDRED AND FIFTEEN

AN ACT

To Incorporate the Boy Scouts of America and for Other Purposes

SECTION 1.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Colin H. Livingstone and Ernest P. Bicknell, of Washington, District of Columbia; Benjamin L. Dulaney, of Bristol, Tennessee; Milton A. McRae, of Detroit, Michigan; David Starr Jordan, of Berkeley, California; F. L. Seely, of Asheville, North Carolina; A. Stamford White, of Chicago, Illinois; Daniel Carter Beard, of Flushing, New York; George D. Pratt, of Brooklyn, New York; Charles D. Hart, of Philadelphia, Pennsylvania; Franklin C. Hoyt, Jeremiah W. Jenks, Charles P. Neill, Frank Presbrey, Edgar M. Robinson, Mortimer L. Schiff, and James E. West, of New York, New York; G. Barrett Rich, Junior, of Buffalo, New York; Robert Garrett, of Baltimore, Maryland; John Sherman Hoyt, of Norwalk, Connecticut; Charles C. Jackson, of Boston,

Massachusetts; John H. Nicholson, of Pittsburgh, Pennsylvania; William D. Murray, of Plainfield, New Jersey; and George D. Porter, of Philadelphia, Pennsylvania, their associates and successors, are hereby created a body corporate and politic of the District of Columbia, where its domicile shall be.

SECTION 2.

That the name of this corporation shall be "Boy Scouts of America," and by that name it shall have perpetual succession, with power to sue and be sued in courts of law and equity within the jurisdiction of the United States; to hold such real and personal estate as shall be necessary for corporate purposes, and to receive real and personal property by gift, devise, or bequest; to adopt a seal, and the same to alter and destroy at pleasure; to have offices and conduct its business and affairs within and without the District of Columbia and in the several States and Territories of the United States; to make and adopt bylaws, rules, and regulations not inconsistent with the law of the United States of America, or any State thereof, and generally to do all such acts and things (including the establishment of regulations for the election of associates and successors) as may be necessary to carry into effect the provisions of this Act and promote the purposes of said corporation.

SECTION 3.

That the purposes of this corporation shall be to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism,

courage, self-reliance, and kindred virtues, using the methods which are now in common use by Boy Scouts.

SECTION 4.

That said corporation may acquire, by way of gift, all the assets of the existing national organization of Boy Scouts, a corporation under the laws of the District of Columbia, and defray and provide for any debts or liabilities to the discharge of which said assets shall be applicable; but said corporation shall have no power to issue certificates of stock or to declare or pay dividends, its object and purposes being solely of a benevolent character and not for pecuniary profit to its members.

SECTION 5.

That the governing body of the said Boy Scouts of America shall consist of an executive board composed of citizens of the United States. The number, qualifications, and terms of office of members of the executive board shall be prescribed by the bylaws. The persons mentioned in the first section of this Act shall constitute the first executive board and shall serve until their successors are elected and have qualified. Vacancies in the executive board shall be filled by a majority vote of the remaining members thereof. The bylaws may prescribe the number of members of the executive board necessary to constitute a quorum of the board, which number may be less than the majority of the whole number of the board. The executive board shall have power to make and to amend the bylaws, and, by two-thirds vote of the whole board at a meeting called for this purpose, may authorize and cause to be executed mortgages and liens

upon the property of the corporation. The executive board may, by resolution passed by a majority of the whole board, designate three or more of their number to constitute an executive or governing committee, of which a majority shall constitute a quorum, which committee, to the extent provided in said resolution or in the bylaws of the corporation, shall have and exercise the powers of the executive board in the management of the business affairs of the corporation, and may have power to authorize the seal of the corporation to be affixed to all papers which may require it. The executive board, by the affirmative vote of a majority of the whole board, may appoint any other standing committees, and such standing committees shall have and may exercise such powers as shall be conferred or authorized by the bylaws. With the consent in writing and pursuant to an affirmative vote of a majority of the members of said corporation, the executive board shall have authority to dispose in any manner of the whole property of the corporation.

SECTION 6.

That an annual meeting of the incorporators, their associates and successors, shall be held once in every year after the year of incorporation, at such time and place as shall be prescribed in the bylaws, when the annual reports of the officers and executive board shall be presented and members of the executive board elected for the ensuing year. Special meetings of the corporation may be called upon such notice as may be prescribed in the bylaws. The number of members which shall constitute a quorum at any annual or special meeting shall be prescribed in the bylaws. The members and executive board shall have power to hold their meetings and

keep the seal, books, documents, and papers of the corporation within or without the District of Columbia.

SECTION 7.

That said corporation shall have the sole and exclusive right to have and to use, in carrying out its purposes, all emblems and badges, descriptive or designating marks, and words or phrases now or heretofore used by the Boy Scouts of America in carrying out its program, it being distinctly and definitely understood, however, that nothing in this Act shall interfere or conflict with established or vested rights.

SECTION 8.

That on or before the first day of April of each year the said Boy Scouts of America shall make and transmit to Congress a report of its proceedings for the year ending December thirty-first preceding.*

SECTION 9.

That Congress shall have the right to repeal, alert, or amend this Act at any time.

Approved 15 June 1916

WOODROW WILSON

* As amended August 30, 1964. Pub. L. 88-304. 78 Seat 636.

CONGRESSIONAL REPORT IN SUPPORT OF ACT TO INCORPORATE BOY SCOUTS OF AMERICA

House Report No. 130, Sixty-Fourth Congress
First Session

February 7, 1916.—Referred to the House Calendar and ordered to be printed.

Mr. Gard, from the Committee on the Judiciary, submitting the following report (to accompany H.R. 755).

The Committee on the Judiciary, to whom was referred the bill (H.R. 755) to incorporate the Boy Scouts of America and to protect its insignia, having carefully considered the same, beg leave to submit the following report with the recommendation that the bill do pass.

The Boy Scout movement is not one seeking to promote a juvenile military system, but is intended to supplement and enlarge established modern educational facilities in activities in the great and healthful out of doors where may be the better developed physical strength and endurance, self-reliance, and the powers of initiative and resourcefulness, all for the purpose of establishing through the boys of today the very highest type of American citizenship.

It tends to conserve the moral, intellectual, and physical life of the coming generation, and in its immediate results does much to reduce the problem of juvenile delinquency in the cities. The movement has grown rapidly during the past few years, until it is now organized in practically every community of 4,000 inhabitants and over and in many smaller communities of the United States. During the past two years

Boy Scouts have demonstrated the value of the education and training they received as an auxiliary force in the maintenance of public order and in the administration of first-aid and practical assistance in times of great public emergencies. Their services on the occasion of the Ohio floods, at the Gettysburg reunion, in the inaugural ceremonies of President Wilson, and at the recent memorable reunion of the Grand Army of the Republic in Washington attracted Nationwide attention and received general commendation, particularly from the American National Red Cross and the officials of the Federal and State Governments. The importance and magnitude of its work is such as entitle it to recognition and its work and insignia to protection by Federal incorporation.

The Scout scheme is based upon the methods involved in educating the boy. It is a scheme of placing the boy on honor. In addition to requiring him to live up to a standard or code of laws which insure development of character along proper lines, it requires him to study in order to pass certain tests of qualification. The passing of these various tests is recognized by the award of appropriate badges or medals and insignia.

If any boy can secure these badges without meeting the required tests, the badges will soon be meaningless, and one of the leading features of the Scout program will be lost. Likewise, with the uniform which designates the Scout. At the present time this is protected by the use of insignia – a seal woven or stamped into the cloth. All of these various badges and insignia are at present protected by the patent laws, but under the patent laws such protection is available for a limited period only. The passing by Congress of this bill will, it is believed, provide the organization with proper protection for its distinctive insignia, the integrity of which is

essential to the maintenance of the movement, and protect it from those who are seeking to profit by the good repute and high standing and popularity of the Scout movement by imitating it in name alone.

The identical language of this bill was incorporated in the bill with amendments thereto, known as H.R. 19907, which was reported from the Committee on the Judiciary on February 3, 1915, with a recommendation that it, as so amended, do pass.

BYLAWS OF BOY SCOUTS OF AMERICA

ARTICLE I. GENERAL

NAME

SECTION 1.

The name of the corporation is Boy Scouts of America. For convenience in these Bylaws the corporation is sometimes referred to as the "Corporation."

PURPOSE

SECTION 2.

The purpose of the Corporation is as set forth in the original certificate of incorporation under the laws of the District of Columbia, dated February 8, 1910, and restated in the Act of Incorporation enacted by the Congress of the United States of America on June 15, 1916, as follows: "That the purpose of this Corporation shall be to promote, through organization and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now in common use by Boy Scouts." In achieving this purpose, emphasis shall be placed upon its educational program and the oaths, promises, and codes of the Scouting program for character development, citizenship training, mental and physical fitness.

SEAL

SECTION 3.

The seal of the Corporation shall be in the form of a circle enclosing the universal badge with the motto Be Prepared underneath the badge and the words Boy Scouts of America around the circle and shall be used only as authorized.

NATIONAL OFFICE

SECTION 4.

The principal office of the corporation shall be located in the City of Irving, County of Dallas, in the State of Texas, and shall be known as the national office of the Boy Scouts of America.

FISCAL YEAR

SECTION 5.

The fiscal year of the Corporation shall be the calendar year.

RULES AND REGULATIONS

SECTION 6.

Establishment

Clause 1. In accordance with the provisions of the Charter, the Executive Board may establish and amend Rules and Regulations for the further governance and guidance of

the Boy Scouts of America including its local councils and affiliates.

Amendment

Clause 2. The Rules and Regulations and amendments thereto shall normally be adopted by resolution of the Executive Board.

Amendment–Special Procedure

Clause 3. Under unusual circumstances the Executive Committee may, by resolution, amend the Rules and Regulations and any such amendment shall be effective provided that such amendment shall be reported to the members of the Executive Board prior to its next meeting and unless such amendment is altered or canceled by the Executive Board at such meeting, it will be as effective as if it had been originally adopted by the Executive Board.

PRIORITIES

SECTION 7.

General

Clause 1. These Bylaws shall be consistent with the Charter. The Rules and Regulations shall be consistent with the Charter and the Bylaws. In the event of any conflicts or inconsistencies, the Charter shall govern primarily and the Bylaws secondarily.

Specifics

Clause 2. All statements contained in official publications of the Boy Scouts of America, its local councils and affiliates including (but not limited to) handbooks, pamphlets,

instructions, magazine articles, bulletins, manuals, and letters which may, from time to time, be issued for clarification or explanation of official language shall be consistent with the language and intent of the Charter, the Bylaws, and the Rules and Regulations. Any contradictory or inconsistent language is unauthorized and without effect.

ARTICLE II. THE NATIONAL COUNCIL

GENERAL

SECTION 1.

In accordance with the provisions of sections 1 and 2 of the Act of Congress, approved June 15, 1916, entitled "An Act to Incorporate the Boy Scouts of America and for Other Purposes," giving the incorporators therein named the power to provide for the election of their associates and successors, the incorporators, and all persons who were duly elected and qualified as members of the National Council herein provided for their successors duly chosen, shall constitute the corporate membership of the Boy Scouts of America, to be known and designated collectively as the National Council of the Boy Scouts of America.

MEMBERS OF THE NATIONAL COUNCIL

SECTION 2.

General

Clause 1. The National Council of the Boy Scouts of America shall consist of elected and ex officio members as

provided in these Bylaws. All members, except honorary members and commissioned professional Scouters, may vote.

Eligibility Requirements

Clause 2. No person shall be eligible for membership on the National Council who is not a citizen of the United States or has not taken the preliminary legal steps to become a citizen of the United States.

Clause 3. A commissioned professional Scouter is ineligible for voting privileges on the National Council.

Election and Designation

Clause 4. Members of Executive Board. All persons elected members of the Executive Board shall upon their election become members of the National Council for the term of their election as members of the Executive Board.

Clause 5. Members of Regional Executive Committees. Persons serving as members of a regional executive committee shall be members of the National Council during their respective terms as members of such regional executive committee.

Clause 6. Local Council Representatives. The duly elected president and council commissioner of a local council shall, during their terms of office, be members of the National Council. Each local council may, in addition, elect one of its members as a member of the National Council for every 5,000 youth members, or major portion thereof, enrolled as of December 31 of the preceding year according to the records of the Corporation. Local councils shall certify as to the election of National Council members so elected and to their terms on forms provided for that purpose.

Clause 7. Members at Large. Members at large of the National Council may be elected by the National Council at its annual meeting to serve for 1 year. Persons who become members of national committees, or their subcommittees, and members of regional committees as defined under article V, section 2 hereof, shall be members at large of the National Council during their respective terms.

Clause 8. Honorary Members. Honorary membership in the Boy Scouts of America shall consist of such citizens of the Untied States as may be elected thereto by the National Council for terms of 1 year in the furtherance of the program of the Boy Scouts of America.

Credentials of Members

Clause 9. The national office shall issue certificates of membership and voting credentials to all voting members of the National Council indicating their right to participate and to vote at the annual meeting of the National Council. Votes shall be cast in person at the meeting and not by proxy.

MEETINGS OF THE NATIONAL COUNCIL

SECTION 3.

Regular Meetings.

Clause 1. General. The National Council shall meet annually at such time and place as may be determined by the Executive Board, for the purpose of delivering the annual reports of the officers and various committees of the National Council, electing members at large and honorary members of the National Council and regular members of its Executive Board, and transacting such other business as may come

before the meeting. The Executive Board shall determine what business is appropriate to come before the meeting.

Clause 2. Notice. A notice of the annual meeting shall be mailed to each member of the National Council at least 30 days in advance thereof, indicating the time and place of the meeting.

Special Meetings

Clause 3. Special meetings of the National Council may be called by the Executive Board at any time and shall be called within 90 days upon the request of at least 5 percent of the members of the National Council (such request specifying the object of such a special meeting) to be held at such place as the President shall determine, provided, however, that a notice of such meeting, indicating the place and object thereof, shall be mailed to each member of the National Council at least 30 days in advance of the meeting. The business of the meeting shall be limited to the matters included in the notice of the meeting.

Quorum

Clause 4. Five percent of the members of the National Council present in person shall constitute a quorum for all purposes.

Voting

Clause 5. At any meeting of the National Council, each member present shall be entitled to one vote.

Guests

Clause 6. Honorary members of the Boy Scouts of America and such other persons as may be specially invited

may attend meeting of the National Council but shall have no vote.

ARTICLE III. THE EXECUTIVE BOARD

POWERS, DUTIES, AND INTERPRETATION

SECTION 1.

Authority of Executive Board

Clause 1. The Executive Board shall, in accordance with the provisions of its Charter and these Bylaws, be the governing body of the Corporation, shall manage its affairs, elect its officers, and shall be the final reviewing authority with respect to all matters whatsoever which may arise at any level within the Scouting movement, which in its judgment should be reviewed.

Interpretation

Clause 2. For the purpose of these Bylaws, the phrase "the whole Executive Board" shall mean the number of members on the Executive Board at the time actually holding office and vacancies shall not be included. The Executive Board shall have full power to interpret these Bylaws.

MEMBERSHIP

SECTION 2.

The Executive Board of the Corporation shall consist of:

Regular Members

Clause 1. Not to exceed 64 regular members who shall be elected at the annual meeting of the Corporation for 1-year terms.

Regional Members

Clause 2. Regional ex officio members shall be those persons serving as presidents of their respective regions whose terms as regional members of the Executive Board shall be the same as their respective terms of office as regional presidents. Each regional president who is a regular member of the Executive Board at the time of becoming a regional president shall continue as a regular member of the Executive Board until the end of the term of such, whereupon the individual shall become a regional member provided that at such time the member is still regional president. Nothing herein contained shall prevent a regional member from being elected as a regular member of the Executive Board.

Youth Members

Clause 3. Those persons who shall be registered youth members may be appointed by the President with the approval of the Executive Board to serve for a specified term of up to 1 year. A youth member may be reappointed for a second 1-year term. The aggregate number of youth members shall at no time exceed five.

Special Members

Clause 4. The chairman of the Advisory Council and the chairman of the Board of Regents of the National Eagle Scout Association shall serve as ex officio members of the Executive Board during their 1-year terms.

ELECTION OF REGULAR MEMBERS; ELECTION, VACANCIES

SECTION 3.

Clause 1. At each annual meeting of the National Council, regular members of the Executive Board shall be elected to serve for a term of 1 year or until their successors have been elected and have qualified.

Clause 2. Where vacancies occur, because of resignation or otherwise of members before the expiration of their term of office, such vacancies may be filled for the unexpired period of the term by nomination by the Nominating Committee and confirmation by a majority vote of the remaining members of the Executive Board.

MEETINGS

SECTION 4.

Regular Meetings

Clause 1. The Executive Board will meet at least three times annually at such times and places as may be designated by the Executive Board, with no more than one meeting during any calendar quarter. One meeting a year shall coincide with the National Council annual meeting.

Clause 1.5. Each Executive Board member must attend a minimum of one board meeting each calendar year. In the event a board member fails to meet this minimum requirement, said board member's position shall be vacated. Such vacancy shall be filled in accordance with the Charter and Bylaws of the Corporation.

Imposition of this rule may be waived by the President, chairman, or acting chairman for good and reasonable cause.

Special Meetings

Clause 2. Special meetings of the Executive Board may be called at any time by the President or by 10 or more members. The call of the meeting shall state the purpose, and no other business not included in the notice of the call shall be transacted.

Notice

Clause 3. A notice of all Executive Board meetings shall be mailed to each member at least 2 weeks in advance of any such meeting.

Quorum

Clause 4. One-third of the members of the Executive Board, present in person, shall constitute a quorum.

ACTION WITHOUT A MEETING

SECTION 5.

Except to the extent otherwise restricted by any applicable law, any action required or permitted to be taken at any meeting of the Executive Board or any committee thereof may be taken without a meeting if prior to such action a written consent thereto is signed by all members of the Executive Board or committee and such written consent is filed with the minutes of the proceedings of the Executive Board or committee.

TELECOMMUNICATION MEETINGS

SECTION 6.

The Executive Board or any committee or subcommittee thereof may meet by telecommunication. Action taken at any such meeting shall be recorded and the record signed by all members participating and filed as the official minutes of such meeting. All notice and quorum requirements shall apply to such meetings provided that the signing of the record of the action taken shall constitute a waiver of notice by persons so signing.

COMMITTEES OF THE EXECUTIVE BOARD

SECTION 7.

General

Clause 1. The Committees of the Executive Board shall consist of an Executive Committee, and other designated standing committees to be known as group and support committees, which shall, though separately structured, coordinate as one entity. Such standing committees shall have and may exercise such powers as shall be conferred or authorized by these Bylaws. In addition, the President shall appoint special committees, and may, from time to time, create ad hoc committees and task forces for the purpose of handling special assignments, with the advice of the Chief Scout Executive and confirmation by the Executive Board.

Clause 2. Duties and Quorum. The duties, responsibilities, and membership qualifications shall be prescribed in these Bylaws, in the Rules and Regulations, and/or by resolution of

the Executive Board. Except as otherwise herein provided, one-third of the members of any committee or subcommittee, exclusive of ex officio members, present in person shall constitute a quorum. Once a quorum is present the departure of one or more members shall not invalidate the meeting.

Executive Committee

Clause 3. General. The Executive Committee of the Executive Board shall have and may exercise all the powers of the Executive Board in the management of the Corporation during the intervals between the meetings of the Executive Board, but in no event shall the Executive Committee act contrary to action theretofore taken by the Executive Board. Minutes shall be kept of all Executive Committee meetings, and the actions thereof shall be reported promptly to the members of the Executive Board.

Clause 4. Interpretation. Unless otherwise stated, whenever the "Executive Board" appears in these Bylaws any responsibility of authority of the Executive Board shall be deemed to extend to the Executive Committee to be exercised in accordance with the preceding paragraph.

Clause 5. Membership. The Executive Committee shall be composed of those persons who are from time to time the President, the executive vice-president, the vice-presidents, the regional presidents, the international commissioner, the national commissioner, the treasurer, the assistant treasurers, the chairmen of the support committees of the Executive Board, the chairman of the Advisory Council, the Chief Scout Executive, and the immediate past-President. The Executive Committee shall be confirmed annually by resolution passed by a majority vote of the whole Executive Board.

Clause 6. Meetings. Meetings of the Executive Committee may be called at any time by the President and shall be called by the President within 30 days upon the request of three or more members of the committee. It shall be the general practice of the Executive Committee to meet at least three times annually. All meetings of the Executive Committee shall be held on at least 5 days' written notice or 2 days' notice by cablegram, telegram, telephone, or radiogram. A majority of the members of the Executive Committee shall constitute a quorum.

Clause 7. Quorum and Voting. Voting by proxy is authorized provided at least one-third of the voting members of the Executive Committee is physically in attendance. Proxy voting is permissible only when a matter of importance is to be presented to the Executive Committee and the presence in person of a quorum is uncertain. Proxy voting is authorized unless the issue to be voted on is one where a proxy is specifically prohibited by formal action of either the Executive Board or Executive Committee. A proxy may be given only to a member of the Executive Committee.

Standing Committees — Group

Clause 8. The group committees are as follows: Administration Group Committee, Program Group Committee, Personnel Group Committee, Regional Presidents' Group Committee, and Relationships/Marketing Group Committee. These group committees shall be chaired by vice-presidents who shall have the responsibility of coordinating the efforts of their related support committees, and shall submit reports, action items, and resolutions to the Executive Board on behalf of those support committees.

Standing Committees — Support

Clause 9. The support committees are as follows: Supply Committee, Finance and Investment Committee, Personnel Committee, Properties Committee, Marketing Committee, Relationships Committee, Cub Scout Committee, Boy Scout Committee, Exploring Committee, Finance Support Committee, High Adventure Committee, Council Services Committee, Professional Development Committee, Compensation and Benefits Committee, and Personnel Administration Committee. The chairmen of these support committees shall be appointed from the membership of the Executive Board for a period of 1 year by the designated vice-president who is chairman of the related group committee, subject to the approval of the President and confirmation by the Executive Board.

Clause 10. Specific Responsibilities. The support committees will develop and recommend policies with respect to the areas of responsibility assigned to them. They will review the progress and needs of the Corporation in such areas and, on the basis of such review, recommend appropriate action to the Executive Board through the Administration Group Committee, Program Group Committee, Personnel Group Committee, Regional Presidents Group Committee, and Relationships/Marketing Group Committee.

Clause 11. International Committee. The International Committee is also a support committee, which will develop and recommend policies with respect to assigned areas of responsibility, will review the progress and needs of the Corporation in such areas, and will recommend appropriate

action to the Executive Board through the international commissioner. The chairman of the International Committee shall be appointed from the membership of the Executive Board for a period of 1 year by the international commissioner with the approval of the President and confirmation by the Executive Board.

Special Committee — Nominating

Clause 12. General Duties. There shall be a Nominating Committee of five, with no ex officio members. The Nominating Committee shall make nominations at the annual meetings of the National Council for members at large and honorary members of the National Council, and regular members of the Executive Board. The Nominating Committee shall make nominations for officers, honorary officers of the Corporation, and members of the Advisory Council at a regular meeting of the Executive Board.

Clause 13. Choice of Nominating Committee, Members of the Nominating Committee and its chairman shall be appointed by athe President from the members of the Executive Board subject to the approval of the Executive Board. Each such member shall be eligible for reappointment for not more than one additional term. In the event any member shall accept nominations for any national elective office, such individual shall cease to be a member of the Nominating Committee. The committee shall be appointed annually at least 6 months prior to the next regular meeting of the National Council.

Clause 14. Submission of Names. The names of possible candidates may be submitted by members of the National Council in writing to the Nominating Committee for its

consideration. The Nominating Committee will submit nominations:

(a) To any meeting of the National Council for members at large and honorary members of the National Council and for members of the Executive Board.

(b) To the Executive Board to fill vacancies in its membership as prescribed in article III, section 3, clause 2.

(c) To the Executive Board for election of members of the Advisory Council.

(d) To the Executive Board for honorary officers, and, prior to the annual meeting of the National Council, for officers of the Corporation.

Clause 15. The Nominating Committee shall be given full information concerning all such candidates, together with advice from the officers and the Chief Scout Executive.

Clause 16. Committee Procedures.

(a) On request of any member, voting shall be by written ballot.

(b) During the actual voting for the selection of officers and members of the Executive Board, the Nominating Committee may, on an affirmative vote of the majority of its members, meet in executive session.

(c) A majority of the members of the Nominating Committee shall constitute a quorum.

Special Committee — Audit

Clause 17. The Audit Committee is hereby authorized by the Executive Board, as specifically detailed in the

subsections below, to fulfill the Executive Board's fiduciary responsibilities relating to accounting and financial matters, financial reporting practices, and internal accounting and financial controls. The chairman of the Audit Committee shall be appointed for a period of 1 year by the President and shall be confirmed by the Executive Board. The Audit Committee shall:

(a) Recommend independent auditors to the Executive Board for its selection.

(b) Recommend to the Executive Board the approval and issuance of the Annual Report of the Treasurer together with the audited financial statements.

(c) Discuss with the independent auditors the scope of their audit and their fees.

(d) Discuss with the independent auditors, the internal auditor, and the appropriate administrative officers, the Corporation's accounting principles, policies, practices, and reporting policies and practices.

(e) Discuss with the independent auditors and the internal auditor the results of their audits.

(f) Discuss with the independent auditors, the internal auditor, and the administrative officers the adequacies of the Corporation's accounting, financial, and operating controls.

(g) Discuss with the administrative officers, the internal auditor, and the independent auditors any proposed accounting policies which are of sufficient significance to be passed upon by the Executive Board.

(h) Report to the Executive Board Audit Committee recommendations and observations with regard to significant financial and accounting matters brought to its attention.

Special Committee — Finance

Clause 18. The Finance Committee has the primary responsibility to develop and present the annual budget of the Corporation to the Executive Board. The committee shall be chaired by the executive vice-president and shall consist of the officers of the Corporation plus additional members as appointed by the President.

Special Committee — Contract Review

Clause 19. The Contract Review Committee has the responsibility to review contractual matters and to act on behalf of the Corporation when it is so authorized by the Executive Board or Executive Committee. The committee is appointed by the President annually and the appointments shall be confirmed by the Executive Board. The committee shall consist of the President who shall serve as chairman, the vice-president—Administration, the treasurer, the chairman of the Properties Committee, and the Chief Scout Executive.

Advisory Council

Clause 20. There shall be an Advisory Council to the Executive Board composed of members of the Nominating Council and United States citizens who, because of experience, have a particular expertise that would benefit the national movement and are elected to membership on the Advisory Council by a two-thirds vote of the members of the Executive Board present at any meeting.

Clause 21. There shall be a chairman of the Advisory Council who shall be an ex officio member of the Executive Board and be appointed by the President with the approval of a majority of the whole Executive Board, to serve for a term not exceeding 1 year or until a successor has been appointed and has qualified.

Clause 22. The Advisory Council shall meet at least annually.

Clause 23. The Advisory Council shall be responsible to the Executive Board, acting in an advisory capacity on matters of major national concern. The Advisory Council also may be requested by the Executive Board to carry out specific projects.

Clause 24. Members of the Advisory Council shall receive notice of all such meetings of the Executive Board and be entitled to attend but not to vote.

Subcommittees, Advisory Panels, Task Forces, and Consultants

Clause 25. From time to time as may be required, any standing committee may:

(a) Subject to the approval of the officers of the Executive Board, appoint one or more subcommittees or task forces to maintain a continuing review of, and to give the standing committee advice concerning a specific area within the standing committee's general area of responsibility. The chairman of each such subcommittee shall be a member of either a group or support committee and, whenever prudent, of the Executive Board. Other members need not be members of the standing committee or the Executive Board.

(b) Subject to the approval of the officers of the Executive Board, appoint advisory panels, whose members need not be members of the standing committee, to offer advice, opinions, and recommendations on specific matters referred to them for consideration.

(c) With the approval of the President and the Executive Board, employ or appoint consultants who need not be members of the standing committee or of the National Council to provide expert testimony or counsel on specific matters.

Clause 26. Each group committee chairman shall appoint for a period of 1 year the chairman of related subcommittees, advisory panels, and task forces, subject to the approval of the officers of the Executive Board.

ARTICLE IV. OFFICERS

GENERAL

SECTION 1.

The only active officers of the Corporation shall be the President, the executive vice-president, one or more vice-presidents, the treasurer, one or more assistant treasurers, the national commissioner, the international commissioner, and the Chief Scout Executive. These officers, with the exception of the national commissioner and the Chief Scout Executive, shall be elected annually from the membership of the National Council by the Executive Board to serve for 1 year or until their successors have been elected and have qualified. The national commissioner shall be appointed by the Chief Scout Executive and confirmed by the Executive Board. The Chief

Scout Executive shall not serve after attaining the age of 65 years. An individual normally will not (a) serve as President for more than two 1-year terms or (b) serve in any other particular office for more than four terms.

PRESIDENT

SECTION 2.

The President shall serve as chairman of meetings of the National Council, chairman of the Executive Board, chairman of the Executive Committee, chairman of the Contract Review Committee, and as a member ex officio of all committees, other than the Nominating Committee, and shall perform such duties as are or may be assigned by the Executive Board.

EXECUTIVE VICE-PRESIDENT

SECTION 3.

There shall be an executive vice-president who shall be elected annually. The President may designate the executive vice-president to serve as President during the President's absence or inability to serve. In the case of the President's inability or failure to make such a designation, the Executive Board shall do so. The executive vice-president shall serve as chairman of the Finance Committee and shall perform other functions as may be assigned by the President and the Executive Board.

VICE-PRESIDENT

SECTION 4.

There shall be one or more vice-presidents elected annually, one of whom may be designated as the international commissioner. Vice-presidents shall perform such functions as may be assigned to them by the Executive Board. The Executive Board may add to the title of any vice-president a designation indicating a special area of responsibility. The Executive Board may designate one of the vice-presidents to serve as President only during the absence or inability of both the President and executive vice-president.

TREASURER AND ASSISTANT TREASURERS

SECTION 5.

The treasurer shall be responsible, through methods of internal control, for the recording and deposit of all receipts of the Corporation, for the proper disbursements of its cash, and for control over all property of the corporation, whether real or personal, tangible or intangible, however acquired. The treasurer shall present annually a complete and detailed statement of all income and expenses during the prior year together with a statement of assets, liabilities, reserves, and funds of the Corporation as at the end of that calendar year, these statements first having been duly audited by independent public accountants approved by the Executive Board. One or more assistant treasurers may be elected by the Executive Board. The treasurer and assistant treasurers shall be bonded.

NATIONAL COMMISSIONER

SECTION 6.

The national commissioner shall (a) be an officer of the Corporation, (b) represent the Boy Scouts of America in national affairs, (c) be the chief morale officer of the Boy Scouts of America, and (d) represent the commissioner service team.

INTERNATIONAL COMMISSIONER

SECTION 7.

The international commissioner shall represent the Boy Scouts of America in international affairs and shall serve as a member, and may be chairman, of the International Committee.

CHIEF SCOUT EXECUTIVE

SECTION 8.

Clause 1. The Chief Scout Executive shall be appointed by and shall serve during the pleasure of the Executive Board and shall serve as the secretary of the National Council, the Executive Board, and its Executive Committee and shall be a member ex officio of all committees except the Nominating Committee without voting privileges, except where otherwise provided by action of the committee in question, except in the case of the Executive Committee of which the Chief Scout Executive shall be a voting member.

Clause 2. The Chief Scout Executive shall serve as the chief executive officer of the Corporation and shall have

general direction of the administrative work of the Corporation, subject to these Bylaws, the Rules and Regulations of the Boy Scouts of America, and to the authority and direction of the Executive Board.

Clause 3. The Chief Scout Executive may execute, on behalf of the Corporation, all documents, deeds, or notes duly authorized to be executed and shall be the custodian of the seal of the Corporation, and may affix the same duly attested to such documents, deeds, or notes as may require it. As to notes, such countersignature shall be required as the Executive Board shall direct.

Clause 4. The Chief Scout Executive may delegate to any staff officer or employee authority in writing to execute such leases, contracts, and other instruments as the Chief Scout Executive may deem desirable.

Clause 5. The Chief Scout Executive shall see that notices are sent to those elected as members of the National Council and officers of the Corporation and to those appointed as members of the committees and shall likewise cause notices to be sent out of all meetings for which provision is made herein.

Clause 6. The Chief Scout Executive shall submit a report at each meeting of the Executive Board relative to the work of the Corporation and to the status of the Scouting movement throughout the nation, inviting attention to matters of particular interest and informing the Executive Board concerning any problems of which the Executive Board should be advised, together with recommendations and suggestions for the good of the movement requiring action by the Executive Board.

Clause 7. The Chief Scout Executive shall prepare an annual report of the Boy Scouts of America for each calendar year and with the approval of the Executive Board shall transmit it to Congress, as required by the provisions of the federal Charter, and shall present it to the National Council at the time of its annual meeting.

HONORARY OFFICERS

SECTION 9.

Honorary President and Vice-Presidents

Clause 1. The President of the United States may, during term of office, be elected to be the Honorary President of the Boy Scouts of America. In addition, living former Presidents of the United States and other citizens who have rendered distinguished service to our country through work for young people may be elected to be honorary vice-presidents. Such election shall be by the Executive Board upon the recommendation of the Nominating Committee for such terms as the Executive Board shall specify.

Other Honorary Officers

Clause 2. The Executive Board may from time to time create such other honorary offices as it may deem to be in the best interest of the movement.

The offices shall be filled by election by the Executive Board upon recommendation of the Nominating Committee to serve for 1 year or until their successors have been elected and qualified and shall perform such duties as may be assigned to them by the President and Chief Scout Executive.

American citizens whose achievements are of such an exceptional character as to capture the imagination of youth and stimulate their enthusiasm for the program of the Boy Scouts of America may, upon the unanimous recommendation of the Executive Board, be elected by the National Council to become honorary officers. Honorary officers are under no obligation to render active service.

ARTICLE V. REGIONAL ORGANIZATION

REGIONS

SECTION 1.

General

Clause 1. Geographical areas within and without the United States shall be divided into administrative units to be known as regions. The number of such regions, their geographical boundaries, and their designation shall be determined by the Executive Board.

Responsibilities

Clause 2. The organization within each region is responsible for the achievement of approved goals and for the effective operation of each of its councils. The region is responsible for the proper alignment of councils, for assuring sufficient qualified volunteer and professional leadership in each council, and for an effective program for financing each council.

REGIONAL COMMITTEES

SECTION 2.

Organization

Clause 1. Subject to these Bylaws, the Rules and Regulations, and the general control of the Executive Board, each region shall implement national policy and program through a regional committee.

Membership

Clause 2. Regular Members. The membership shall consist of members of the National Council residing in the region and such additional members as may be elected by the regional committee.

Clause 3. Youth members may be appointed by the regional president with the approval of the regional board to serve as members of the regional committee. The number, qualification, and terms shall be fixed in the Rules and Regulations.

Meetings

Clause 4. Each regional committee shall meet once a year at such time and place as the regional executive committee or president may direct.

REGIONAL BOARD

SECTION 3.

General

Clause 1. The regional board consisting of the regional executive committee, the area vice-presidents, plus not more

than 50 members at large elected annually by the regional committee shall exercise the authority and responsibility of the regional committee in the interval between its meetings. Each member at large must hold some specific committee or other regional assignment.

Youth Members

Clause 2. Youth members may be appointed by the regional president with the approval of the regional board to serve as members of the regional board, subject to the following criteria:

(a) The term of appointment shall be for 1 year.

(b) A youth member may be reappointed for a second 1-year term.

(c) At no time will the aggregate number of youth members exceed five.

Meetings

Clause 3. Each regional board shall meet at least annually at such times and places as the regional president may direct for planning of regional events and activities and for meetings of the regional standing committees for training and planning council service.

REGIONAL EXECUTIVE COMMITTEE

SECTION 4.

General

Clause 1. The elected officers including the regional president and vice-presidents, area presidents, and chairmen of the regional standing committees as appointed by the

regional president, and the regional director, shall constitute the regional executive committee and shall have and may exercise the authority and responsibility of the regional board in the interval between its meetings, but in no event shall the regional executive committee act contrary to action theretofore taken by the regional board or regional committee.

Meetings

Clause 2. Each regional executive committee shall meet at least annually at such times and places as the regional president may direct.

REGIONAL DIRECTOR

SECTION 5.

The regional director of field operations shall serve as secretary of the regional committee, the regional board, the executive committee, and the standing committees.

REGIONAL OFFICERS

SECTION 6.

Regional President

Clause 1. One member of each regional committee shall be elected regional president, who shall be a citizen of the United States of America, be elected annually by the regional board, and shall become a member ex officio of the Regional Presidents Group Committee and the Executive Board in accordance with the provisions of these Bylaws. In the event of a vacancy in the regional presidency, the regional executive committee will elect a successor to serve until the next regional election.

The regional president may appoint a member of the regional executive committee as a substitute.

Regional Vice-Presidents

Clause 2. One or more regional vice-presidents may be elected to carry out responsibilities as may be assigned by the regional board.

Area President

Clause 3. One member from each area of the region shall be elected annually as area president by the regional board. Area presidents will report directly to the regional president. In the event of a vacancy in an area presidency, the regional president will appoint a successor subject to the approval of the regional executive committee.

Elections

Clause 4. Elections shall be by majority vote of those persons voting. On request of 10 members, voting shall be by secret ballot.

REGIONAL STANDING COMMITTEES

SECTION 7.

Nominating Committee

Clause 1. Appointment. The regional president shall appoint a nominating committee which shall submit its recommendations at each meeting of the regional committee and the regional board at which an election is to be held.

Clause 2. Timing. The nominating committee will be appointed and the chairman designated by the regional

president at the time of the annual elections or within 30 days following such elections to serve until the next elections.

Clause 3. Nominees. Persons to be elected annually shall include the regional president, the regional vice-presidents, area presidents, and members of the regional board.

Clause 4. Suggestions. At least 120 days prior to the regional elections, members of the regional committee will be invited to submit in writing names of persons to be considered for regional committee membership.

Clause 5. Report. The report of the nominating committee will be submitted to all eligible voters in writing at the time of elections.

Other Standing Committees

Clause 6. Other standing committees shall include the following: relationships committee, finance committee, council services committee, program committee, and personnel committee. A member of the following regional program committees is to serve on the national committee of the same name: Cub Scout committee, Boy Scout committee, Varsity Scout committee, Exploring committee, international committee, and health and safety committee.

AREA COMMITTEES

SECTION 8.

The area executive committee, and specialists, council presidents, and National Council members from the local councils in the area, shall constitute the area committee.

AREA EXECUTIVE COMMITTEE

SECTION 9.

The area president, area vice-president(s), and committee chairmen and/or specialists constitute the membership of the area executive committee.

REGIONAL ADVISORY COUNCIL

SECTION 10.

Clause 1. There shall be an advisory council to the regional board composed of members who because of experience have a particular expertise that would benefit the movement through the region and are elected to membership on the advisory council by a two-thirds vote of the members of the regional board present at any meeting.

Clause 2. Members of the advisory council shall be relieved of the obligation of regular attendance at meetings of the regional board, but shall receive notice of all such meetings and be entitled to attend, but not to vote.

RELATIONSHIPS

SECTION 11.

Additional information concerning the interrelationship existing between the regions, area, and councils plus further details on these organizations will be incorporated into the Rules and Regulations.

ARTICLE VI. LOCAL COUNCILS GENERAL

SECTION 1.

In order to accomplish its purposes and to carry out its programs, the Corporation will charter local councils each with jurisdiction over a prescribed geographical area.

All local council charters shall be issued for a period not exceeding 1 year ending June 30 and may be renewed annually upon application, accompanied by reports based upon operations for the preceding calendar year, together with such other evidence as may be required, showing a satisfactory effort to meet the responsibilities of a local council as herein provided.

Such charters shall be contingent on such local councils' fulfilling the basic purpose of the Scouting movement within their specified territory, in accordance with these Bylaws and the Rules and Regulations of the Corporation.

APPLICATIONS

SECTION 2.

Applications for new charters shall be accompanied by a copy of the proposed Local Council Articles of Incorporation and Bylaws of the council and evidence showing that it will be for the best interests of the youth of the community and the Scouting movement to have a chartered council and that those who are making the application are in a position to perform the functions of the local council in a manner which would justify the issuance of a charter.

CONDITIONS AND TERMINATION

SECTION 3.

The Corporation may charter a local council subject to such conditions as it may deem appropriate and may terminate or refuse to grant or renew a local council charter in any instance where it deems such action advisable in the interests of Scouting.

REVOCATION OF CHARTER

SECTION 4.

The Executive Board may revoke or decline to renew such charters for failure to comply with the Bylaws, Rules and Regulations, or policies of the Corporation.

RESPONSIBILITY OF THE LOCAL COUNCIL

SECTION 5.

Clause 1. It shall be the responsibility of each local council to make sure that the general principles of advancement are understood and carried out by the units on the council area.

Clause 2. It shall make Scouting training available to all members of chartered organizations and community groups using the Scouting program while maintaining standards in policies, protecting official badges and insignia, and providing adequate leadership and finances.

Clause 3. The local council shall supervise advancement procedures to make sure that they are carried out in such a

way as to ensure strict adherence to the requirements and standards as set forth in the Rules and Regulations and the official publications of the Boy Scouts of America. The local council shall organize the necessary unit, district, and council procedures to make sure that youth members have an opportunity to advance and receive recognition promptly. It shall provide training for leaders in the principles and conduct of advancement.

Clause 4. No local council Cub Scouter, Varsity Scouter, Exploring leader, or Scouter shall have authority to increase or diminish requirements and standards established by the Corporation.

Clause 5. The powers and responsibilities of local councils shall be controlled by these Bylaws and by the Rules and Regulations.

INCORPORATION OF LOCAL COUNCILS

SECTION 6.

General

Clause 1. Local councils duly chartered by the Boy Scouts of America shall, wherever possible, become incorporated under the laws of their respective states pertaining to nonprofit corporations and pursuant to and consistent with these Bylaws and the Rules and Regulations of the Boy Scouts of America.

Approval of Documents

Clause 2. Proposed corporate articles and Bylaws of local councils, and any amendments of such articles or Bylaws,

shall be submitted to the Corporation's national office for review and approval in advance of adoption. When corporate articles are found to be in proper form, a certificate of approval, with consent to incorporate, for Scouting purposes under the name agreed upon, shall be furnished in behalf of the Boy Scouts of America. This certificate shall be attached to the corporate articles when filed by the local council with the state authorities.

ORGANIZATION AND OPERATION

SECTION 7.

Clause 1. The membership of each local council shall consist of a chartered organization representative from each chartered organization and additional members at large from within the territorial boundaries of the local council totaling a minimum of 100 adults. When a council is incorporated, its incorporators shall be its initial members. Thereafter its members shall be elected annually by its board of trustees, which usually will be designated as the executive board.

Clause 2. The members shall elect annually not fewer than 25 or more than 50 of its members to serve as its executive board. The executive board shall be the governing body of the council and shall be responsible for its operations and its assets.

Clause 3. The executive board annually shall elect its officers which will consist of a president, one or more vice-presidents, and a treasurer. It also may elect a commissioner and such officers as it may from time to time determine.

ARTICLE VII. YOUTH MEMBERSHIP

GENERAL

SECTION 1.

Youth membership in Boy Scouts of America is open to all who meet the membership requirements. Cub Scouting, Boy Scouting, and Varsity Scouting are for boys. Exploring is for young men and young women.

MEMBERSHIP, ADVANCEMENT, AND ACHIEVEMENT

SECTION 2.

Both membership in Scouting and advancement and achievement of leadership in Scouting units are open to all boys without regard to race or ethnic background, and advancement and achievement of leadership in Scouting is based entirely upon individual merit.

ARTICLE VIII. ADULT LEADERSHIP

GENERAL

SECTION 1.

Leadership Qualifications

No person shall be approved as a leader unless, in the judgment of the Corporation, that person possesses the moral, educational and emotional qualities deemed necessary for leadership and satisfies such other leadership qualifications as it may from time to time require.

CITIZENSHIP REQUIREMENT
(See Rules and Regulations)

COMMISSIONED LEADERSHIP
(See Rules and Regulations)

PROFESSIONAL LEADERSHIP

SECTION 2.

General

Clause 1. The commissioned status of professional Scouters is separate and distinct from their employment. The commissioning of a Scouter does not in itself entitle a professional to be appointed to or to retain a position. The appointment of an individual to a position in Scouting does not in itself entitle him to receive a commission.

Professional Scouters

General

Clause 2. A corps of qualified and trained professional Scouters is essential to the success of the whole Scouting movement. To secure and retain such people for service in the national and local councils, their professional status must be clearly defined.

Clause 3. To this end, and subject to these Bylaws and the Rules and Regulations, the Executive Board:

(a) Shall establish requirements to be met by any person seeking to become and remains a professional Scouter.

(b) Shall establish rules and procedures covering the commissioning and decommissioning of professionals.

(c) Except for newly employed professional trainees, no person may be employed in a professional capacity by any local council or by the Corporation who does not hold a currently valid commission.

Employment

Clause 4. Rules and Guidelines. The Executive Board, subject to the provisions of these Bylaws, shall establish rules and regulations covering the employment, training, promotion, tenure, demotion, and retirement or discharge of all professional and other employees of the Corporation and of all professional employees of the local councils.

Clause 5. Authority of the Chief Scout Executive. The Chief Scout Executive is, subject to these Bylaws, the Rules and Regulations, and the decisions of the Executive Board, authorized to appoint and remove all employees of the Corporation and to direct their work.

EMPLOYMENT OF PROFESSIONALS
(See Rules and Regulations)

ADMINISTRATIVE ORGANIZATION
(See Rules and Regulations)

NONPROFESSIONAL STAFF
(See Rules and Regulations)

ARTICLE IX. POLICIES AND DEFINITIONS

POLICIES

SECTION 1.

Declaration of Religious Principle

Clause 1. The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout Oath or Promise the member declares, "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law." The recognition of God as the ruling and leading power in the universe and the grateful acknowledgment of His favors and blessings are necessary to the best type of citizenship and are wholesome precepts in the education of the growing members. No matter what the religious faith of the members may be, this fundamental need of good citizenship should be kept before them. The Boy Scouts of America, therefore, recognizes the religious element in the training of the member, but it is absolutely nonsectarian in its attitude toward that religious training. Its policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life.

Activities

Clause 2. The activities of the members of the Boy Scouts of America shall be carried on under conditions which show respect to the convictions of others in matters of custom and religion, as required by the twelfth point of the Scout Law, reading, "Reverent. A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others."

Freedom

Clause 3. In no case where a unit is connected with a church or other distinctively religious organization shall members of other denominations or faith be required, because of their membership in the unit, to take part in or observe a religious ceremony distinctly unique to that organization or church.

Leaders

Clause 4. Only persons willing to subscribe to these declarations of principles shall be entitled to certificates of leadership in carrying out the Scouting program.

Clause 5. Other major policies are set forth in article IX of the Rules and Regulations.

DEFINITIONS

SECTION 2.

In addition to those contained in these Bylaws, there are others, some pertaining to the Bylaw material, set forth in article IX of the Rules and Regulations.

ARTICLE X. PROGRAM

PROGRAM OBJECTIVES

SECTION 1.

The program shall be one designed to achieve objectives in character development, citizenship training, and mental and physical fitness.

In its several phases the program shall be adapted to the groups into which youth members are divided and shall be as set forth from time to time in these Bylaws and in the Rules and Regulations of the Corporation.

In all activities, emphasis shall be placed upon practice in daily life of the principles of the Tiger Club Promise, the Cub Scout Promise, the Scout Oath or Promise, and the Explorer Code. In association with suitable adult leadership, members registered in Scouting will be guided to develop traits of character which are expressed in self-reliance, consideration of and help to others, personal courage, and above all in lives of useful citizenship.

ACTIVITIES
(See Rules and Regulations)

ADVANCEMENT
(See Rules and Regulations)

BOYS' LIFE MAGAZINE
(See Rules and Regulations)

INSIGNIA, UNIFORMS, AND BADGES
(See Rules and Regulations)

SPECIAL AWARDS
(See Rules and Regulations)

AWARDS FOR DISTINGUISHED SERVICE TO YOUTH
(See Rules and Regulations)

ARTICLE XI. BUSINESS

FINANCE

SECTION 1.

Expenses

Clause 1. The necessary expenses of the Corporation shall be met from the receipts from annual registration fees and contributions; from the proceeds from sales of publications and supplies; and from such other sources as may be determined by the Corporation.

Contributions

Clause 2. Contributions shall be solicited in the name of the Boys Scouts of America only through or by the authority of the Corporation, and shall be limited to the National Council or chartered local councils, in accordance with these Bylaws and Rules and Regulations of the Corporation. Youth members shall not be permitted to serve as solicitors of money for chartered organization units, for the local council, or in support of other organizations. Adult members and youth members shall not be permitted to serve as solicitors of money in support of personal or unit participation in local, national, or international events. Youth members, however, are permitted to secure sponsors for council or district activities approved by the executive board. These approved activities may result in financial support for the local council in accordance with the Bylaws and Rules and Regulations of the Corporation.

Deposit of Funds

Clause 3. All funds shall be deposited in such depositories as shall be approved by the Executive Board.

Custody of Securities

Clause 4. The securities of the Corporation shall be deposited in any such deposit vault or vaults or with such bank or banks, trust company or trust companies, or such other depositories, and access thereto shall be provided as may from time to time be determined by the Executive Board. Access to the securities may be had as provided in the Rules and Regulations or by resolution of the Executive Board and not otherwise. They may be examined or withdrawn by such officer or officers or other employees of the Corporation as may from time to time be designated by the Executive Board. The Executive Board by resolution may authorize any two members of the Executive Board of the Corporation to have access to the securities for the purpose of audit or such other purpose at it may specify in the resolution.

Checks, Notes, Etc.

Clause 5. Except as otherwise provided by law or in those Bylaws, all checks, drafts, notes, bills or exchange, or other orders, instruments, or obligations for the payment of money shall be signed by such officer or officers, employee or employees, or agent or agents of the Corporation as shall be specified by the Executive Board.

DEEDS, CONTRACTS, BONDS, ETC.

SECTION 2.

Authority to Execute Documents

Except as otherwise provided by law or in these Bylaws, such officer or officers, employee or employees, or agent or agents of the Corporation as shall be specified by the Executive Board shall sign, in the name and on behalf of the Corporation, all deeds, bonds, contracts, mortgages, and other instruments or documents, the execution of which shall be authorized by the Executive Board, and such authority may be general or confined to specific instances.

REAL ESTATE
(See Rules and Regulations)

REGISTRATION
(See Rules and Regulations)

ARTICLE XII. AFFILIATES
(See Rules and Regulations)

ARTICLE XIII. SPECIAL SITUATIONS

EXPERIMENTAL PROGRAMS

SECTION 1.

From time to time the Executive Board may wish to authorize experimental programs to determine how best to achieve the purpose of the Boy Scouts of America under changing conditions. If such experimental programs are in

any manner inconsistent with these Bylaws, the programs shall be adopted only in accordance with the procedures established in the Rules and Regulations.

OVERSEAS SCOUTING

SECTION 2.

General

Clause 1. To further its objectives of extending membership privileges to citizens of the United States in other parts of the world, the Corporation authorizes the registration of youth members and leaders and the establishment of units in areas lying outside of the jurisdiction of any local council.

Policy of Cooperation

Clause 2. To foster and strengthen the close and friendly relationship that exists between the Boy Scouts of America and other Scout Associations, members and leaders of units will work in close harmony with their fellow Scouts and Scouters in the area.

Services

Clause 3. Administration, organization, program, and training services shall be furnished by the International Division of the Corporation and the cooperation of region, area, or council where such can be utilized.

Deviations

Clause 4. To the extent feasible, the provisions of the Bylaws, Rules and Regulations, and policies of the Corporation relating to its domestic units shall apply to Direct Service units. It is recognized that as the application of

certain of these may be impractical, their waiver or modifications will be permitted. Also due to varying conditions, it is recognized that such waiver and modification could result in nonuniform application as between units.

Any deviations will be authorized by the Executive Board, whose authority may be delegated to a committee or subcommittee. Major deviations of a general nature normally will be incorporated into the Rules and Regulations.

LEARNING FOR LIFE

SECTION 3.

Clause 1. To further the mission of the Boy Scouts of America to meet and serve the needs of youth and communities, the Corporation authorizes the establishment of a subsidiary corporation, to be known as Learning for Life, to work in cooperation with our nation's schools.

Clause 2. Learning for Life's is a nontraditional, educational outreach program that takes place during school hours and/or as part of school curriculum and is not part of the traditional Scouting program.

Clause 3. The administration, organization, program, and registration of Learning for Life shall be governed as set forth in the Rules and Regulations.

ARTICLE XIV. INDEMNIFICATION

INDEMNIFICATION

SECTION 1.

Persons made a party to any action, suit, or proceeding, civil or criminal, because they, their testator, or intestate are or were members of the Executive Board or committee of the Executive Board of the Corporation, officers or employees of the Corporation or directors, officers, or employees of any corporation which they served as such at the request of the Corporation, shall be indemnified by the Corporation against the expenses (including amounts paid by way of judgment or settlement) actually and necessarily incurred by them in connection with defense of such action, suit, or proceeding, whether or not such defense shall be successful in whole or in part or in connection with any appeal therein or any settlement thereof, except in relation to matters as to which it shall be adjudged in such action, suit, or proceeding that such persons are liable for negligence or misconduct in the performance of their duties. Such indemnification, if afforded, shall not be deemed exclusive of any other rights to which such persons may be entitled apart from this section. This section shall not be deemed to limit any power or exclude any right of the Corporation to provide any additional or other indemnity or right for any Executive Board member, officer, employee, or other person. If this section should be invalid or ineffective in any respect, the validity and effect of the section in any other respect shall not be affected.

ARTICLE XV. WAIVERS AND AMENDMENTS

WAIVERS

SECTION 1.

Whenever any notice is required by these Bylaws or by any law to be given to any member of the National Council, member of the Executive Board, or any committee or any officer, such notice except as otherwise provided by these Bylaws or by any law may be given personally or by telegram, cable, or radiogram addressed to the person at such person's place of business, if any, or (to the extent applicable) at such address as has been given to the Corporation as the home address of the person; or the notice may be given in writing by mail, in a sealed wrapper, postage prepaid, addressed to such person at such address. Any notice given by telegram, cable, or radiogram shall be deemed to be given when it shall have been delivered for transmission and any notice given by mail shall be deemed to have been given when it shall have been deposited in a post office, in a regularly maintained letter box, or with a postal carrier. A waiver of any such notice in writing, signed by the person entitled to such notice as required, shall be deemed the equivalent thereof, and the presence at any meeting of any person entitled to notice thereof shall be deemed a waiver of such notice as to such person.

AMENDMENT OF BYLAWS

SECTION 2.

Procedures

Clause 1. These Bylaws may be amended at any meeting of the Executive Board by the affirmative vote of a majority of the whole Executive Board; upon the recommendation of the Executive Committee of the Executive Board; or when the proposed amendment has been sent to the members of the Executive Board at least 15 days in advance of the meeting.

Promulgation

Clause 2. All changes in the Bylaws, when made, shall be announced to the national and local councils in such manner as the Executive Board shall direct.

RULES AND REGULATIONS OF THE BOY SCOUTS OF AMERICA

ARTICLE VI. LOCAL COUNCILS

COUNCIL ORGANIZATION

Section 1.

Members

Clause 1. Active. The active membership of all local councils shall consist of persons 21 years of age or over, duly registered as provided in these Bylaws. The membership shall include representatives from organizations or groups of citizens operating units as provided in the Bylaws, classified as chartered organization representatives, together with representatives at large of the various business, civic, educational, labor, social, and religious interests of the communities, classified as council members at large.

Clause 2. Associate. Persons desiring to maintain an actual Scouter membership without assignment to active service may be elected as associate members of local councils, without vote, provided that they qualify by the same procedure and under the same conditions as active Scouters. They may wear the uniform and shall be enrolled as subscribers to *Scouting* magazine.

DISTRICT ORGANIZATION

Section 2.

Districts

Clause 1. For the purpose of unit service and program administration, a local council may be divided geographically or functionally into such districts as the local council executive board may determine. The Executive Board of the Corporation may from time to time adopt rules and regulations concerning district organization.

District Committee

Clause 2. The supervision of Scouting in each district shall be exercised by the local council through a district committee.

Function of District Committee

Clause 3. The district committee, including the committees of the district, has no legislative authority. Its purpose is to make effective in the territory policies and programs as adopted by the local council, its executive board, and council committees.

LOCAL UNITS

Section 3.

Organization of Units

Clause 1. General. The Corporation shall have the power to grant charters to organizations and groups of citizens of the

United States meeting the requirements of the Bylaws and these Rules and Regulations to organize and maintain units of the Scouting program, and to issue certificates of membership in such units to the officers and members thereof who comply with the requirements of the Bylaws and these Rules and Regulations. The Corporation shall have the power to revoke such charters when in its sole judgment such revocation is warranted.

Charters to Organizations

Clause 2. For the formation of units, charters may be granted to organizations upon application from the duly constituted authorities of such organizations on forms provided for that purpose. Such applications shall obligate the organizations to provide adequate facilities, supervision, and leadership for at least 1 year and to make an effort to provide youth members with the opportunity for a quality program experience as set forth in the official literature of the Boy Scouts of America.

Charters for Community Units

Clause 3. While the formation of units in connection with existing organizations shall be preferred, when conditions warrant a charter may be granted for the formation of a unit independent of any relationship with an existing organization, provided, however, that the applicants are citizens of the United States, who subscribe to the principles of the Scout Oath and Law, and whose interest is primarily in helping boys and young adults through the Scouting program, and who shall have the resources to provide the necessary leadership, supervision, and facilities. In such cases the obligations upon

the applicants for a charter shall be the same as those required for organizations.

Standards of Organizations

Clause 4. Intended meeting quarters shall be periodically inspected to determine their adequacy as well as to ascertain other uses to be made of these or adjoining quarters, for the purpose of considering the compatibility of uses and the general appropriateness of the environment. An investigation shall also be made as to the general objectives, purpose, character, intent, and programs of the prospective chartered organization or community group and its compatibility with the aims and purposes of the Boy Scouts of America. The history, length of service, and general reputation of the organization or community group are also factors that should be considered.

Renewals

Clause 5. Unit charters may be renewed upon application, provided a review of past activities, personnel, and plans for the future shows a satisfactory effort to carry out the Scouting program, as set forth in the official handbooks, and to comply with the Rules and Regulations of the Boy Scouts of America.

Local Council Approval

Clause 6. In territory supervised by a local council, all applications for unit charters, new and renewal, may be granted only upon the favorable recommendation of the local council.

Chartered Organization Representative

Clause 7. In territory supervised by local councils, each chartered organization shall appoint a citizen of the United States, other than the unit leader or assistant unit leader, as its chartered organization representative to represent it as a member of the district committee and as a voting member of the local council.

Unit Committees

Clause 8. Each chartered unit of the Boy Scouts of America shall be under the supervision of a unit committee, consisting of three or more qualified adults, 21 years of age or over, selected by the organization with which the unit is connected, or in the case of a community unit of those who make application for the unit charter, one of whom shall be designated as chairman.

The unit committee shall have such responsibilities as may from time to time be defined by the Corporation.

Leadership

Clause 9. Each Cub Scout den and Webelos den and each chartered Cub Scout pack, Boy Scout troop, Varsity Scout team, and Explorer post shall have one citizen of the United States, 21 years of age or older, who shall be registered and serve as the unit or den leader. A unit leader may not serve simultaneously in any other position within the same unit. The head of the chartered organization or chartered organization representative and the local council must approve the registration of the unit or den leader on the appropriate form.

Packs

Clause 10.

(a) Packs, consisting of no fewer than five Cub Scouts, may be organized in the territory and under the supervision of local councils.

(b) The provisions of these Rules and Regulations relating to the organization of units shall apply to the organization of packs.

(c) The active adult leadership of the pack shall be designated collectively as Cub Scouters, and individually as pack committee members, Cubmaster, assistant Cubmasters, den leaders, assistant den leaders, Webelos den leaders, assistant Webelos den leaders, Tiger Cub organizations, and den leader coach.

They shall be appointed and commissioned as outlined in the Bylaws and these Rules and Regulations. These Cub Scouters shall be required to meet the same membership requirements and leadership responsibilities and shall have the same privileges and opportunities as provided for all unit Scouters.

(d) The Cub Scout membership of a pack shall be organized on the den system.

Troops

Clause 11.

(a) Troops, consisting of no fewer than five Boy Scouts, may be organized in the territory and under the supervision of local councils.

(b) The provisions of these Rules and Regulations, relating to the organization or units, shall apply to the organization of troops.

(c) The active adult leadership of a troop shall be designated collectively as Scouters and individually as troop committee members, Scoutmaster, and assistant Scoutmasters. They shall be appointed and commissioned as outlined in the Bylaws and these Rules and Regulations. These Scouters shall be required to meet the same membership requirements and leadership responsibilities and shall have the same privileges and opportunities as provided for all unit Scouters.

(d) The membership of a troop shall be organized on the patrol system.

Teams

Clause 12.

(a) Teams, consisting of no fewer than five Varsity Scouts, may be organized in the territory and under the supervision of local councils.

(b) The provisions of these Rules and Regulations, relating to the organization of units, shall apply to the organization of teams.

(c) The active adult leadership of a team shall be designated collectively as Varsity Scouters and individually as team committee members, Coach, and assistant Coach. They shall be appointed and commissioned as outlined in the Bylaws and these Rules and Regulations. These Varsity Scouters shall be required to meet the same membership

requirements and leadership responsibilities and shall have the same privileges and opportunities as provided for all unit Scouters.

(d) The Varsity Scout membership of a team shall be organized on the squad method.

Posts

Clause 13.

(a) Posts (ships), which shall consist of no fewer than five Explorers, may be organized in the territory and under the supervision of local councils.

(b) The provisions of these Rules and Regulations, relating to the organization of units, shall apply to the organization of Explorer posts/ships.

(c) The active adult leadership of an Explorer post/ship shall be designated collectively as Exploring leaders and individually according to the designated titles of their respective type of Explorer unit. They shall be appointed and commissioned as outlined in the Bylaws and these Rules and Regulations, and shall meet the same membership requirements and leadership responsibilities and shall have the same privileges and opportunities as provided for all unit Scouters.

Unit Designation

Clause 14.

(a) All units shall be designated by the name of the community in which the unit is located.

(b) Each unit shall be designated also by a serial number assigned by the local council or, if not under local council, by the Corporation.

(c) There shall be only one series of numbers for units by which the unit shall be identified at the national office. A program code should be included with each national unit number. This shall prevent the use of a local community number where units having previously been assigned local numbers desire to continue the use of such numbers locally, and, when requested, such numbers shall be used upon the unit charter and certificates.

POWERS AND RESPONSIBILITIES

Section 4.

Clause 1. It shall be the duty of the chartered councils to promote the Scouting program through the organization and registration annually of units and their personnel: also to approve and provide leadership and supervision of all program activities, within the territory covered by their charters, in such a manner as to ensure compliance with the provisions of the Bylaws of the Boy Scouts of America and the Rules and Regulations thereof, as set forth in the official handbooks, or as may be announced.

Clause 2. Local councils shall be specifically charged with the responsibility to guard against the use of the official insignia and uniform by persons not officially registered with the Corporation and to bring to the attention of the Corporation any violation of regulations not within their power to prevent or any attempt to commercialize the Scouting movement.

Clause 3. Local councils shall through their Scout executives or other representatives, make the benefits of the Scouting program known to all agencies or organizations having contact with boy and young-adult life and cooperate in the organization of units so that boys and young adults may have the benefit of the Scouting program.

Clause 4. Local councils shall provide means for assisting chartered organizations in securing and training individuals to serve as unit leaders and assistants. The chartered organization shall provide leadership and facilities in order that youth members under their jurisdiction may have the opportunity to participate in a quality program experience as set forth in the official literature of the Boy Scouts of America.

Clause 5. Local councils shall endeavor to provide facilities and leadership in order that Explorers under their jurisdiction may have the opportunity to participate in an Explorer superactivity away from home each year.

Clause 6. Local councils shall provide procedures for advancement in order that youth members may meet the various requirements of rank in adherence to the advancement requirements set forth in the official literature of Boy Scouts of America.

AUTHORITY FOR SCOUT EXECUTIVES MANUAL

Section 5.

The authorization for policies and procedures discussed in the *Scout Executive's Manual* comes from the Rules and

Regulations, which in turn comes from the Charter and Bylaws of the Boy Scouts of America.

ARTICLE VII. YOUTH MEMBERS

GENERAL CLASSIFICATIONS

Section 1.

Active

Clause 1. An active youth member is one who, with the approval of a parent or guardian if necessary, becomes a member of a unit; obligates himself or herself to attend the meetings regularly; fulfills a member's obligation to the unit; subscribes to the Scout Oath or the code of his or her respective program; and participates in an appropriate program based on a member's age, as promulgated from time to time by the Boy Scouts of America.

Associate

Clause 2. Any youth member who, in the judgment of the unit leader and the unit committee, is unable to meet the requirements of active membership may be carried on the unit records as an associate, provided the individual attends at least one meeting of the unit within the year and in all other respects is guided by the obligations of an active member.

Visiting Youth Members

Clause 3. Enrollment. Young people of other nationalities who are temporarily resident in the United States may

be enrolled as "visiting" youth members, at the national office of the Corporation upon local council recommendation.

Clause 4. Affiliation. Such enrollment shall entitle the youth members to affiliate with a local unit where the individual temporarily resides and to share all activities, privileges, advancement recognition, and service credits to which registered members of the Boy Scouts of America are entitled. This shall include the right to wear, while thus affiliated, the prescribed insignia and uniform of the Boy Scouts of America for which the member may qualify.

Clause 5. Certificates of Service. Upon leaving the United States, certificates shall be given such affiliated "visiting" youth members arresting their service record and advancement while in the United States.

PROGRAM GROUPS

Section 2.

Tiger Cubs, Cub Scouts, Boy Scouts

Clause 1. Youth members shall meet specific requirements as established by the Boy Scouts of America and published from time to time in the official publications of the organization. Specific membership requirements are:

(a) Tiger Cub - Must be in first grade or be age 7, but not yet age 8.

(b) Cub Scout - Must have completed first grade or be age 8 through age $11_{1/2}$, or have completed fifth grade, whichever is later.

(c) Boy Scout - Must have competed fifth grade or be age 11; or have entered the Arrow of Light Award, but not have reached age 18.

(d) Varsity Scout - Must be at least age 14 and not yet age 18.

Explorers

Clause 2. Members in Exploring shall be male or female and meet specific requirements as established by the Boy Scouts of America and published from time to time in the official publications of the organization.

(a) Explorer - Be 14 years of age and complete the eighth grade, or be 15 years of age or older, and not yet 21 years of age.

(b) Career Awareness Exploring - A program for Explorer-age youth conducted on school time which provides program opportunities as described in the official literature of the Boy Scouts of America.

(c) Sea Exploring - A special-interest program carried on as a part of Exploring.

Lone Cub Scout and Lone Boy Scout

Clause 3. A lone Cub Scout or lone Boy Scout is a boy who meets the same requirements of grade or age as established in clause 1, becomes registered, and meets the program objectives with the help of a lone Scout friend and counselor. The program shall be carried out under supervision of the local council in which he lives.

Section 3.

Youth Leadership Positions

Each Scouting unit may have certain key youth leadership positions which shall involve youth members in leadership and program management. Positions are:

(a) Junior Assistant Scoutmaster - A 16- to 17-year-old youth appointed by the Scoutmaster, approved by the troop committee, and responsible to the Scoutmaster for tasks assigned.

(b) Senior Patrol Leader - Shall be elected by the majority of youth members registered in the troop. He shall meet the qualifications set by the patrol leaders' council. He may appoint other youth leaders with the concurrence of the Scoutmaster and shall preside over the patrol leaders' council.

(c) Varsity Team Captain - Shall be nominated by the team committee with the concurrence of the Coach. The Varsity Scouts comprising the team vote to elect, or accept, the captain. He runs the team and appoints cocaptains, program managers, and squad leaders with the concurrence of the Coach and youth members.

(d) Explorer Elected Officers - Elected Explorer officers work together to help the post succeed. Elected officer positions are: president, first vice-president, second vice-president, secretary, and treasurer.

ARTICLE VIII. ADULT LEADERSHIP

GENERAL

Section 1.

Designation

Clause 1. Scouters. The collective designation for all registered adult members of the Boy Scouts of America.

Clause 2. Unit Scouters. All adult members registered with the unit, except the chartered organization representative who shall be considered a council Scouter.

Clause 3. District Scouters. All adult members serving on the district committee.

Clause 4. Council Scouters. All adult members registered with the council.

Approval

Clause 5. All recommendations for commissions or certificates of membership for unit, district, and council Scouters under council Scouters under council supervision are subject to the approval of the local council before transmission to the national office of the Corporation. Said recommendations for unit Scouters must be approved by the head of the chartered organization or by the chartered organization representative.

Clause 6. All recommendations from local units of the Direct Service Council for commissions or certificates of membership are subject to the approval of the Corporation.

CITIZENSHIP REQUIREMENT

SECTION 2.

Service Within the United States

Clause 1. Individuals serving in any official relationship with the Boy Scouts of America shall subscribe to the statement of religious principle, as prescribed in the Bylaws, and the Scout Oath and Law. They shall either be citizens of the United States or shall legally declare intention to become a citizen of the United States (unless the position qualification stipulates citizenship as a specific requirement of registration, e.g., chartered organization representative.)

Clause 2. No adult alien, visiting or resident, shall be registered or enrolled in any capacity in Scouting, with the exception that adults from other countries legally resident in the United States may be enrolled as unit Scouters at the discretion of the Corporation and pursuant to specific recommendations from the national Scout associations (where such associations exist) of the countries involved.

Each adult so registered or enrolled shall take a modified form of the Oath, Promise, Pledge, or Code, pledging to respect and obey the laws of the country in which the individual is living. This individual will not be required to pledge allegiance to the flag and Government of the United States.

Service Outside the United States

Clause 3. At the discretion of the Executive Board of the Boy Scouts of America, and under such rules and regulations as it may prescribe, commissions or certificates of

membership as Scouters may be issued to citizens serving in a country or territory under the control of the United States.

COMMISSIONED LEADERSHIP

SECTION 3.

Issuance of Commissions

Clause 1. All individuals in unit leadership positions (including Lone Cub Scout and Boy Scout friend and counselors) shall be issued commissions by the Boy Scouts of America.

Clause 2. All individuals selected to serve as commissioners (including Explorer service team members) shall be recommended by the Scout executive and approved by the council executive board. They shall be issued commissions by the Boy Scouts of America on an annual basis.

Age Requirements

Clause 3. Commissioned officials must be at least 21 years of age, with the exception of those individuals at least 18 years of age who may be commissioned as assistant unit leaders. (Assistant Varsity team Coaches and associates Explorer Advisors must be 21 years of age.)

Commissioner

Clause 4. Council Commissioner. The council commissioner shall direct the extent and quality of commissioner service through monthly meetings with district commissioners and commissioner conferences. The council

commissioner has the responsibility at the council level to report to the council president and regularly interpret the commissioner function to the council executive board. The council commissioner is responsible for the local council's commitment to on-time reregistration of units. The council commissioner shall serve as an officer of the council and as a National Council representative.

Clause 5. Assistant Council Commissioners. Each local council may have one or more assistant council commissioners. These individuals, are appointed by the council commissioner and assist, on direction, in the performance of the duties of that office.

Clause 6. District Commissioner. A district commissioner is offered for approval and appointment by the district nominating committee. The district commissioner shall, through a volunteer staff, be responsible for on-time charter renewals, unit service and monthly roundtables in the district and give leadership to recruiting, training, and supervision of an effective staff. The district commissioner serves on the council commissioner's staff, reports to the district chairman, and has an advisory relationship with the district operating committees.

Clause 7. Assistant District Commissioners. Each district may have one or more assistant district commissioners. These individuals are appointed by the district commissioner and shall, under direction, recruit, train, and supervise unit commissioners or assist in staff operation through functional assignments.

Clause 8. Unit commissioners shall be appointed by the district commissioner to be responsible for the continuity and

program capability of assigned units. Unit commissioners provide their assigned units with meaningful service that brings about on-time charter renewal, membership growth, and the delivery of Scouting ideals to boys. They give guidance in unit operation to unit leaders and interpret council and district activities in terms of unit opportunities.

Clause 9. Roundtable Commissioners.

(a) A Cub Scout roundtable commissioner is appointed by the district commissioner to be responsible for monthly Cub Scout leader roundtables that provide unit program ideas and inspiration to reinforce leaders' commitment to help boys grow. The Cub Scout roundtable commissioner shall recruit, train, and supervise a permanent Cub Scout roundtable staff.

(b) A Boy Scout roundtable commissioner is appointed by the district commissioner to be responsible for monthly Boy Scout leader roundtables that provide unit program ideas and inspiration to reinforce leader's commitment to help boys grow. The Boy Scout roundtable commissioner shall recruit, train, and supervise a permanent Boy Scout roundtable staff.

(c) A Varsity Scout huddle commissioner is to be appointed by the district commissioner to be responsible for Varsity Scout leader huddles that provide team program ideas and inspiration to reinforce leader's commitment to help boys grow. The Varsity Scout huddle commissioner shall recruit train, and supervise a permanent Varsity Scout huddle staff.

Clause 10. Roundtable/Huddle Staff.

(a) Cub Scout roundtable staff members shall be appointed by the Cub Scout roundtable commissioner and,

under direction, plan and conduct monthly Cub Scout leader roundtables.

(b) Boy Scout roundtable staff members shall be appointed by the Boy Scout roundtable commissioner and, under direction, plan and conduct monthly Boy Scout leader roundtables.

(c) Varsity Scout huddle staff members shall be appointed by the Varsity Scout huddle commissioner and, under direction, plan and conduct Varsity Scout leader huddles.

Unit Leadership

Clause 11. Unit Leadership. All recommendations for commissions to serve as unit leader, assistant unit leader, den leader, assistant den leader, Webelos den leader, or assistant Webelos den leader shall originate with the unit committee, the chartered organization, or the community unit committee. The head of the chartered organization or the chartered organization representative must approve the registration of the leader on the appropriate form. The local council must also approve the registration.

Adult leadership positions shall be filled by persons 21 years of age or older, except the following, which may be filled by persons 18 years of age or older: assistant Cubmaster, assistant Scoutmaster, assistant den leader, and assistant Webelos den leader.

PROFESSIONAL LEADERSHIP

SECTION 4.

General

Clause 1. Persons who have met the qualifications and requirements established for professional service in the Boy Scouts of America shall be commissioned as professional Scouters.

Requirements

Clause 2. The Personnel Committee shall be responsible for the development of such criteria, policies, and procedures as will assure the recruitment of professional candidates with necessary physical, educational, personal, and moral qualifications. These criteria, policies, and procedures will be reviewed annually. They shall include at least the following:

(a) The recruit must have attained age 21 unless prohibited by any applicable law.

(b) The recruit must have earned a bachelor's degree from an accredited college or university. Consideration will be given a person with an associate arts degree with satisfactory evidence of a successful career experience of at least 10 consecutive years in general business, industry, government, or the military, along with at least 5 years of leadership experience as an adult Scouting volunteer. An approved paraprofessional employee with 2 consecutive years of successful employment and an associate arts degree may also be considered.

(c) The recruit must accept the declaration of religious principle and the Scout Oath and Law.

(d) The recruit must be a citizen of the United States of America before being commissioned as a professional Scouter.

Commissioning

Clause 3. The following procedure provides the basis for the commissioning of persons as professional Scouters:

PHASE I

A person employed as a professional trainee shall demonstrate to the satisfaction of the local council Scout executive (or, in the case of a trainee employed by the Corporation, the Chief Scout Executive) an acceptable willingness to work and a degree of cooperation, is motivated toward a career service in the movement, and has demonstrated an apparent ability to succeed as a professional Scouter. These requirements must be satisfactorily made prior to the time the trainee is sent to the National Executive Institute. In the event the trainee does not meet all of these requirements, employment shall be terminated by the local council Scout executive (or, as applicable, the Chief Scout Executive) prior to the time the trainee attends the National Executive Institute.

PHASE II

The trainee who successfully completes Phase I of the commissioning process shall be sent to the National Executive Institute for NEI-I training not longer than three months following employment as a professional trainee.

The trainee must satisfactorily accomplish those designated assignments in NEI-I; satisfactorily demonstrate the development of necessary techniques; and demonstrate moral and personal fitness as set forth in the Scout Oath and Law and in the Scout Executive's Code. The faculty of the National Executive Institute and the director of Professional Development shall decide whether the trainee has satisfactorily completed NEI-I. Those trainees who successfully complete NEI-I shall receive a certificate to that effect and will be commissioned by the Chief Scout Executive, or designee, as a professional Scouter and shall receive documentary evidence of such commission and shall thereupon be entered into the official roll of professional Scouters of the Boy Scouts of America. Prior to commissioning the trainee's employment status is considered that of a probationary employee.

Decommissioning

Clause 4. Upon proper showing, the Executive Board of the Boy Scouts of American may decommission a professional Scouter. "Proper showing" means the establishment by competent evidence that the professional Scouter has committed a grievous breach of the trust placed in that individual by the commission of one or more of the following:

(a) Intolerable personal conduct;

(b) Incompetence; or,

(c) Substantial violations of the principles of management established by the BSA.

Procedure

Step 1. Conciliation: Over a period of not less than 90 days after the Chief Scout Executive concludes that cause exists to believe that the professional Scouter should be decommissioned, the Chief Scout Executive shall:

(a) In the case of a local council Scout executive: attempt to persuade the local council's executive board of the necessity of terminating the services of the local council Scout executive.

(b) In the case of all other professional Scouters employed by local councils the Chief Scout Executive shall attempt to persuade the local council Scout executive of the necessity of terminating the employment of the professional Scouter. This authority may be delegated to the applicable regional director, or the national director of Personnel.

(c) In the case of a professional Scouter employeed by the Corporation the Chief Scout Executive may terminate the employment of the professional Scouter.

In any of the foregoing cases and whether or not the involved professional Scouter's employment was terminated, the Chief Scout Executive, for the reasons stated above, may implement step 2 below for the purpose of removing a professional Scouter from the movement through the process of decommissioning.

Step 2. Formal charges shall be served on the involved professional Scouter and shall include:

(a) The factual allegations alleged to constitute a "proper showing" for being decommissioned:

(b) Notice of a hearing to be held not fewer than 20 or no more than 30 days following such service, at which time the Chief Scout Executive shall attempt to establish such "proper showing."

In the case of a member of the Chief Scout Executive's executive committee, a group director, or a regional director of the Corporation, a hearing shall be held before a standing panel of five members of the Executive Board of the Boy Scouts of America selected by the President of the Boy Scouts of America, who shall determine the issue.

In the case of all other professional Scouters employed by the Corporation, a hearing shall be held before a standing panel of five members selected from the Chief Scout Executive's executive committee, the group directors or the regional directors, but excluding the Chief Scout Executive's legal counsel, who shall determine the issue.

In the case of a professional Scouter employed by a local council, including a local council Scout executive, a hearing shall be held before a standing panel of five of the six Scout executives, one from each region, selected by the national office in consultation with the regional directors, who shall determine the issue.

The panel may choose counsel to serve as it deems proper. The professional Scouter and the Chief Scout Executive may be represented by counsel. The burden of establishing a "proper showing" rests upon the Chief Scout Executive. A verbatim stenographic record of the hearing shall be made and provided to all parties. Within 15 days of the hearing, briefs may be filed with the panel. The panel shall reconvene within 20 days after the hearing to decide the issue. Its

decision by majority vote of all its members shall be in writing and shall state the findings and conclusion of the panel.

Step 3. In the event the panel finds there is no "proper showing," the procedure is ended. In the event the panel finds there is a "proper showing," the involved professional Scouter may within 10 days of the step 2 decision file a notice of appeal in writing with the Executive Board of the Boy Scouts of America. Upon receipt of the notice of appeal a panel consisting of not fewer than three nor more than five members of the Executive Board of the Boy Scouts of America shall be appointed by the national President to determine the appeal in all cases except those involving members of the cabinet of the Boy Scouts of America. In cases involving members of the cabinet, a quorum of the Executive Board of the Boy Scouts of America shall constitute the panel in this step 3.

Its determination shall be made upon the record and written briefs submitted within 15 days after notice of appeal is filed. It shall upon due consideration by majority vote of all its members affirm or reverse the decision of the step 2 panel. Its decision shall be in writing. It may reverse the panel only upon concluding that the decision of the step 2 panel was not supported by substantial evidence in the record. During the pendency of the appeal the professional Scouter may remain in office if employment has not already been terminated as provided for in step 1 above. The appeal panel shall meet at a place determined by the national President and shall decide the matter within 10 days after written briefs are filed.

In the event the step 2 panel finds "proper showing" exists, and no appeal is filed, the Executive Board of the Boy Scouts of America at its next meeting (which may be a specially called meeting) shall, upon such showing, decommission the professional Scouter who shall thereupon be decommissioned, removed from office, and removed from the professional service.

EMPLOYMENT OF PROFESSIONALS

SECTION 5.

Rules and Guidelines

Clause 1. The Chief Scout Executive, subject to the direction of the Executive Board, the Bylaws, and these Rules and Regulations, shall establish procedures covering employment, training, promotion, tenure, demotion, and retirement or discharge of all professional and professional-technical employees of the Corporation and of local councils; as well as determine the positions that may be held only by commissioned professional Scouters.

Special Situations

Clause 2. It is recognized that for the efficient operation of the Corporation certain professional and professional-technical staff positions may be held by people selected because of their specialized qualifications. The Chief Scout Executive may, in exceptional instances, waive the education or equivalency requirement of section 4, clause 2, above and grant to such persons professional or professional-technical status during their term of employment which shall be limited to such professional or professional-technical staff positions.

National Professional Staff

Clause 3. The Chief Scout Executive, subject to the approval of the Executive Board, shall determine the necessary national organization structure and professional staff requirements.

Local Council Professional Personnel

Clause 4. A local council may employ as its Scout executive — that is, its executive officer having general direction of its administration and supervision over Scouting activities within its jurisdiction — a person selected by it from the list of candidates of commissioned professional Scouters submitted by the national office who shall serve so long as commissioned as provided herein and during the pleasure of the local council's executive board subject to the policies and procedures of the National Council.

In no event shall a local council select as its Scout executive a professional employee currently serving in any other capacity in that council, nor shall any such person be included in any list provided for in the preceding paragraph.

Other Local Council Staff

Clause 5. A local council may employ in other professional positions persons selected from lists of candidates consisting of commissioned professional Scouters submitted by the national office. Such persons shall serve in the local council so long as commissioned as provided herein and during the pleasure of the local council's Scout executive. The duties of such professional personnel shall be defined by the local council Scout executive with the approval of the

local council executive board. The classification and title of such position shall be determined by the Chief Scout Executive.

Clause 6. A local council may employ individuals in professional-technical positions approved by the national office. Employment in that position shall continue as long as responsibilities for which the position was approved remain unchanged.

Clause 7. A local council may also employ individuals in the following categories:

(a) Professional Trainees. Newly employed persons uncommissioned as professional Scouters employed as described in article VIII, section 4, clause 3, in these Rules and Regulations and with the approval of the national office. The employment period shall not extend more than 3 months prior to attending the National Executive Institute.

(b) Paraprofessionals. For purposes of these Rules and Regulations, paraprofessionals shall not be considered professional positions, and the requirements for professional service shall not apply to persons in such positions.

BSA EMPLOYEES

SECTION 6

Retirement

Contributions and benefits under the Basic Retirement Plan of the Boy Scouts of America are based upon normal retirement of employees at age 65. Subject to satisfactory performance, continued employment by an employee is subject to applicable state and federal law.

ARTICLE IX. PRINCIPLES, POLICIES, AND DEFINITIONS

(See article IX of Bylaws for Declaration of Religious Principle.)

PRINCIPLES - OATH, SLOGAN, PROMISES, PLEDGE, MOTTO, AND CODE

SECTION 1.

Motto

Clause 1. The motto of the Boy Scouts of America is: "Be Prepared."

Slogan

Clause 2. The slogan of the Boy Scouts of America is "Do a Good Turn Daily."

The Scout Oath or Promise and the Scout Law

Clause 3. All Boy Scouts must know and subscribe to the Scout Oath or Promise and Law, as follows:

The Scout Oath or Promise

On my honor I will do my best
To do my duty to God and my country and to
obey the Scout Law;
To help other people at all times;
To keep myself physically strong, mentally
awake, and morally straight.

The Scout Law

A Scout is:

Trustworthy. A Scout tells the truth. He keeps his promises. Honesty is part of his code of conduct. People can depend on him.

Loyal. A Scout is true to his family, Scout leaders, friends, school, and nation.

Helpful. A Scout is concerned about other people. He does things willingly for others without pay or reward.

Friendly. A Scout is a friend to all. He is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs other than his own.

Courteous. A Scout is polite to everyone regardless of age or position. He knows good manners make it easier to people to get along together.

Kind. A Scout understands there is strength in being gentle. He treats others as he wants to be treated. He does not hurt or kill harmless things without reason.

Obedient. A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.

Cheerful. A Scout looks for the bright side of things. He cheerfully does tasks that come his way. He tries to make others happy.

Thrifty. A Scout works to pay his way and to help others. He saves for unforeseen needs. He protects and conserves natural resources. He carefully uses time and property.

Brave. A Scout can face danger even if he is afraid. He has the courage to stand for what he thinks is right even if others laugh at or threaten him.

Clean. A Scout keeps his body and mind fit and clean. He goes around with those who believe in living by these same ideals. He helps keep his home and community clean.

Reverent. A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others.

The Tiger Cub Promise, Cub Scout Promise, and Law of the Pack

Clause 4. All Tiger Cubs must know the Tiger Cub Promise. All Cub Scouts must know and subscribe to the Cub Scout Promise and the Law of the Pack

Tiger Cub Promise

I, promise to love God, my family, and my country and to learn about the world.

Cub Scout Promise

I, _____, promise
To do my best to do my duty to God and my country,
To help other people, and
To obey the Law of the pack.

The Law of the Pack

The Cub Scout follows Akela.
The Cub Scout helps the pack go.
The pack helps the Cub Scout grow.
The Cub Scout gives goodwill.

The Explorer Code

Clause 5. All Explorers must subscribe to the Explorer Code, as follows:

As an Explorer

I believe that America's strength lies in our trust in God and in the courage, strength, and traditions of our people.

I will, therefore, be faithful in my religious duties and will maintain a personal sense of honor in my own life.

I will treasure my American heritage and will do all I can to preserve and enrich it.

I will recognize the dignity and worth of all humanity and will use fair play and goodwill in my daily life.

I will acquire the Exploring attitude that seeks the truth in all things and adventure on the frontiers of our changing world.

POLICIES

SECTION 2.

Cooperation With National Movements

Clause 1. With the consent of the local council, members of the Boy Scouts of America may cooperate with established nonpartisan and nonsectarian national movements for the relief of humanity in undertakings to raise money by giving personal service, provided, however, that this shall not

involve the use of BSA youth members as collectors or solicitors of money.

Participation in Public Functions

Clause 2. The officers and leaders of the Boy Scouts of America shall, when practicable, cooperate in connection with civic or other public gatherings of a nonpartisan and nonpolitical character in a way which gives youth members an opportunity to render service in harmony with their training instead of merely taking part in parades or making a show of themselves in their uniforms.

Unit Money-Earning Projects

Clause 3. Units may conduct money-earning projects only when the projects have been approved by the chartered organization and the local council and are consistent with the principles set forth in these Rules and Regulations.

Scouting Public Display Activities

Clause 4. Local councils may approve the sale of tickets for the public display of Scouting activities, such as merit badge shows, circuses, rallies, and demonstrations, when (a) the nature of the program or function offers a value commensurate with the purchasing price of tickets offered for sale, (b) the sale of tickets is not used as an indirect method of defeating the purpose of article IX, section 2, clause 7 of these Rules and Regulations, and (c) the participation of youth members in the sale of tickets for such affairs is confined to their parents and friends and does not involve methods similar to those used in the sale of tags or other general solicitation.

Advertising Policy

Clause 5. Advertisements.

(a) Advertisements for placement in Scouting publications and other media, in addition to meeting the standards in general use by publishers of high-grade periodicals and other advertising media, must:

(1) Relate to a service or product which could reasonably be foreseen to render some service to the audience of the advertisement, or relate in some way to the purposes of the Boy Scouts of America, and

(2) Merit the purchase price of the article or service offered in the advertisement.

(b) No advertisement will use or display any logo, insignia, terms in common usage, or descriptive marks relating to Scouting without conforming to all currently accepted procedures and guidelines as established by the National Council, Boy Scouts of America, and interpreted in the local council policy guidelines for advertising and commercialism.

Policy Concerning Political Questions

Clause 6. The Boy Scouts of America shall not, through its governing body or through any of its officers, its chartered councils, or members, involve the Scouting movement in any question of a political character. However, this shall not be interpreted to prevent the teaching of ideals of patriotism and good citizenship as required to fulfill the Corporation's purpose. This policy shall also not limit the freedom of thought or action of any official or member as an individual,

nor shall it prevent the organization from expressing its opinion upon matters of governmental concern when considered in its best interest by the governing body of the Boy Scouts of America.

Commercialism Policy

Clause 7. Commercial Contracts.

(a) No member of the Boy Scouts of America, chartered unit, chartered local council, or any officer or representative of the Boy Scouts of America shall have the right to enter into a contract or relationship of a commercial character directly involving or obligating the National Council, Boy Scouts of America, unless duly authorized by the national Executive Board.

(b) A local council may not enter into a contract or business relationship that uses any logo, insignia, terms in common usage, or descriptive marks relating to Scouting, unless the relationship or contract conforms to currently accepted procedures and guidelines as established by the National Council, Boy Scouts of America. The contract or relationship must avoid endorsement of any commercial product or venture.

(c) Subject to the above, chartered organizations, unit leaders, or youth members shall not be restricted from earning money to obtain their own unit equipment, provided that all approved procedures for doing so are followed, including prior approval by the governing local council.

Policy Concerning Military Training

Clause 8. In carrying out the purpose of the Scouting movement as stated herein technical military training and drill shall not be included.

Conflict-of-interest Policy

Clause 9. A fundamental principle ethics is that any person who exercises discretionary authority on behalf of the Corporation may not use this authority for his or her own benefit.

It is therefore the basic policy of the Boy Scouts of America (BSA) that all Executive Board members or members of any committee thereof or officers or employees of BSA have a duty to be free from the influence of any conflicting interest when they act on behalf of BSA or represent it in negotiations or advise others in BSA with respect to dealing with third parties. They are expected to deal with suppliers, customers, contractors, and others having dealings with BSA on the sole basis of that which is in the best interest of BSA, without favor or preference to third parties based on personal considerations. To this end, the following shall be the policy of the Boy Scouts of America:

(a) No member of the Executive Board or member of any committee thereof or officer or employee of BSA shall accept from any person, directly or indirectly, whether by himself or herself or through his or her spouse or a member of his or her family or through any partner or business or professional associate, any gift, favor, service, employment or offer of employment or any other thing of value which he or she knows or has reason to believe is made or offered to him or her with the intent to influence him or her in the

performance of his or her duties as a member of the Executive Board or member of any committee thereof or officer or employee of BSA.

(b) No member of the Executive Board or member of any committee thereof or officer or employee of BSA who is a partner, officer, or employee of a partnership, firm, or corporation or who owns or controls more than 10 percent of the stock of such corporation, shall represent, appear for, or negotiate on behalf of BSA in connection with the acquisition or sale by BSA of any interest in real or tangible or intangible personal property from or to such partnership, firm, or corporation.

(c) No member of the Executive Board or member of any committee thereof shall participate by discussion, voting, or by any other action taken by the Executive Board, or any committee thereof, in the enactment of or defeat of a motion in which that member has an interest as defined in paragraph (b) above. In case any such matter is discussed at any meeting where any Executive Board or committee member who has such an interest is present, the member shall promptly disclose that interest in the matter to be voted on to the chairman of the meeting. The member shall not vote on the matter and at the discretion of the disinterested members present may be required to leave the meeting during the discussion and the voting on the matter.

DEFINITIONS

SECTION 3.

Adult

Clause 1. Unless otherwise stated, the word "Adult" refers to a person 18 years of age or older.

National Office

Clause 2. The term national office may be used to refer to the Chief Scout Executive or other members of the national staff at the Corporation's headquarters at Irving, Texas. Where a responsibility is assigned to the national office it will be handled by the Chief Scout Executive or a member of the staff.

ARTICLE X. PROGRAM

ADVANCEMENT

SECTION 1.

General Principles

Clause 1. Education is the chief function of the Scouting movement and it shall be the basis of the advancement program. A fundamental principle of advancement shall be that the boy's progress is a natural outcome of his activities in his unit. The rank requirements in these phases of the Scouting program, as set forth in the official publications, shall furnish the basis of the activities of the unit.

(a) In Cub Scouting, recognition is earned in the home and the neighborhood by passing certain achievements related to simple skills, habits, ideals, and hobbies.

(b) In Boy Scouting, recognition is gained through leadership in the troop, attending and participating in its activities, living the ideals of Scouting, and proficiency in activities related to outdoor life, useful skills, and career exploration.

(c) In Varsity Scouting, recognition is gained through leadership in the team, attending and participating in its activities, living the ideals of Varsity Scouting, and proficiency in activities related to outdoor life, useful skills, and career exploration.

(d) In Exploring, recognition takes on a wider scope, involving the assumption of adultlike roles, identification with adult careers, and participation in community and citizenship responsibilities.

Administration

Clause 2. All advancement procedures shall be administered under conditions which harmonize with the aims and purposes of the Boy Scouts of America.

Cub Scout Advancement

Clause 3. Basis for Advancement. The Cub Scout advancement program shall be the basis for the Cub Scout's advancement. There shall be three steps in Cub Scout and Webelos Scout advancement procedures: preparation, qualification, and recognition.

Clause 4. Ranks. There shall be the following ranks in Cub Scouting: Bobcat, Wolf, Bear, Webelos, and Arrow of Light. The requirements shall be as authorized by the Executive Board and set forth in Cub Scout publications.

Boy Scout Advancement

Clause 5. Basis for Advancement. The Boy Scout requirements for ranks shall be the basis for the Scout's advancement. There shall be four steps in Boy Scout advancement procedure: learning, testing, reviewing, and recognition.

Clause 6. Ranks. There shall be the following ranks in Boy Scouting: Tenderfoot, Second Class, First Class, Star, Life, and Eagle. The requirements shall be those authorized by the Executive Board and set forth in the official Scouting publications. Eagle palms may also be awarded on the basis of requirements authorized by the Executive Board and set forth in the official Scouting publications.

Clause 7. Responsibility of Troop Committee. It shall be the responsibility of the troop committee, under the leadership and guidance of the local council, to make sure that the program of the troop is conducted in such a way that Scouts have an opportunity to advance on the basis of the four steps outlined in clause 5.

Varsity Scout Advancement

Clause 8. Basis for Advancement. The Boy Scout requirements for advancement shall be the basis for the Varsity Scout advancement.

Clause 9. Responsibility of the Team Committee. It shall be the responsibility of the team committee, under the leadership and guidance of the local council, to make sure that the program of the team is conducted in such a way that Varsity Scouts have an opportunity to advance n the basis of the four steps outlined in clause 5.

Clause 10. Varsity Scout Letter. By participating actively in all phases of Varsity Scouting, a Varsity Scout may qualify for the Varsity Scout letter.

Explorer Recognition

Clause 11. Basis for Advancement. A male Explorer who has achieved the First Class rank as a Boy Scout in a troop or as a Varsity Scout in a team may continue working toward the Eagle Award while an Explorer, until his 18th birthday. There is no Explorer advancement route to qualify for the Eagle Award.

Clause 12. Ranks. There shall be awards and ranks in Sea Exploring, the requirements for which shall be approved by the Executive Board as proposed by the Exploring Committee and set forth in Explorer publications.

Clause 13. Examination in Camps.

(a) In special instances, where Scouts are attending educational or similar institutions and/or camps which give an intensive Scouting program, said institutions and camps may, upon application, be authorized by the Corporation to give the prescribed examinations and pass Scouts in such manner and with such special conditions as the facts presented (as to the facilities and leadership of the institution or camp) may, in the judgment of the Corporation, warrant.

(b) Upon the recommendation of the Corporation, authority may be granted annually for the above privileges to Scout camps or camps conducted by authorized representatives of the Boy Scouts of America that submit evidence of maintaining the program standards, provided their programs have been approved by the Corporation. No

exception shall be made to the time requirements to qualify for rank advancement or for the award of Eagle palms.

Responsibility for Merit Badges

Clause 14. The responsibility for merit badges shall rest with the merit badge counselor approved by the local council and district advancement committee. Merit badge counselors shall be registered adult members of the Boy Scouts of America. The merit badge counselor shall prepare and qualify youth members. There shall be no board of review procedure for merit badges, but public recognition may be given at a unit court of honor or other suitable occasion.

ACTIVITIES

SECTION 2.

Anniversary Celebration

Clause 1. The anniversary celebration of the Boy Scouts of America shall take place annually on February 8, the anniversary of the original day of incorporation of the Boy Scouts of America, and throughout the week (beginning on Sunday) containing this date. This week is known as Scouting Anniversary Week.

Clause 2. The national office of the Corporation through its various officers and with the cooperation of Scouters throughout the country shall arrange for a nationwide celebration on February 8 and throughout the month of February for the purpose of bringing more definitely to the attention of each community the value of the Scouting program for work with boys and young adults for the development of character and training for citizenship.

Clause 3. The program for the anniversary celebration of the Boy Scouts of America shall include a plan whereby every registered youth member shall be given an opportunity to observe Anniversary Day, February 8, with special ceremonies in which they recommit themselves to their respective Promise, Oath, Pledge, or Code.

Clause 4. On this occasion it shall be the duty of the unit leader and other leaders to bring to the attention of the unit members the extent of the Scouting brotherhood in our own country and throughout the world and impress upon their minds the fact that every member the world over is committed to the same obligation, as stated in the Tiger Cub Promise, Cub Scout Promise, Scout Oath, and Explorer Code.

Scouting Bands

Clause 5. Bands and bugle (or fife) and/or drum corps may be organized among members of the Boy Scouts of America and provided with suitable insignia indicating this special membership, provided, however, that the purpose of such organization shall be primarily and distinctively for the development of the boy and young adult along lines in harmony with the aims and objectives of the movement and that the members thereof also carry out the regular program.

Participant Fees

Clause 6. All national events and activities for which a participant fee is charged, to be determined from time to time by the Executive Board, must include a surcharge for the national liability insurance program.

BOYS' LIFE MAGAZINE

SECTION 3.

The Corporation shall publish a periodical entitled *Boys' Life* for all boys of Scouting age, providing wholesome stories and other material of interest and educational value, which will stimulate ambition and help in character development of boys. All stories and material shall be in harmony with the principles of Scouting as set forth in the Scout Oath and Law.

INSIGNIA, UNIFORMS, AND BADGES

SECTION 4.

General

Clause 1. The badges and other official insignia and the uniforms of the Boy Scouts of America shall be made available only to, and used only by, registered youth members or officials and other members who have satisfactorily complied with the requirements prescribed by the Corporation.

Official Uniforms

Clause 2. The official uniforms authorized as evidence of official relationship to the Boy Scouts of America shall be those approved by action of the Executive Board of the Boy Scouts of America from time to time, as illustrated and correctly described in the handbooks, catalogs, and other official publications of the Boy Scouts of America.

Protection of Uniforms

Clause 3. Restricted Sale and Use. The sale and use of the appropriate uniform as specified shall be restricted to members of the Boy Scouts of America who are registered and in good standing, according to the records of the organization. It shall be the responsibility of all members of the Boy Scouts of America and especially of all commissioned officers and chartered councils to cooperate with the Corporation in preventing the use of the official uniforms by those who are not members of the organization in good standing.

Clause 4. Prohibition of Alteration or Imitation.

(a) No alteration of, or additions to, the official uniforms, as described in the official publications, or the rules and regulations covering the wearing of the uniform and the proper combinations thereof on official occasions, may be authorized by any Scouting official or local council or any local executive board or committee, except the Executive Board of the Boy Scouts of America after consideration by the Program Group Committee.

(b) Imitation of United States Army, Navy, or Marine Corps uniforms is prohibited, in accordance with the provisions of the organization's Congressional Charter.

Distribution of Uniforms

Clause 5. The official uniforms and parts thereof shall be issued only as authorized by the Executive Board of the Boy Scouts of America and sold either directly by the national office — through responsible local merchants designated as local Scouting distributors — or through designated local

councils. Local Scouting distributors may be appointed and licensed and the licenses revoked only by the national office, but chartered local councils may make recommendations for such actions.

Use of Uniform

Clause 6. The official uniforms are intended primarily for use in connection with Scouting activities as defined by the national Executive Board, and their use may be approved by the local council executive board for council events or activities under conditions consistent with the Rules and Regulations of the Boy Scouts of America.

Clause 7. Use Abroad. Members of the Boy Scouts of America, whose address of registration is within the United States, shall not wear the official uniforms nor any official Scouting badges and insignia outside the limits of the United States except when carrying international letters of introduction issued by the Corporation or as members of groups traveling with tour permits issued by the Corporation.

Protection and Use of Badge and Insignia

Clause 8. All badges and insignia of the Boy Scouts of America shall be used exclusively by members of the Boy Scouts of America, registered and in good standing according to the records at the national office, who qualify in accordance with the provisions herein set forth or as may be authorized by the Executive Board from time to time and published in the official handbooks by the Corporation.

Clause 9. All badges and insignia shall remain the property of the Boy Scouts of America subject to recall for cause by the Corporation or its duly authorized representative.

Alteration of Badges and Insignia

Clause 10. No alteration of, or additions to, the official badges and insignia or in the rules and regulations governing their use or their location upon the uniform may be authorized by any Scouting official, local council, local executive board, or committee except the Executive Board of the Boy Scouts of America and committees specifically authorized thereof.

Special Local Badges and Insignia

Clause 11. Local councils are authorized to adopt special badges and insignia as awards for particular purposes in harmony with national policies and to permit their use upon the official uniform in accordance with the Rules and Regulations of the Corporation, but such awards must be approved as to purpose and design by the Corporation in advance.

Authorization

Clause 12. The national office shall have the sole right to authorize the use of insignia, words, phrases, designation marks, pictorial representation, and descriptive remarks relating to the program of the Corporation on commercial products, promotional efforts, and/or sale and distribution to members of the Boy Scouts of America and/or the general public. The use of same by local councils shall be only as authorized and approved by the national office.

LIFESAVING AND MERITORIOUS ACTION AWARDS

SECTION 5

Lifesaving Awards

Clause 1. Lifesaving Awards. Recognition may be given to a youth member or adult leader of the Boy Scouts of America where the evidence presented to the National Court of Honor, in accordance with prescribed regulations, shows that he or she saved or attempted to save life under circumstances which indicate heroism and risk to self. The court will give consideration to resourcefulness and to demonstrated skill in rescue methods. In no case shall recognition be given where it appears that the risk involved was merely in the performance of duty or the meeting of an obligation because of responsibility to supervise and give leadership to the persons whose lives were saved. The awards are:

(a) Honor Medal With Crossed Palms. The Honor Medal With Crossed Palms may be awarded in exceptional cases to a youth member or adult leader who has demonstrated unusual heroism and extraordinary skill or resourcefulness in saving or attempting to save life at *extreme* risk to self.

(b) Honor Medal. The Honor Medal may be awarded to a youth member or adult leader who has demonstrated unusual heroism and skill in saving or attempting to save life at *considerable* risk to self.

(c) Heroism Award. The Heroism Award may be awarded to a youth member or adult leader who has

demonstrated heroism and skill in saving or attempting to save life at *minimum* risk to self.

Meritorious Action Awards

Clause 2. Meritorious Action Awards. Recognition may be given to a youth member or adult leader where the evidence presented to the National Court of Honor, in accordance with prescribed regulations, shows that a significant or outstanding act of service, *of an exceptional character*, was performed. The action taken need not involve attempts of rescue or risk to self but must put into practice Scouting skills and/or ideals. Recognition shall not be given where it appears that the action involved was merely in the performance of duty or the meeting of an obligation. The awards are:

(a) Medal of Merit. The Medal of Merit may be awarded to a youth member or adult leader who has performed an act of service *of a rare or exceptional character* that reflects an uncommon degree of concern for the well-being of others.

(b) National Certificate of Merit. The National Certificate of Merit may be awarded to a youth member or adult leader who has performed a significant act of service that is deserving of special national recognition.

Clause 3. All applications should be submitted to the National Court of Honor through the local council upon duly prescribed forms, and it shall be within the discretion of the National Court of Honor to determine which type of recognition, if any, shall be given. Recipients of these awards must be registered members of the Boy Scouts of America at

the time the action was performed. Awards are made in the name of the Boy Scouts of America.

AWARDS FOR DISTINGUISHED SERVICE TO YOUTH

SECTION 6.

Silver Buffalo Award

Clause 1. The Boy Scouts of America may award the Silver Buffalo for distinguished service to citizens of the United States upon the following basis and procedure:

(a) These awards may be made each year.

(b) The award is made on the basis of noteworthy service to youth, of a national or international character, outside of the line of regular duty, either directly to or independent of the Boy Scouts of America.

(c) As evidence of the award there shall be presented: a suitable certificate, descriptive of the services rendered, duly authenticated by the Boy Scouts of America, pursuant to the action of the Executive Board; and a miniature Silver Buffalo, suspended by a red, white, and red ribbon to be worn around the neck.

(d) These awards shall be made at the meeting of the National Council or at a major function of the Boy Scouts of America, pursuant to the action of the Executive Board, which action shall be based upon recommendation to the Executive Board by the National Court of Honor, or by recommendations to the Executive Board by the president of the corporation and the Chief Scout Executive.

Silver Antelope Award

Clause 2. The Boy Scouts of America, acting through the National Court of Honor, may award the Silver Antelope for distinguished service to youth upon the following basis and procedure:

(a) This award may be made each year upon the nomination of the regional cabinet. The nomination shall be submitted not less than 30 days in advance of the date upon which it is desired to present the award.

(b) This award may be made for noteworthy service of exceptional character to youth by registered Scouters, Cub Scouters, Varsity Scouters, and Exploring leaders within the territory under the jurisdiction of a regional cabinet.

(c) As evidence of the award there shall be presented: a suitable certificate, duly authenticated by the Boy Scouts of America, pursuant to the action of the National Court of Honor; and a miniature Silver Antelope suspended by an orange, white, and orange ribbon to be worn around the neck.

(d) It shall be a general policy that no public announcements shall be made by the region in advance of action of the National Court of Honor with reference to the names presented for consideration.

(e) These awards shall be presented to the recipients by the region in connection with its annual meeting or other public function, but only after approval of the award by the National Court of Honor.

(f) Each region shall be entitled to one nomination for each 30,000 registered adults or portion thereof in its territory.

as of December 31 preceding the nominations, according to the records of the national office.

(g) Regions not using their full allotment in any year may accumulate the unused portion for use in any subsequent year.

(h) The National Court of Honor may, based upon initial recommendation of the Operations Group, award the Silver Antelope to persons in overseas areas.

Silver Beaver Award

Clause 3. The Boy Scouts of America, acting through the National Court of Honor, may award the Silver Beaver Award for distinguished service to youth upon the following basis and procedure:

(a) This award may be made each year upon the nomination of chartered local councils. These nominations shall be submitted not less than 30 days in advance of the date upon which it is desired to present the awards.

(b) The award is made for noteworthy service of exceptional character to youth by registered Scouters, Cub Scouters, Varsity Scouters, and Exploring leaders within the territory under the jurisdiction of a local council.

(c) As evidence of the award there shall be presented: a suitable certificate, duly authenticated by the Boy Scouts of America, pursuant to the action of the National Court of Honor; and a miniature Silver Beaver suspended by a blue, white, and blue ribbon to be worn around the neck.

(d) It shall be a general policy that no public announcements shall be made by the local council in advance

of action by the National Court of Honor with reference to names presented for consideration.

(e) These awards shall be made to the recipients by the local council concerned in connection with its annual meeting or other public function.

(f) Each duly chartered local council shall be entitled to one nomination. Councils having more than 60 units shall be entitled to further nominations on the basis of one for each additional 60 units or fraction thereof in their territory, as of December 31 preceding the nomination, according to the records of the national office.

(g) Councils not using their full allotment in any year may accumulate the unused portion for use in any subsequent year.

(h) In extraordinary cases the Silver Beaver Award may be made by the National Court of Honor to a Scouter upon the recommendation of the duly constituted Scouting authorities having supervision of one or more units of the Boy Scouts of America, located outside of the United States and not under the jurisdiction of a local council.

Silver World Award

Clause 4. The Boy Scouts of America through the National Court of Honor which has delegated the selection of recipients as hereinafter provided may award the Silver World Award for distinguished service to youth as follows:

(a) The award may be presented to citizens of any country whose Scout association is a member of the World Scout Conference, in recognition of his or her service of

exceptional character to the youth of his or her own country, or on an international basis.

(b) The recipient does not have to be a member of a Scout association. United States citizens may receive the Silver World Award for international service to youth, provided they are not registered members of the Boy Scouts of America.

(c) Approved awards may be presented by an authorized member of the Boy Scouts of America either by a personal visit with the recipient or at an official meeting of a national Scout association, including the BSA.

(d) Designation of recipients of the Silver World, by authority of the International Committee and the Executive Board, is delegated to the following:

President of the Boy Scouts of America
Chief Scout Executive
International Commissioner
Chairman of the International Committee

(e) The award may be granted upon the concurrence of any three of the above. Awards may be made at any time on behalf of the International Committee and the national Executive Board. The International Committee receives a full report of the Silver World Award designation at each meeting and will maintain accumulative records of awards including support data.

(f) As evidence of the award there will be presented: A suitable certificate duly authorized by the Boy Scouts of America. The design will be a circular blue enameled silver medallion upon which will be superimposed meridian lines

and stars signifying the global scope of the award. An applied silver universal badge of the Boy Scouts of America will be centered upon the front of the medallion. The award will be suspended upon a red and white ribbon and will be worn about the neck of the recipient, when such practice does not conflict with approved uniforming policy.

ARTICLE XI. BUSINESS, FINANCE, PROPERTIES, CONTRACTS, REGISTRATION

FINANCE

SECTION 1.

Local Council and Unit Finance

Clause 1. Control of Funds.

(a) Limitation of Authority. No unit or local council shall have authority to commit the National Council to any financial obligation whatever.

(b) Purpose. All money raised by or received for the benefit of a unit or local council and all property acquired by a unit or local council shall be deemed to be received or acquired solely for the benefit of Scouting as interpreted and promoted by the Boy Scouts of America.

(c) Local Council Control. Subject to general rules and regulations adopted by the National Council or Executive Board, local councils shall control the raising and expenditure of all funds for local Scouting work in their jurisdiction.

(d) Annual Reports. Each chartered local council shall render annually to the community in which it is located a duly

audited statement of all funds collected and expended and shall furnish a copy thereof to the national office.

(e) Gambling. Any fundraising project designated to benefit chartered organization units, districts, local councils, or on a national basis which involves games of chance, lotteries, sale of raffle tickets, bingo, or which could be construed as a gambling activity, is not permitted.

(f) Product Sales. The National Council will not engage in a product sale at the national level.

(g) Insignia. The National Council shall have the sole right to authorize the use of insignia, words, phrases, designation marks, pictorial representations, and descriptive remarks relating to the program of the Corporation on commercial products, promotional efforts, and/or sale and distribution to members of the Boy Scouts of America and/or the general public. The use of the same by local councils shall be only as authorized by the national office.

(h) Pyramid Sales, Multilevel Marketing. Any fundraising projects on a unit, council, or national basis which are in the nature of pyramid sales or multilevel marketing are not permitted.

(i) A local council may charge a unit activity fee or a participant surcharge, to be determined from time to time by the local council, to be applied to council national liability insurance program charges.

Clause 2. Disposition of Funds Upon Termination of Local Council or Unit.

(a) Council Obligations. In the event of the dissolution of a council or the revocation or lapse of its charter, the

Executive Board may, at its option, assume charge of the affairs of the council and continue operation pending reorganization or reestablishment of the council or wind up the business of the council, applying all funds and property in the possession or control of such council to the payment of its obligations and administering any surplus funds or property as it may, in its judgment, deem to be in the best interests of Scouting.

(b) Unit Obligations. In the event of the dissolution of a unit or the revocation or lapse of its charter, the unit committee shall apply unit funds and property to the payment of unit obligations and shall turn over the surplus, if any, to the local council, if there is one, or if there is no local council, dispose of the same in accordance with the direction of the Executive Board of the Boy Scouts of America. In the case of a chartered organization, any funds or equipment which may have been secured as property of the unit shall be held in trust by the chartering organization or the chartered local council, as may be agreed upon, pending reorganization of the unit or for the promotion of the program of the Boy Scouts of America.

(c) Administration of Local Funds by Corporation. Any property or funds acquired by the Executive Board upon the dissolution of a Scouting unit or local council shall be administered so as to make effective, as far as possible, the intentions and wishes of the donors.

(d) Special Funds. Special funds created for specific purposes, acquired by a unit or local council, shall be vested in a bank, trust company, or BSA Intravest Trust, in trust for the use of the unit or the local council, in accordance with the

wishes of the donors, with the provision in the statement of the conditions governing the administering of the funds that in the event of the dissolution of the unit or council or revocation or lapse of its charter said trustee or trustees will, after satisfying any claims against such fund, turn over to the Boy Scouts of America the balance for use by the Boy Scouts of America for the benefit of Scouting in such locality and for the specific purposes for which the fund was granted. If there is no suitable opportunity for the use of said fund in such locality, it may be used elsewhere.

REAL ESTATE

SECTION 2.

Local Council

Title to Real Estate. Except as hereafter provided in this clause with respect to incorporated local councils, the title to all real estate acquired for a unit or local council shall be vested in a bank or trust company, in trust for the use of the unit or local council in accordance with the wishes of the donors, with a provision in the deed that in the event of the dissolution of the unit or council or the revocation or lapse of its charter said trustee or trustees will, after satisfying any claims against such unit or council to which such real estate may be subject, convey said property or, if sold, pay the net proceeds of such sale to the Boy Scouts of America, which shall hold or use said property or funds for the benefit of Scouting in such locality or elsewhere if there is not suitable opportunity to use said property or funds in such locality. Any incorporated local council may hold title to real property in its own name provided its certificate or articles of incorporation

expressly provide for the conveyance of such property or the net proceeds from the sale thereof to the Boy Scouts of America in the event of the dissolution of the local council or the revocation or lapse of its charter.

REGISTRATION

SECTION 3.

Local Council Registration

Clause 1. Council Charter and National Service Fees

(a) Applications for new or renewal charters stipulate a number of requirements, which must be satisfied in order to maintain the local council in good standing.

(b) An annual registration fee, known as the council charter fee and determined from time to time by the Executive Board and announced to the field, will be paid by local councils to the national office upon charter application or renewal application.

(c) An annual assessment, known as the national service fee, for which the calculation will be determined from time to time by the Executive Board and announced to the field, will be paid by the local councils to the national office. This fee will be paid during the 10-month period beginning with February and ending in November.

Unit Registration

Clause 2. There is an annual unit charter fee determined from time to time by the Executive Board and announced to the field. This fee is paid to the national office each time a

unit registers or reregisters and is in addition to the individual membership registration fees.

Clause 3. Expiration of Unit Registration. The expiration of the registration of units shall normally be 12 months from the last day of the month in which the original organization of the unit was approved by the local council or, in the case of units not under local council supervision, by the Corporation.

The rights and privileges of all the members of a unit expire with the expiration of the unit registration.

Clause 4. Dropped Units. In cases where units have been dropped from the records under conditions which they could not avoid, they may have their record of continuous service reestablished by submitting evidence of continued activity and paying registration fees from the date of charter expiration.

Term of Membership

Clause 5. The expiration of registered membership shall be as follows:

(a) National Council members and officers and regional committee members and officers, at the end of the period for which they have been duly elected, unless registered in some other capacity.

(b) Scouters serving in council and district capacities only and members of the Scouter Reserve, with the expiration of the council year for which they are issued. (This does not include the chartered organization representatives.)

(c) Unit Scouters serving in unit capacities only (including chartered organization representative of the

chartered organization or group of citizens), with the unit charter.

(d) Unit members, with the expiration of the registration of their respective units.

(e) Lone Cub Scouts and Lone Cub Scout friends and counselors, annually, 1 year from the date of their last registration.

(f) Lone Boy Scouts and Lone Boy Scout friends and counselors, annually, 1 year from the date of their last registration.

(g) Registered retired professional Scouters, annually, 1 year from the date of their last registration.

(h) Individuals (adult or youth members) holding an unexpired registration certificate transferring from unit to council, council to unit, or unit to unit pay a membership transfer charge. This charge applies to all transfers during the charter year, but shall not apply to Tiger Cubs becoming Cub Scouts in their affiliated pack.

Registration of Youth Members

Clause 6. Youth membership with the Boy Scouts of America requires the payment of an annual registration fee determined from time to time by the Executive Board and announced to the field. Except for Career Awareness Explorers, this fee is prorated to coincide with the expiration date of the unit charter for periods of time of more or less than 1 year.

Clause 7. Explorers may participate in more than one Explorer unit as well as a Boy Scout troop or Varsity Scout

team with the payment of one primary registration in an Explorer unit.

Registration of Adult Members

Clause 8. There shall be an annual registration fee determined from time to time by the Executive Board and announced to the field, a portion of which is for a subscription to *Scouting* magazine for adult members. When additional names of members are added to a unit or council for a registration period of less than a year, the fee is prorated.

Clause 9. If an adult member serves in more than one capacity, only one registration fee is required.

Procedure for Registration

Clause 10. All applications shall be submitted on official forms prepared for that purpose and carrying due reference to the requirements and provisions of the Bylaws of the Boy Scouts of America.

Clause 11. The Corporation shall issue to each approved registrant a suitable certificate of membership or commission designating the applicant's official relationship to the Boy Scouts of America.

Special Types of Registration

Clause 12. Sustaining. Persons who desire to be identified with the local council through their financial support and influence in the expansion of the council program may be enrolled as sustaining members of local councils. They may, if the council desires, be elected as associate members in accordance with article VI, section 1, clause 2, of these Rules and Regulations.

Clause 13. Camp Staff Members. Young men and women, 16 years of age and over, who are employed as members of a Scout camp staff, and who are not already registered, shall be registered by the employing council as camp staff members.

Clause 14. College Scouter Reserve. College students who will commit themselves to an informed interest and active participation in the program, whenever possible, may be registered as members of the College Scouter Reserve.

Clause 15. Merit Badge Counselors. Persons who are at least 18 years of age may serve as merit badge counselors in subjects for which they are qualified and must register as such as adult Scouters as provided in this section. A fee for such registration shall not be required.

Clause 16. Scouter Reserve. Individuals 21 years of age and over may upon approval of the local council register as members of the Scouter Reserve of the Boy Scouts of America by paying the registration fee required of a Scouter. Individuals so registered may serve in the following ways: as faculty members of Cub Scout training courses, assisting in organizing and training in connection with Cub Scout packs, Varsity Scout teams, with Explorer posts and ships as consultants, and as hosts and hostesses, and by helping in finance and public relations campaigns. They may serve as members of fathers' and mothers' clubs, parents' clubs, and auxiliaries of units. Members of the Scouter Reserve may wear the universal badge of Scouting to signify their membership.

Clause 17. Veteran Award. After 5 years of duly registered service in the Boy Scouts of America, individuals may upon application receive the designation of "veteran,"

provided they agree to live up to their Scouting obligations and to keep local Scouting authorities in the community in which they live informed as to their availability for service. A special badge shall be made available to veterans. Such veterans, maintaining an active registered relationship in any capacity, shall pay the regular registration fees of their class. Veterans, desiring recognition as veterans for periods of time established by the Corporation for particular recognition, must maintain active registered relationship for the required number of years, paying their annual registration fees.

Clause 18. Retired Professional Scouters. Persons who have been retired from professional Scouting may be registered on an annual basis with the national office of the Corporation upon the approval of the Corporation.

Clause 19. Mentally Retarded or Severely Physically Handicapped Youth Members. In the discretion of the Executive Board, and under such rules and regulations as it may prescribe upon consultation with appropriate medical authorities, registration of boys who are either mentally retarded or severely physically handicapped, including the blind, deaf, and emotionally disturbed, over age 11 as Cub Scouts and over age 18 as Boy Scouts, or Varsity Scouts, and registration of young adults who are either mentally retarded or severely physically handicapped, including the blind, deaf, and emotionally disturbed, over age 21 as Explorers, and the participation of each in the respective advancement programs while registered, is authorized.

Clause 20. Confidentiality of Membership Lists. The Boy Scouts of America has the responsibility to protect the confidentiality of the names of those who are affiliated with

the movement. No commercial or unauthorized use is to be made of the lists (names and addresses) of members or of financial supporters, or those who answer surveys in connection with Scouting. Results of surveys may be shared by local councils with existing or potential chartered organizations in the normal pursuit of membership growth.

Denial of Registration

Clause 21. Article VIII, section 1, of the Bylaws sets forth the right of the Boy Scouts of America to set standards of membership and leadership. The procedure for maintaining those standards through denial of registration is expressed in a publication entitled *Procedures for Maintaining Standards of Membership and Leadership.*

ARTICLE XII. AFFILIATES

NATIONAL EAGLE SCOUT ASSOCIATION

SECTION 1.

Clause 1. The Corporation shall establish and operate a National Eagle Scout Association whose primary purpose will be to conserve and develop the potential represented by those who hold Eagle Scout rank. The organizational structure and operating practices of the National Eagle Scout Association shall be in harmony with the principles of Scouting. The Executive Board of the Corporation shall receive an annual report of the work and have jurisdiction over the National Eagle Scout Association.

Clause 2. The National Eagle Scout Association shall be advised by a Board of Regents. Recipients of the

Distinguished Eagle Scout Award are invited to serve, and all who accept become members of the Board of Regents. A chairman, who shall be an ex officio member of the Executive Board, is elected by the members of the Board of Regents.

ORDER OF THE ARROW

SECTION 2.

The Corporation shall operate a national brotherhood of honor campers of the Boy Scouts of America known as the Order of the Arrow. The purposes of the Order of the Arrow shall be to recognize those Scout campers who best exemplify the Scout Oath or Promise and Law in their daily lives, to develop and maintain camping traditions and spirit, to promote Scout camping, and to crystalize the Scout habit of helpfulness into a life purpose of leadership in cheerful service to others.

ARTICLE XIII. SPECIAL SITUATIONS

EXPERIMENTAL PROGRAMS

SECTION 1.

ANY EXPERIMENTAL PROGRAM WHICH IS INCONSISTENT WITH THE PROVISIONS OF THE BYLAWS OR THESE RULES AND REGULATIONS MAY BE ADOPTED SUBJECT TO THE FOLLOWING RESTRICTIONS.

Clause 1. It must be approved by the Executive Board upon the recommendation of the Executive Committee.

Clause 2. The geographical areas affected shall be clearly defined.

Clause 3. A termination date shall be fixed.

Clause 4. A progress report shall be made to the Executive Board:

(a) If an extension is requested or

(b) At the Executive Board meeting next preceding the termination date.

OVERSEAS SCOUTING

SECTION 2

Direct Service Units

Clause 1. General. To further its objectives of extending membership privileges to citizens of the United States in other parts of the world, the Corporation authorizes the registration of youth members and leaders and the establishment of units in areas lying outside of the jurisdiction of any local council.

Clause 2. Policy of Cooperation. To foster and strengthen the close and friendly relationship that exists between the Boy Scouts of America and other Scout associations, members and leaders of units will work in close harmony with their fellow Scouts and Scouters in the area.

World Organization of the Scout Movement

Clause 3. Operation of Scouting units in the United States for member associations of the World Organization of the Scout Movement.

Member associations of the World Organization of the Scout Movement may organize, administer, and service units of their association for dependents of their citizens living temporarily in the United States. Such permission to be granted upon certification by the national office, under the following conditions:

(a) The approval to establish a unit will be on an annual basis and may be extended upon review of status as reflected in an annual report.

(b) Registration will be restricted to citizens and dependents of member countries. No registration will be accepted or allowed in the unit from citizens of the United States or any third country.

(c) The condition of registration will reflect agreements as to the use of Boy Scouts of America uniforms, badges, and insignia. In this instance only would there be a requirement for dual registration.

(d) There will normally be no registration fee assessed by the Boy Scouts of America for either a unit or individual member.

(e) Standards of certification will include membership qualifications, use of insignia and uniform, and adherence to the basic policy, program, and methods of the World Organization of the Scout Movement.

IN-SCHOOL SCOUTING

SECTION 3.

Clause 1. To further its purpose and relationships concept of working through others to meet and serve the needs of youth and communities, the Corporation authorizes the establishment of a cooperative program known as in-school Scouting.

Clause 2. In-school Scouting refers to all types of Scouting's youth programs which take place during school hours and/or as part of school curriculum.

Clause 3. In-school Scouting provides additional opportunities for schools to utilize the values and ideals of Scouting, through mutually agreeable programs between local councils and the schools, which offer character development, citizenship training, and mental and physical fitness opportunities to students taking part in such programs.

ARTICLE XIV. INDEMNIFICATION
(See Bylaws)

ARTICLE XV. WAIVERS AND AMENDMENTS
(See Bylaws)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF DR. RICKY L. SLAVINGS IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF VIRGINIA)
) ss.:
MONTGOMERY COUNTY)

Ricky L. Slavings certifies:

1. I am Associate Professor of Sociology at Radford University in Radford, Virginia. I have a Ph.D. in Sociology from the University of Missouri. In my professional work and research, I have specialized in the sociology of education and the sociology of youth and adolescence, devoting special attention to small group interaction and small group dynamics. The attached curriculum vitae more fully describes my educational and professional background and my publications.

2. I have been personally involved in the Boy Scout program for over 10 years. I served as an assistant Scoutmaster, Troop Committee Chairman and Acting Scoutmaster of Troop 708 in Columbia, Missouri. I am currently the assistant Scoutmaster of Troop 244 in Radford, Virginia. I have assisted with organizing Boy Scout Troops and Patrols and Cub Scout Packs and Dens.

3. For a number of years I have been studying Boy Scout Troops and Cub Scout Packs as part of a professional study of the socialization processes and methods of value transmission in Scouting. In the course of this work I have conducted observations of over 60 Boy Scout Troops. I am familiar with the literature of Boy Scouting, including recent editions of the Boy Scout Handbook, Scoutmaster Handbook, Patrol Leader's Handbook, Boy Scout Field Book and most of the publications and training materials that are directed to youth or adult Boy Scout leaders.

Scouting's Expressive Goals and Activities

4. Boy Scouting uses a variety of methods to instill in young boys a set of norms and values, ideas about what is right or wrong. The norms and values that Scouting seeks to teach are set forth in the Boy Scout Oath and the Boy Scout Law. The Boy Scout Oath reads "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; to help other people at all times, to keep myself physically strong, mentally awake and morally straight." The Scout Law provides that "A Scout is Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent."

5. Among the values and norms Scouting seeks to instill are that boys in Scouting are to be "morally straight" and "clean" in their thoughts and conduct, as expressed in the Scout Oath and Law and that homosexual behavior is inconsistent with these requirements of the Oath and Law. Scout leaders as well as other Scouts influence the development of Scouts' norms, values, identities and self concepts, which in turn influence their behaviors. The youth

members of Boy Scouting are at an age where their norms, values and self concepts are particularly susceptible to change and influence.

6. The Scout leader occupies a prominent role in reinforcing Scoutings' norms and values. For the boys, the Scout leader is the embodiment of the norms and values represented by the Scout uniform he wears and the boys will look to him for guidance and support. This is especially true when boys are on camping trips and they do not have their parents upon which to rely for guidance. In time, the Scout leader becomes a friend to the boys, perhaps the first adult relationship aside from their parents these boys ever had.

7. The use of small groups and the positive example of adult leaders are some of the methods Scouting uses to guide boys in understanding and living by the norms and values expressed in the Scout Oath and Law. The Patrol offers boys a sense of identity with a group and a chance to share in the responsibilities of leadership. Associating with adult leaders who live according to the norms and values expressed in the Scout Oath and Law allows boys to accept these norms and values as their own.

8. The groups in which Scouting takes place are small, intimate, primary groups. A group is considered a primary group in sociological terms if it has relatively few members, it has a relative degree of permanence, its activity is characterized by face-to-face interaction among its members and it has a sense of group purpose. For example, a group of people waiting at a bus stop is not a primary group because it has no permanence beyond the arrival of the next bus, no group identity, and minimal face-to-face interaction.

9. Both Troops and Patrols are primary groups. They are relatively small groups, typically having between 15 and 30 boys in a Troop and three and eight boys in a Patrol. His Troop and his Patrol are constants for a boy. The Troop and Patrol are organized for face-to-face interaction through team work. Troop and Patrol members share a sense of group purpose in getting together to share the norms and values of Scouting and attending to their personal and social needs.

10. The groups in which youth members of Boy Scouts of America participate reinforce Scouting values in members and are powerful agents of socialization. Such reinforcement and socialization occurs through the processes of role modeling, normative advocacy, rhetorical reflection, and labeling and identification.

11. Role modeling is a process by which a person of importance lives by, expresses, and practices the norms and values he or she wishes the others to adopt. Others look to the role model for guidance and pattern their values and behavior after the role model. A Scout leader is a role model for the Troop members and is likely to influence the values, identity, self-concept and behavior of Scouting youth. An effective role model for Scouting values accepts the Scout Oath and Law as a guide for living.

12. Normative advocacy involves telling boys what values they should adopt. In Boy Scouting there are two primary components to normative advocacy, the Scout leader and the group itself (here, the Patrol or Troop). The Scout leader advocates the specific norms and values to Scouting youth that he wants them to adopt, those contained in the

Scout Oath and Law. Over time, the values and norms of the Oath and Law are reinforced in the boys through this process.

13. Rhetorical reflection is a process which results from the public affirmation of the norms and values which Scouting seeks to instill and the engaging in activities which reinforce those norms and values. Scouting requires that members state the Scout Oath and Law, a public promise to live according to certain norms and values, and statements of and activities concerning the Oath and Law lead to the acceptance of the norms and values embodied in the Oath and Law.

14. Labeling occurs when members are labeled in accordance with the beliefs and the values that the Scouting organization seeks to instill. Youth members of Boy Scouting are labeled as those who live by the Scout Oath and Law. Once labeled with particular norms and values over a period of time members internalize those values and identify with those values.

The Effect of Having a Scout Leader Whose Values were Inconsistent with Those of Scouting

15. The Scouting movement's ability to transmit its norms and values concerning morally straight and clean conduct to Scouting youth would be interfered with if persons who did not subscribe to those norms and values, and in fact lived as avowed homosexuals, were permitted to become leaders.

16. The placing of an avowed homosexual in a leadership position in Scouting despite Scouting's view that homosexuality is inconsistent with the Scout Oath and Law would minimize the importance of Scoutings' other norms and values.

17. The most effective way of instilling a set of norms and values in the members of a group is to consistently present those norms and values as being very important. To exempt a leader from holding one of those norms or values would reduce the power and importance of the other norms and values in the eyes of youth members.

18. Scoutings' ability to reinforce its norms and values also would be adversely affected by interfering with the four mechanisms outlined above. A leader could not serve as an effective role model for a Scouting value which the leader did not live by; such a leader would instead serve as a role model for the values the role model actually practiced. The presence of a homosexual Scout leader would provide a role model to youth members for the view that homosexuality is moral.

19. The process of normative advocacy of Scouting values to Scouting youth would be weakened if a leader advocated a value which was inconsistent with Scouting values. A Scout leader who was an avowed homosexual would serve as a normative advocate for a value directly contrary to what Scouting seeks to instill.

20. The process of rhetorical reflection would be undermined if the boys were aware as the Troop recited the Scout Oath and Law that their leader did not share all of the values therein expressed.

21. The process of labeling and identification of Scouting youth with the value of being morally straight and clean, as defined by Scouting, would be weakened if their leader, labeled as an adult Scouter, did not share that value with respect to the moral character of homosexual conduct.

22. Thus, a Scout leader who was an avowed homosexual would interfere with Scouting's ability to instill in youth the normative message that homosexual conduct is inconsistent with the Scout Oath and Law, as well as the other normative messages and values contained in the Scout Oath and Law.

23. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: October 26, 1993

/s/ Ricky L. Slavings
Ricky L. Slavings

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF P. KARL ROWLEY IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS)
) ss.:
COUNTY OF DALLAS)

P. Karl Rowley certifies:

1. I am employed as a commissioned professional by Boy Scouts of America ("Boy Scouts") in the position of Director of Council Services. I am fully familiar with the purposes and methods of Scouting.

2. Scouting seeks to instill values in boys and young people to prepare them to make ethical choices over their lifetimes. The values Scouting strives to instill are those expressed in the Scout Oath and Law.

3. The Scout Oath and Law set forth a positive moral code for living, setting forth affirmative qualities, such as being trustworthy, loyal, and morally straight. Through the Scouting program, youth members learn how to live up to these goals.

4. Since the Oath and Law set forth lists of "do's" rather than "don'ts," conduct that is inconsistent with the Oath and Law is not mentioned by name in their texts.

5. Homosexual conduct is a form of behavior that is regarded by Boy Scouts of America as not "morally straight" under the Scout Oath or "clean" under the Scout Law. This has been the position of the Scouting movement since Boy Scouts of America was incorporated in 1910.

6. For most of the period during which the Scouting movement has been active in the United States, the immorality of homosexual conduct was not a matter of public dispute. The medical and psychological communities considered homosexual behavior a form of sexual deviation and a psychosexual disease up until the 1970's. Until 1961, every state in the Union and the District of Columbia treated consensual sodomy as a criminal offense.

7. During this period, it was rare for anyone to declare himself to be a homosexual and inconceivable that an avowed homosexual would reasonably suppose that he would be eligible to serve as a Scout leader.

8. Until the homosexual rights movement began to a become active, there had been no occasion to prepare position statements with regard to homosexual conduct. The first Boy Scouts position statement, which was prepared in 1978, was never distributed because there were no questions being raised as to whether avowed homosexuals could become Scout leaders. Since 1981, when Timothy Curran brought suit in California, Scouting's position on homosexual conduct has been widely publicized, and position statements have been issued from time to time since then. Several position statements are annexed as Exhibit A.

9. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: November 9th, 1993

/s/ P. Karl Rowley

Exhibits to Certification of P. Karl Rowley

[LOGO OMITTED]

National Office - Boy Scouts of America

North Brunswick, New Jersey 08902
Telephone: 201-249-6000
TWX 710-180-6262

March 17, 1978

TO: EXECUTIVE COMMITTEE MEMBERS

Homosexual activist groups across the country have been recently pursuing non-discrimination ordinances and laws. There are many reported instances of inquiries concerning the chartering of units to openly homosexual organizations, membership of homosexuals, and the appointment of homosexual volunteer and professional leaders.

We have been asked to express our official position to the field regarding these matters.

The following is a statement of our policies and procedures relating to homosexuality and Scouting. Please bear in mind that only the issue of homosexuality is dealt with, i.e., matters of sexual preference and not sexual deviance or criminal sexual misconduct.

POLICY

1. Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?

A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership.

2. Q. May an individual who openly declares himself to be a homosexual be a registered unit member?

A. No. As the Boy Scouts of America is a private, membership organization, participation in the program is a privilege and not a right. We do not feel that membership of such individuals is in the best interests of Scouting.

3. Q. May a group of individuals who openly profess to be homosexuals obtain a unit charter?

A. No. As in the case with leadership and membership, a Boy Scouts of America unit charter is a privilege and not a right. We reserve the right to grant or withhold charters as we see fit.

4. Q. May an individual who openly declares himself to be a homosexual be employed by the Boy Scouts of America as a professional or non-professional?

A. Boy Scouts of America does not knowingly employ homosexuals as professionals or non-professionals. We are unaware of any present laws which would prohibit this policy.

5. Q. Should a professional or non-professional individual who openly declares himself to be a homosexual be terminated?

A. Yes, in the absence of any law to the contrary. At the present time we are unaware of any statute or ordinance in the United States which prohibits discrimination against individual's employment upon the basis of homosexuality. In the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it, in this case as in Paragraph 4 above. It is our position, however, that homosexuality and professional or non-professional employment in Scouting are not appropriate.

PROCEDURE

1. Q. By what procedure may an individual's registration in the Boy Scouts of America be revoked?

A. This procedure is set forth in detail in the publication entitled Maintaining Standards of Leadership.

2. Q. What procedure should be followed in the event that an individual involved in Scouting is alleged to be a homosexual?

A. The matter should be investigated in a discreet and responsible fashion, with the utmost regard for the concerned individual's civil rights.

3. Q. What procedure should be followed in the event that a professional or non-professional employee is arrested and charged with an offense involving public morals?

A. The council representative should respectfully decline to comment or to take any action without the advise of the council's attorney. Any comment, speculation, or

volunteering of gratuitous information may be prejudicial to the civil rights of the accused . . . and under certain conditions, could lead to a suit for damages.

Downing B. Jenks
President

Harvey L. Price
Chief Scout Executive

POSITION STATEMENT

HOMOSEXUALITY AND THE BSA

For more than 80 years, the Boy Scouts of America has brought the moral values of the Scout Oath and Law to American boys, helping them to achieve the objectives of Scouting.

The Boy Scouts of America also places strong emphasis on traditional family values as being necessary components of a strong, healthy society. The Scouting program is designed to be a shared, family experience.

We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts.

Because of these beliefs, the Boy Scouts of America does not accept homosexuals as members or as leaders, whether in volunteer of professional capacities.

Our position on this issue is based solely upon our desire to provide the appropriate environment and role models which reflect Scouting's values and beliefs.

As a private membership organization, we believe our right to determine the qualifications of our members and leaders is protected by the Constitution of the United States.

6/6/91

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JCK
2/15/91

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We believe that homosexual conduct is inconsistent with the requirements in the Scout Oath and Scout Law. Because of these beliefs, the Boy Scouts of America does not accept homosexuals as members or as leaders, whether in volunteer or professional capacities.

Support points:

- The Scouting program is designed to be a shared, family experience.
- Our position on this issue is based solely upon our desire to provide the appropriate environment and role models which reflect Scouting's values and beliefs.
- As a private membership organization, we believe our right to determine the qualifications of our members and leaders is protected by the Constitution of the United States.

5/6/92 js
hpos

POSITION STATEMENT

HOMOSEXUALITY AND THE BSA

Support Points

- The Boy Scouts of America does not ask prospective members about their sexual preference, nor do we check on the sexual orientation of boys who are already Scouts.
- The reality is that Scouting serves children who have no knowledge of, or interest in, sexual preference. We allow youth to live as children and enjoy Scouting and its diversity without immersing them in the politics of the day.
- Membership in Scouting is open to all youth who meet basic requirements for membership and who agree to live by the applicable oath and law.
- Scouting involves poor, middle-class and rich youth, boys from the city, suburbs and the country; boys from all faiths, from Judaism, Christianity and Moslem.
- Scouts come from all walks of life and experience diversity that they often cannot see elsewhere in their lives.
- The position of the Boy Scouts of America has been conveyed to the American public frequently and consistently; exceptions to the national policies of the BSA are not granted, and any youth or adult presenting him or herself to any office of the Boy Scouts of America will be reinformed of our policy and position. However, a

youth does not join the BSA through a council office, but rather, through a local troop or pack.

- The BSA respects the rights of persons and groups to values which differ from those of the BSA; however, the BSA expects that those who oppose Scouting's positions exercise the same respect for the rights of the BSA.

BSA Position

The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization.

We do not believe that homosexuals provide a role model consistent with these expectations.

Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF EARL C. WIGHTMAN
IN SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY)
) ss.:
OCEAN COUNTY)

Earl C. Wightman certifies:

1. I was a Scoutmaster of Troop 73 in Matawan, New Jersey, at the time James Dale became an Assistant Scoutmaster of Troop 73. During the period that James Dale (then known as James Dick) was a youth member of Troop 73, I was an Assistant Scoutmaster of the Troop.

2. I have been active in Scouting for many years. I was a Cub Scout in Pack 17 in Red Bank, New Jersey and a Boy Scout in Troop 126 in Little Silver, New Jersey.

3. I first became an adult member of Boy Scouts of America in 1977, when I became Assistant Scoutmaster of Troop 126 in Little Silver, New Jersey. During my years of military service, I was Assistant Scoutmaster of two troops in Connecticut. I served as Assistant Scoutmaster of Troop 73 in Matawan, New Jersey from 1982 until becoming Scoutmaster on January 5, 1989. I remained as Scoutmaster until 1992, when the Troop ceased to be active. I am

presently once again an Assistant Scoutmaster of Troop 126 in Little Silver.

4. In connection with my volunteer service with Boy Scouts, I have completed several training courses, including Scoutmastership Fundamentals, Scouter's Basic Training and Commissioner Training, and attended Wood Badge training sessions. I am a Vigil Honor member of the Order of the Arrow, Na-Tsi-Hi Lodge and am an active adult advisor in several capacities in the Lodge. Like all volunteers in Boy Scouts, I receive no compensation, fringe benefits, worker's compensation protection or any other remuneration for my volunteer service.

5. The Order of the Arrow is an honor camping society within the Boy Scouts of America. I was inducted into the Order of the Arrow, Na-Tsi-Hi Lodge, at age 20 when I was Assistant Scoutmaster of Troop 126. Several years later, I became acquainted with James Dick through Order of the Arrow activities. Dick expressed to me a wish to move from the Troop to which he then belonged, and I invited him to join Troop 73.

6. When James Dick joined Troop 73 in 1985, he was already a junior in high school. When he joined Troop 73, Dick had completed all but a few of the merit badges required to earn the Eagle rank. Dick, who was the most senior member of the Troop, became Junior Assistant Scoutmaster.

7. In the years I was associated with it, Troop 73 was a small Troop, rarely having more than 10 Scouts active at any one time. Troop 73 met weekly on Tuesday evenings in the fellowship hall of the First United Methodist Church of Matawan, the sponsor of the Troop.

8. Troop 73's weekly meetings followed the same general format. Dick would begin the opening ceremony by playing Call to Colors or a similar song on the Bugle. The Senior Patrol Leader then would lead the Troop in a recitation of the Scout Oath and Law and Outdoor Code and the Pledge of Allegiance. There would be an instructional period, followed by a recreational period. The instructional time was usually spent on a Scouting skill or in preparing for an upcoming event such as a campout or a field trip. The recreational period might involve a knot-tying contest or a game of steal the bacon. The meeting would close with some final announcements on upcoming events, followed by a Scoutmaster's Minute and a Closing Ceremony.

9. About once a month, the Troop would engage in an outdoor activity -- a hike, a campout, or an outing such as a museum trip. Perhaps once a year, Troop 73 participated in a District or Council-wide event, such as a camporee or a Scout Fair. Occasionally, I would advance the Troop money from my personal funds to pay a camping or activity fee, for which I later would be repaid. However, I was never reimbursed for any personal expenses.

10. Troop 73 on occasion went on public lands in the course of its activities. For example, the Troop sometimes hiked on state park land or visited a museum or other place of interest, like the Edison National Historic Site, Allaire State Park, or Old Fort Hancock. To the best of my knowledge, the Troop's access to public lands was the same as that afforded to any other group of citizens.

11. Troop meetings were planned by the junior leadership with the guidance of the adult leadership.

Monmouth Council did not impose any activity requirements and did not involve itself in the inner workings of the Troop.

12. After Dick turned 18, he applied for adult membership as an Assistant Scoutmaster. He changed his name to Dale and went off to college by the time he applied.

13. I do not remember Dale participating in the Troop after that, except for his attendance at the Eagle Court of Honor of James Mawby, which was held in Spring 1990. Unlike the 15 other Eagle Scouts in attendance, Dale did not wear his uniform or otherwise participate. After that, I did not see him again at any Scouting function.

14. As an adult leader, I have always understood homosexual conduct to be incompatible with Scouting principles as reflected in the Scout Oath and Scout Law. I believe the other adult volunteer members of Troop 73 also understood that homosexual conduct was inconsistent with Scouting values.

15. As Scoutmaster, I approved James Dale for the position of Assistant Scoutmaster. Had I been aware that James Dale was an avowed homosexual, I would not have approved his application.

16. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: October 16th, 1993

/s/ Earl C. Wightman
Earl C. Wightman

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

AFFIDAVIT OF PHILIP REISSMAN

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Philip Reissman, a word processor at the firm of Hughes Hubbard & Reed, deposes and says:

1. The attached transcript is a fair and accurate record of a segment of the Joan Rivers Show of Friday, July 16, 1993, entitled "Gays in Uniform."

2. I am not related to any of the parties of this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

/s/ Philip Reissman
Philip Reissman

Subscribed and sworn to before me
this 31 day of August, 1993.

/s/ Carla A. Kerr
Notary Public

"Gays in Uniform"

The Joan Rivers Show of Friday, July 16, 1993

Joan: "Today gays in uniform -- candid stories from law enforcement officers and others, including an ex-boy scout and what it's like to be out of a closet while trying to serve the public at the same time. Plus, of course, what do we do everyday. Gossip, gossip, gossip with the latest on Cindy Crawford and Scott Baio. It's all coming right up here, so stay right where you are. Okay? okay.

. . .

Joan: Okay, we'll be back with more. When we come back, we're gonna meet someone who was kicked out of the Boy Scouts because he was gay. I mean it just goes on and on and on. So -- having a uniform does not . . .

[Audience applauds]

Joan: My next guest joined the Cub Scouts at the age of eight. But he's now suing them for throwing him out because he is homosexual. Please welcome James Dale. How nice to have you along.

[Audience applauds]

Joan: Now. This looks to me like an Eagle Scout uniform. Right?

James: Uh yeah . . .

Joan: That's what my nephew was.

James: I was an Eagle Scout . . .

Joan: This was yours.

James: This was mine. And I'm not allowed to wear it any more because I openly admit that I'm gay.

Joan: So you can't wear this?

James: I can't wear that, I can't have anything to do with the Scouting program . . .

Joan: If you put this on; what would they do, arrest you?

James: I guess I'll just have to have another lawsuit or something to go against that one. I'm -- I'm not sure, just legally they've taken away my history, all the years, the 12 years I had in the Scouting program.

Joan: When you joined the Boy Scouts you were how old?

James: I was -- I joined the Cub Scouts at the age of eight, I was a Cub Scout, then a Webelos, I was in the Scouting program for over 12 years, I'm 22 years old now, so this is over half of my life that they've basically taken away.

Joan: And then what happened? You came out? You found you were a homosexual, and then you said I'm homosexual, or they found out, or you kept it quiet, what's the story?

James: Well actually when I was 18 I went away to college at Rutgers University, and while I was at college my second year I got very active in gay politics there, and I was co-president of the Rutgers University Lesbian/Gay/Bisexual Alliance, and I basically took

up leadership roles that I was taught in the Boy Scouts. In the Boy Scouts they taught me to stand up for what I believe in, to be the best that I could be, to basically have conviction and have morals and have values, and because of those things that they taught me, I was basically thrown out of the Boy Scouts, and it actually is very ironic how it all happened.

Joan: How?

James: I was very close with the people who were in charge of my local council in Monmouth County, New Jersey, and I received what I found out later to be a form letter from them saying, "James Dale, you no longer meet the standards for leadership as established by the Boy Scouts of America." They didn't say why, and it was signed by a man who I knew, a man named James Kay, and later on I found out, I wrote them back and said, "Why? Why is it that for 12 years you told me that I was the best Scout, I spoke at fundraising banquets, I worked at Scout camp, um, I was basically Boy Scout of the Year one year, I was basically the best that I could be, since I was eight until nineteen, and then, I was an Assistant Scoutmaster, and, in the second letter they said, quote, "Avowed homosexuals are not permitted in the Boy Scouts of America." And I'd heard never heard anything for it for 12 years, ever.

Joan: Were any of your friends who were gay, uh, Boy Scouts?

James: Um, in retrospect I find out that a lot of people that are gay were Boy Scouts. Um, actually one interesting story is, one of those kids in my troop when I was an Assistant Scoutmaster at nineteen, the age of nineteen, had called me up, he had heard that I'd filed my lawsuit last July, and he was really concerned about what all this was about, and I told him that, yes, I am gay, and I'm very proud of who I am, and he was really concerned. The Boy Scouts meant a lot to him as it did to me when I was growing up. And he wanted to know what he should do if he wanted to make Eagle Scout as I had done, and I said "If you want to stay in the Scouting program, if it means a lot to you as it did to me, you have to lie to them. So you have to --"

Joan: You have to break one of the basic rules.

James: Yes. You have to be somebody other than who you really are. You can't be honest, and I think the big thing here, which I find out with a lot of the different organizations, it's not a matter of being gay, or being straight -- it's a matter of being proud. I had pride. I came out with conviction when I was nineteen years old, my parents support me 100%. They go to Parents and Friends of Lesbians and Gays meetings. I have pride, I stand up for what I believe in, I mean, what you see is what you get. I'm not hiding anything. But the Boy Scouts don't like that. There are hundreds and thousands of gay men and gay boys in the Boy Scouts, but they just can't say anything about it.

Joan: Why are you suing them? Why don't you just walk away and say go to hell, and you know what I would do I would just wear the uniform.

[Audience laughs]

Joan: Oh, I'd wear it all over the place.

James: I don't think it would fit though.

[Audience laughs]

Joan: Oh, my little merit badge. Why do you want to sue them?

James: Why do I want to sue them? Because --

Joan: For the publicity? What will you get from it?

James: No no. What will I get from it? The fact that I've basically been defamed by them because of who I am. They've basically said that I'm not good enough any more because I'm honest with them, because I'm open. What I expect to get back is the right to be an Assistant Scoutmaster or a Scoutmaster in the Boy Scouts. I expect to get back my pride, and I don't believe it's the entire program. I don't believe it's every single Scout and every single Scoutmaster saying, you know, "You're not good enough any more." What it really is, is it's a bureaucracy in Texas saying, "no girls, no gays," they have this whole list of things that's not allowed in the Boy Scouts. And "no gays" just happens to be one of them. So I, I believe in the program, a lot, and --

Frank: And I admire what you're doing. We have a case in San Diego -- and there are cases going on all over the country. In San Diego we have a fellow by the name of Chuck Merino. Fifteen-year police officer, who handles this this Explorer, Explorer Unit, and, uh, they threw him out, and he's an exemplary police officer. Uhm, the hidden agenda of these people is, child abuse, obviously, sexual abuse, they equate with homosexuality.

Donna: Yes.

Frank: And if you look at the FBI's statistics, over 90% of the children that are molested, are molested by heterosexuals. So if people try to equate pedophilia with homosexuality, they're two separate issues. And I think Jim would agree. That's the kind of hidden agenda that these people have, they try to equate homosexuals with child molesters, and less -- nothing could be farther from the truth.

Donna: I think it makes it easier to hate you too. If they keep that vision, that you do little boys or little girls, that it's just an add-on to further make them hate you. It's another reason.

Joan: Was either -- any one of you in Boy Scouts?

Frank: I was a Brownie.

[Audience laughs]

Guest: I was a Scout.

Joan: You were a Scout . . . you were a Scout . . . were you a Girl Scout?

Donna: No.

Guest: I think all these people --

Joan: So you guys now theoretically can't wear <u>your</u> uniforms ever again.

Guest: I wouldn't look good in a Brownie uniform.

[Audience laughs]

Joan: If you were to go to a reunion they wouldn't allow -- what can they do to you? It seems so stupid! It just annoys me!

James: Because I have a lawsuit against them I don't want to do anything to aggravate that further. And I respect the program, and I really believe in it, but I don't believe in the bigotry, and the open discrimination that they're expressing.

Joan: Oh of course. We'll go back, we'll talk about more of this, let's just go to a commercial. I just think this whole thing is so <u>stupid</u> I can't tell you. We'll be right back in a moment so please stay tuned.

[Audience applauds]

[Sound Bite: Recording of "God Bless America" sung at Boy Scout convention]

[Audience applauds]

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

DEPOSITION OF JAMES DALE
MAY 10, 1993

(excerpts)

* * * *

Q. When did you first become involved with Scouting?

A. At the age of eight.

Q. And did you become a Cub Scout at that time?

A. That is correct.

Q. And what led you to get involved with Cub Scouting?

A. My father, my mother and my brother were all involved in the Scouting program.

Q. In what capacities?

A. My father was -- I'm not sure at that period of time what my father's position was, but he was involved in the Cub Scouts with my brother and my mother was a den mother, and my brother was a Cub Scout.

Q. When you became a Cub Scout, who was the den leader of your den?

A. My den?

Q. Right.

A. I'm not certain.

Q. It wasn't your mother though?

A. No.

Q. She was a den mother for another den?

A. Yes.

* * * *

Q. When you became a Boy Scout, did you as part of the ceremony of joining Boy Scouting, recite the Boy Scout oath?

A. Yes, I did.

Q. Can you recite that oath today?

A. Yes, I can.

Q. Can you do so, please?

A. On my honor, I will do my best to do my duty to God and my country, to obey the Scout law, to keep myself physically strong, mentally awake and morally strict.

Q. Can you recite the Scout law as well?

A. Yes, I can.

Q. Can you do so, please?

A. A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean and reverent.

Q. When you joined Boy Scouting, did you join a particular Scout troop?

A. Yes, I did.

Q. What troop was that?

A. Scout Troop No. 220.

Q. Do you know what institution sponsored that troop?

A. King of Kings Lutheran Church.

Q. What roles did you have in that troop?

A. I was a Scout and assistant patrol leader.

Q. Did there come a time when you joined a different troop?

A. Yes, there was.

Q. Why was that?

A. Because my first Scout troop folded due to lack of adult leadership.

Q. The adult leadership was voluntary leadership?

A. That is correct.

Q. What troop did you join next?

A. I joined Scout Troop No. 128.

Q. By what institution was that troop sponsored?

A. Christ Church.

Q. What roles did you have in that troop?

A. Bugler, assistant patrol leader, patrol leader. That's all I can recall offhand.

Q. Did there come a time when you joined yet another troop?

A. Yes.

Q. And why was that?

A. My second troop also folded due to lack of adult leadership.

Q. What troop did you then join?

A. Troop No. 73.

Q. Who sponsored that troop?

A. I believe the name of the institution was Matawan Methodist Church or First Methodist Church.

Q. What roles did you have in that troop?

A. Junior assistant Scoutmaster, bugler, assistant Scoutmaster. That's what I can recall offhand.

Q. Now, did your Scout troops meet weekly?

A. Yes, they did. During the school year, yes.

Q. Did they hold their weekly meetings at the respective churches that sponsored them?

A. Occasionally.

Q. Did they also meet elsewhere?

A. That is correct.

Q. Troop 73, where did it typically meet?

A. Typically it met in the Methodist church. It also met in parks and other locations.

Q. In terms of the weekly meeting, was that meeting typically held in the church?

A. What do you mean by typically?

Q. Ordinarily. More often than not.

A. More often than not, yes.

* * * *

Q. As junior assistant Scoutmaster, what were your responsibilities in that role?

A. Essentially a liaison between the senior patrol leaders and the members of the troop and the Scoutmasters on the committee. Basically it's a senior leadership position within the troop for a youth member. It would consist of possibly filling the duties of Scoutmaster or senior patrol leader if need be. It varied depending on the troop and the day, depending on the individual.

Q. What were your responsibilities when you were patrol leader?

A. Basically reporting to the senior patrol leader, having weekly patrol meetings, basically organizing the patrol. Depending on the type of troop, the type of event, organizing, looking for a Scout camping trip and things of that nature. Helping the other Scouts advance in rank.

Q. Your patrol included how many boys approximately?

A. It really depended; it varied from troop to troop.

Q. What range did it vary?

A. Most likely between five and eleven.

* * * *

Q. Mr. Dale, we talked earlier about weekly troop meetings and summer camp. Apart from weekly troop meetings and summer camp, what other activities did your troops participate in as a troop?

A. Service projects, camping events in general, numerous communications such as Scout fairs, Scout shows, sometimes troop-sponsored fund-raising events, sometimes Council events such as dinners or things of that sort.

Q. What service projects were your troops involved in?

A. Well, my Eagle Scout project was reconstructing a trail at Holmdel Park. Other service projects included selling items for fund-raising like the Haskell Estate hunt, cleanup for that, and recycling and things of that sort.

Q. So, in other words, the troop as a group would go out and help clean up an area, pick up the trash for an outdoor area and that sort of thing?

A. Often, yes.

Q. You mentioned camping. How often did your troop go camping?

A. It varied greatly from troop to troop.

Q. Let's take it troop by troop then.

A. Troop 220, probably about once a month, once or twice a month. The same would hold true for Troop 128,

probably about twice a month. And Troop 73, approximately once a month.

Q. What is a Scout fair or a Scout show? Is that the same thing?

A. Pretty much the same thing. I think the name had been changed, somewhat reflective of location possibly.

Q. How often does that event take place?

A. That was an annual event.

Q. Is that a kind of demonstration of various Scout crafts and activities?

A. That's correct, among other things.

Q. Among what other things?

A. Such as being a camping event, an opportunity for various troops to meet and discuss things, to have -- enjoy activities, events, competitions and things of that sort.

Q. So it was an annual opportunity to interact with other troops in the area?

A. Yes, one opportunity.

Q. Were there other opportunities to interact with other troops in the area?

A. Yes, there were.

Q. What were those?

A. One would be the Klondike Derby. Just other jamboree-types of events which were not necessarily annual in nature.

Q. Do you know what intervals they occurred in?

A. Sometimes sporadic, sometimes it was -- it had a lot to do with councils and districting and that sort of thing. The annual events were the Klondike Derby and Scout fair or Scout show. Other things were more flexible and things of that sort.

Q. One year there might not be one but the next year there would be one?

A. There would always be some type of Councilwide event. Sometimes the type of event would change.

Q. I want a feel for how often they occurred. There would be a Councilwide event every year?

A. In addition to the ones I previously mentioned, yes, once a year.

Q. Two Councilwide events a year approximately --

A. Maybe two or three. Camping events.

Q. And the remainer of the time the troop was camping, it would be camping on its own?

A. No. I didn't say that.

Q. Would they be camping with other groups?

A. Sometimes they camped with other groups. There is the summer camp I mentioned previously.

Q. I didn't mean to include the summer camp. I was talking about weekend-type activities.

A. Yes.

Q. These fund-raising events you referred to, events to raise funds for the troop, were they?

A. Yes. Also the Council.

Q. What fund-raising events did you participate in?

A. The Haskell Estate hunt, newspaper drives, selling popcorn, selling Easter candy. Those are the ones that I can recall.

Q. Did you do a newspaper drive every year?

A. No.

Q. How often did that take place?

A. I believe when I did the newspaper drive, I was helping with other troops. I'm not certain. Possibly with my pack also, possibly.

Q. That was a one-time event?

A. Other troops had had it ongoing but none of my troops had an ongoing paper drive.

Q. So you can recall that you on some occasions helped out another troop with their paper drive?

A. That's correct.

Q. How about popcorn, was that an annual event?

A. No. I believe that was -- that went on for a year or so.

Q. How about Easter candy?

A. I believe that was annual throughout Cub Scouting.

Q. But that didn't happen in your Boy Scout troops?

A. Not that I can recall.

Q. Can you tell us the advancement rank you earned in Scouting?

A. Including the ones I mentioned previously?

Q. Yes. The events with ranks in Boy Scouting. I'm sorry. I didn't mean to include Cub Scouts.

A. Scout, Tenderfoot, First Class, Second Class, Star, Life, Eagle. Those are the badges that I earned.

Q. Did you have a Court of Honor for your Eagle?

A. Yes, I did.

Q. Can you describe that for us?

A. Basically there is a program attached in what was supplied today.

Q. Is there any videotape of that event?

A. No, not that I know of.

* * * *

Q. Then there's an item, "Presentation of the Eagle Badge." Then there is the phrase "I-n-g-w-e."

What was that?

A. One of my former Scoutmasters.

Q. Is that a nickname that he had?

A. I believe it's a name bestowed upon him by a South African tribe.

Q. Did he make any remarks at the time that he presented you with the badge?

A. Yes, he did.

Q. Do you recall what he said?

A. I can recall a general feeling of what he said. I'm not sure of the exact words.

Q. Can you give us what you recall?

A. Basically he mentioned our experience together as him being my Scoutmaster for a period of time, he mentioned he thought I was a wonderful candidate to be an Eagle Scout, that he thought very highly of me, that he felt I epitomized what an Eagle Scout should be, and he was very honored in presenting it to me. That was the general thing.

Q. Then the next item is "Presentation of Eagle Certificate and Eagle Scout Neckerchief." What took place at that point?

A. Basically Charles Niles presented me with the Eagle Scout certificate and Eagle Scout neckerchief and mentioned the history of the Eagle Scouts within Troop 73.

Q. Is that reflected on page 28 of Exhibit 3?

A. Yes.

Q. Then we come to an item "Presentation of Eagle Scout Parent Pins." Is that a presentation by you to your mom and dad of Eagle pins?

A. Yes.

Q. Then "Blanket Ceremony." What does that refer to?

A. A variation of the Native American ceremony. I believe that is bestowed upon chiefs of the tribe. It was a variation of that by Dennis Wood.

Q. So did he present you with a blanket as part of all of this?

A. No. But it was a ceremony including a blanket.

Q. Do you recall in substance what it involved?

A. Basically some Native American language -- I'm not exactly sure of the Native American language, but he spoke in the native tongue of an Indian tribe, and he basically felt I was a wonderful candidate for Eagle Scout and he was happy to know me.

Q. How did you know that's what he was saying?

A. Because he spoke in English too.

Q. He translated himself?

A. No. He mentioned -- some of it was in English and some in Native American. I believe the tongue was Leni-Lenape.

Q. Was he in Scout uniform during this ceremony?

A. I believe he was in Indian costume.

Q. Then there's an item called "Presentation of James' Scouting Record." What did that involve?

A. Basically I told the various troops I was a part of, how I was active in Scouting from the age of eight. I was very dedicated. The work I did with the Order of the Arrow, various awards I received in my Scouting career, things of that sort.

Q. Then there is "Introductions and Presentations from Community Leaders."

A. Yes.

Q. Was that a variety of people getting up and congratulating you and handing you certificates and things of that nature?

A. Yes.

Q. "Eagle's Response." Did you then address the group?

A. That's correct.

Q. Then there's "A Scoutmaster's Minute." What happened at that point?

A. Basically Earl Wightman spoke of my record in Scouting and the active participation he had had with me in the Scouting program and how he felt I was a good candidate and he was glad to know me and was very pleased that I had finally reached this last step within Scouting.

Q. I would like to ask you what, in substance, did you say to the group, if you recall?

A. Basically I thanked those who had helped me attain my merits in Scouting, provided encouragement and support for me. I thanked my parents, my Scoutmasters, I thanked the support of God in making this possible, and I basically thanked everyone for coming and being supportive of me, and I also promised to live up to their expectations and would do whatever I felt was right.

Q. Then the final item is "Benediction"?

A. That's correct.

Q. By the same church elder who performed the invocation?

A. Yes.

Q. Was that like the closing prayer?

A. Yes.

Q. In the course of talking about your Eagle ceremony, you mentioned Order of the Arrow. Were you a member of the Order of the Arrow?

A. Yes.

Q. What is that?

A. The Honor Camping Association of the Boy Scouts of America.

Q. How do you become a member of the Order of the Arrow?

A. You are nominated by your peers.

Q. Your peers being your fellow Scouts in your own troop?

A. That's correct.

Q. And then after you are nominated, how do you actually become a member?

A. You attend an ordeal weekend and then basically you go through the ordeal and either you do or don't become a member of the Order of the Arrow, or possibly you would go back at a later date if the circumstances weren't proper.

Q. Did you go through the ordeal weekend?

A. Yes, I did.

Q. Where did that take place?

A. Forestberg, New York. Forestberg Scout Reservation.

Q. Can you describe for us what happens on the ordeal weekend? You arrive at Forestberg. Then what happens?

A. Basically you go through Order of the Arrow ceremonies, a weekend of work and Scout service and various ceremonies within the Boy Scouts of America, within the Order of the Arrow Lodge and things of that sort.

Q. Is there a part of it where you sleep outside in the woods by yourself?

A. That's correct.

Q. Does that happen on the first night when you get there?

A. That's correct.

Q. Before that happens, is there some kind of a ceremony or campfires?

A. Yes.

Q. Can you describe that for us?

A. Well, I can, but I feel that I'm violating the Order of the Arrow. This is kind of secret and I'm not supposed to mention it. The ceremony is basically secretive. But if I'm further -- if I'm prompted, I will go into it. I took an oath. Only because I took an oath.

* * * *

Q. I'll note also that the date appears to be March 21 of 1989 when you signed this, which was three days after your Eagle Court of Honor. Does that refresh your recollection as to when you signed your adult leader application?

A. Yes. I was serving in the capacity prior to that date though.

Q. So now, there are a few people listed as references. Doris Dick is your mother?

A. That's correct.

Q. Earl Wightman was your Scoutmaster in Troop 73?

A. That's correct.

Q. And who is Amy Caddle?

A. A personal friend.

Q. There came a time when you became -- began to attend the Rutgers University Lesbian, Gay & Bisexual Alliance meetings, is that right?

A. Yes.

Q. When did you start to do that?

A. September of 1989.

Q. You mentioned on Exhibit 8 that you taught Sunday school. Was that at the Lutheran church?

A. King of Kings Lutheran Church.

Q. You mentioned a church youth group. What was that?

A. A church youth group at King of Kings consisting of church retreats, social meetings, things of that sort.

Q. In the course of your being raised in the Lutheran Church, has there ever come a time when you had an understanding of the church's position with respect to the morality of homosexual conduct or activity?

A. It was never mentioned.

Q. So to this day you have no information as to the church's position on that?

A. I do not know offhand what the position of the church is.

* * * *

Q. The bar at the end of your Order of the Arrow, is that indicating a certain rank in the Order of the Arrow?

A. Having attained brotherhood membership status.

Q. And you subsequently attained a higher status in the Order of the Arrow?

A. A vigil honor status.

Q. This photograph would have been taken sometime between when you attained brotherhood and had not yet attained vigil?

A. That's correct.

Q. Do you remember what year you attained vigil?

A. I have it on the list. Can I look through these documents?

Q. Yes.

A. June 8, 1986.

Q. And brotherhood?

A. April 1984, the fall. No, April 1984. Not the fall.

Q. How do you believe your involvement with the Scouting movement has influenced your development as a person?

A. Greatly. I mean I have been a member of the Scouting program for over 12 years, which constitutes over half of my Life, and I would say the period of time I was actively involved with the Scouting program, it was a very good developmental period of my Life as a youth developing. It has had an extremely large effect on my socialization and who I am today.

Q. Character development?

A. I would say my convictions, my values, what I believe in, what I stand up for. My effort -- the things I hold dear to myself I think are all very much representative of those values instilled in me by the Boy Scouts of America.

Q. Would they be the values found in the Boy Scouts' oath and law?

A. For the most part.

Q. Beyond the oath and law also?

A. My religious convictions and things like that, yes.

Q. I was getting at, you are not excepting any part of the oath and law from your remarks?

A. No. I still believe to this day I respect the oath and law.

Q. How did you come to become an assistant Scoutmaster after completing your eligibility as a youth member?

A. I was invited to be an assistant Scoutmaster by my Scoutmaster and committee members.

Q. Your Scoutmaster being Earl Wightman at that time?

A. Yes.

Q. Committee members being --

A. Basically Paul Terzulli, Sr., being the chair of the Troop 73 committee, and other members.

Q. Who else was a member of that committee?

A. I don't recall the specific individuals offhand.

Q. Did they individually speak to you or -- are we talking about an invitation here?

A. Earl Wightman definitely urged me to be an assistant Scoutmaster. It was almost a given. It wasn't a matter of saying, "Do you want to be an assistant Scoutmaster?" It was a normal progression. There was really no question as to whether I would be an assistant Scoutmaster or continue my participation in the program.

Q. In terms of invitation, the only person you can specifically identify who invited you to become an assistant Scoutmaster would be Earl Wightman?

A. Earl Wightman and Paul Terzulli, Sr., and also my father who was on the committee.

Q. Now, was there ever a time that you had a summer job at a Scout camp?

A. Yes, there was.

Q. When was that?

A. I believe it was the summer of -- if I can refer to these papers -- I believe it was the summer of 1986. Either the summer of '86 or '85. I can't recall.

Q. What were your duties?

A. I worked in both the Dan Beard trading post and I was dining hall steward for a period of time.

Q. Did you receive a salary or wage for that activity?

A. Yes, I did.

Q. What was the salary?

A. I don't recall offhand.

Q. Did you get free room and board?

A. Yes, I did.

Q. For how long a period was that?

A. I believe it was for two weeks.

Q. Two weeks?

A. Yes.

Q. Apart from these two weeks when you were working at the camp, did you ever receive any salary or wage for any other activity that you engaged in at Scouting?

A. I would say I would receive reimbursement for out-of-pocket expenses.

Q. Gas and tolls if you drove people to a camping trip or anything like that?

A. Gas, tolls, things of that sort. A lot of the time that I was chair, I had a lot of out-of-pocket expenses.

* * * *

Q. At any time before your 18th birthday, did you ever have a view as to the morality of homosexual conduct?

A. In reference to what?

Q. Not in reference to anything. Did you have a view as to whether homosexual conduct was or was not moral conduct?

A. Yes.

Q. And what was that view?

A. It wasn't a very concrete view. It was the assumption that due to lack of information, that possibly it was immoral, but it was not a concrete belief that homosexuality was immoral.

Q. When did you have that view?

A. I can't pinpoint it to one distinct time.

Q. Just whatever period, inclusive period of years you can give me would be helpful.

A. I would say my early adolescence.

Q. And when did you form a contrary view?

A. Actually I think I might want to rescind that statement. I don't know that I necessarily felt that homosexuality was immoral, generally speaking. I felt I did not want to be homosexual. That was not something that would be for me that I believed I was. I think that is a much more accurate portrayal of how I felt during my adolescence. I don't know if I had the morality to pass judgment on others though.

What was your question?

Q. My question is when did you come to a contrary view?

A. Well, being that I just said that I felt --

Q. When did you form a view that homosexual conduct was not immoral, was affirmatively not immoral?

A. I think the latter was a lot more accurate, that I felt homosexuality was not something I wanted to be or something that I thought was right for me, so therefore being that I rescind what I previously stated, I don't know if I can answer your second question.

Q. Well, do you now have a view that homosexual conduct is not immoral?

A. Yes, I believe homosexuality is not immoral.

Q. When did you form that view?

A. I would say I formed that view between my first and second years of college.

Q. During the period prior to your 18th birthday, did you ever read or hear anything to the effect that homosexual conduct was immoral?

A. In what realm?

Q. Any realm.

A. Possibly from religious fundamentalists on TV. Not any that I can think of. A lack of information is a better way of putting it, I would say.

Q. Are you aware a number of religious groups consider homosexual conduct to be immoral?

A. I'm aware some religious groups consider homosexuality to be immoral.

MR. DAVIDSON: I would like to have marked as Exhibit 15, a one-page xerox of a newspaper article which indicates "Ledger" in the upper left-hand corner, dated July 8, 1990.

(Whereupon, newspaper article dated July 8, 1990 marked Dale Exhibit 15 for identification, as of this date.)

Q. Mr. Dale, do you recognize Exhibit 15 as an article that appeared in the Newark Star Ledger on or about July 8, 1990?

A. Yes, I do.

Q. Did you see that article at the time it came out?

A. I think some period of time afterwards.

Q. In the paragraph that starts at the bottom of the second column with the words "James Dale, 19" and runs

over to the first line of the third column, it doesn't purport to quote you directly, but it says you made certain statements.

Did you tell the reporter that you lived a double Life while in high school pretending to be straight while attending a military academy?

A. I don't know if that's an accurate interpretation of what I had stated.

Q. What did you say?

A. I believe I inferred that --

Q. Implied.

A. Excuse me, I implied that I had, in a sense, tried to be heterosexual, that I was not fully conscious of my sexual orientation at that age and that I did what I assumed was expected of me.

Q. It is fair to say that you did not at that time regard yourself as pretending to be straight?

A. With hindsight I can look back and say I was pretending to be straight. At the time, which was up until the age of 18, 17, 16, 15, 14 while in high school, I don't think at that time I felt I was pretending to be straight, no.

Q. At the bottom of the third column to the top of the fourth column, there is a paragraph containing a purported quote from you. Did you tell the reporter that? Actually it is more accurately beginning with the purported exact quote and concludes with statements attributed to you without quotation marks.

A. Once again I think with hindsight, I stated that, not necessarily at the time, that I felt that I was looking for a role

model. I was looking for positive gay imagery or people that were openly gay and supportive when I was younger.

As I said previously, I don't think I considered myself pretending as they made reference to earlier in the article.

Q. Let me try to understand this. So you were looking for openly gay role models while a teenager but without understanding that you were gay?

A. Yes.

Q. As far as you know, were any of the adult leaders that you came into contact with in Scouting gay?

A. To me, I don't think sexual orientation had anything to do with Scouting. I didn't make reference or suppositions about any of my adult leaders being gay or not.

Q. I'm not really talking about what you were thinking about at the time. Now do you believe that any of your Scouting leaders were gay?

A. I have absolutely no idea.

Q. You today have no idea?

A. Today I have no idea. I really don't think it matters.

* * * *

Q. When was the last time you talked to any of your Scoutmasters?

A. I'd say about a month ago.

Q. Who was that?

A. Norman Powell.

Q. Did you talk about this situation with him?

A. Yes, I did.

Q. And what conversation did you have with him?

A. He basically said that he supports me, that he felt that if he had a grandson, that he would be more than happy to have me be his Scoutmaster, but he didn't really understand the whole issue of sexual orientation. I mean he understood it but basically he said that he still supports me as an individual.

Q. He must be quite a senior citizen by this time, don't you think?

A. I'd say he is pretty much on the ball.

Q. Is he in advanced years?

A. I would say late 70's, early 80's. He is an heir to Lord Baden Powell, the founder of the Boy Scouts.

Q. Have you talked to any of your other former Scoutmasters?

A. Not in relation to this case, no.

Q. In relation to anything else in recent times?

A. Recent being --

Q. Well, is the last Scouting thing you did is you went to your colleagues' Eagle Court of Honor?

A. Yes.

Q. Since then?

A. Yes.

Q. To whom have you spoken since then?

A. Earl Wightman.

Q. What was your conversation with Earl?

A. He just basically wanted to know how I was doing. We didn't really get into specifics.

Q. Was that subsequent to this situation developing?

A. Yes. I would say that was the fall of 1990.

Q. Did he call you or did you call him?

A. He called me.

Q. What did he say?

A. We just basically -- it was a brief conversation. He wanted to see how I was doing. He didn't mention this at all and neither did I.

Q. Is Mr. Powell active in Scouting anymore?

A. I don't believe he is, though I'm not certain.

Q. How about Earl Wightman?

A. I'm not certain.

MR. DAVIDSON: I would like to have marked as Exhibit 16, an article from Philadelphia Magazine, January 1993, consisting of nine pages. (Whereupon, Philadelphia Magazine article dated January 1993 marked Dale Exhibit 16 for identification, as of this date.)

Q. Mr. Dale, is Exhibit 16 an article that you saw in Philadelphia Magazine in or about January of 1993?

A. Yes, it is.

Q. Were you interviewed for this article?

A. Yes, I was.

Q. If you flip over to the third page of the xerox copy, the one that has a picture of some boys saluting down in the lower left-hand corner, you will note that in the second full paragraph or the right-hand column there's a quote attributed to you that begins "At Boy Scouts." Did you say those words to the reporter?

MS. COSTA: Are you referring to the words in quotes?

MR. DAVIDSON: Yes, the words in quotes in that paragraph.

A. Yes.

Q. Did you tell the reporter that the Order of the Arrow induction ceremony was a dramatic ceremony?

A. No, I did not.

Q. Is this a male or female author?

A. A male.

Q. Did you tell him about the ceremony in general terms?

A. Very, very general terms.

Q. You mentioned Native American rituals and costumes?

A. Yes.

Q. And it was out in the woods?

A. Yes, it was common knowledge.

Q. And that it had a big impact on you?

A. Oh, yes.

Q. Skip down to the sentence, "He rose to chairman in the Order of the Arrow ceremonies team."

Do you see that three or four lines above the division on the page?

A. Yes, I see that.

Q. Focusing on the next sentence, "Dale was also becoming an important role model for the younger scouts."

Did you tell the reporter that?

A. I think he might have inferred it. He might have, yes, inferred that. I don't know if I said it in those words.

Q. Did you tell him that you were someone an eleven-year-old could confide in?

A. I think he made that assumption.

Q. Well, did you spend some time telling the reporter about your various roles as a youth leader in Scouting?

A. Yes.

Q. And in the course of that discussion, did you make it clear to him that you did serve as a role model for the younger Scouts and as a counselor to the older Scouts?

A. I would assume, yes.

Q. Because it is true that you served in that role, is that right?

A. That's correct.

Q. When younger Scouts had a problem, they could turn to you?

A. Yes.

Q. Did you tell the reporter, in words or substance, that without adults wanting to volunteer huge amounts of time and energy, the troop would simply vanish overnight?

A. Those weren't my exact words, of course, but I think the general thrust of what I said is interpreted there.

Q. Turn over to the page that has a picture of Baden Powell on it and to the left-hard column below the break in the page. There is a sentence that says, "Dale became deeply involved in gay rights issues and maintained a high profile on campus." Is that accurate?

A. That's correct.

Q. Then down in the next -- not the next paragraph but the paragraph after that, there is a reference to your accepting an invitation to speak at a conference for social workers, principals and guidance counselors. And in referring to your acceptance of that invitation, the reporter refers to "remembering the self-loathing he carried throughout his teenage years." Did you tell the reporter that?

A. I did not state that.

Q. Is that an accurate characterization of your state of mind during your teenage years?

A. I don't agree, no.

Q. You had a positive self-image as a teenager?

A. I didn't say that either. I think it was somewhat mixed.

Q. But certainly not falling into the self-loathing category?

A. I wouldn't say self-loathing, no.

* * * *

(39)

No. 99-699

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

JOINT APPENDIX
Volume III

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

MICHAEL W. MCCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109
Attorneys for Petitioners

EVAN WOLFSON
Counsel of Record
DAVID BUCKEL
JON W. DAVIDSON
BEATRICE DOHRN
RUTH HARLOW
LAMBDA LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585
Attorneys for Respondent

(Attorneys Listing Continued on Inside Cover)

CERTIORARI GRANTED JANUARY 14, 2000
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DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

SANFORD D. BROWN
CERRATO, DAWES, COLLINS,
SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728
Attorneys for Petitioners

THOMAS J. MOLONEY
ALLYSON W. HAYNES
SETH A. STUHL
KIERITH A. JONES
CLEARY, GOTTLIEB, STEEN
& HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

LEWIS H. ROBERTSON
231 Maple Avenue
P.O. Box Y
Red Bank, New Jersey 17701
(732) 842-6660
Attorneys for Respondent

TABLE OF CONTENTS

Page

Relevant Docket Entries in the Superior Court of New Jersey, Chancery Division in *Dale v. The Boy Scouts of America and The Monmouth Council, Boy Scouts of America* 1

Relevant Docket Entries in the Superior Court of New Jersey, Appellate Division in *Dale* 5

Relevant Docket Entries in the Supreme Court of New Jersey in *Dale* 7

Complaint 10

Answer 30

Selected Exhibits to Certification of Ayala Deutsch, Attorney for Respondent

Fact Sheet – Order of the Arrow (excerpts) 43

Fact Sheet – The Presidents of the United States and the Boy Scouts of America 46

Fact Sheet – What Is Boy Scouting? 56

A Representative Membership (1975) (excerpts) 64

Organizations that Use Scouting (excerpts) 69

Fact Sheet – Community Organizations and The Boy Scouts of America (excerpts) 93

The Chartered Organization Representative (excerpts) 99

Announcements of Meetings for Prospective Cub Scouts 102

Press Release Announcing School Night for Scouting by Monmouth Council 104

Fact Sheet – BSA at a Glance (1991) 106

Affidavit of James Dale in Support of Motion for Summary Judgment (Sept. 9, 1993) 112

Selected Exhibits to Affidavit of James Dale

Letter from James W. Kay to James R. Dale (July 19, 1990) 135

Letter from James R. Dale to James W. Kay (Aug. 8, 1990) 136

Letter from James W. Kay to James R. Dale (Aug. 10, 1990) 137

Letter from David K. Park, Esq. to Glenn Gordon, Esq. (Dec. 21, 1990) 138

Affidavit of Gerald Dick in Support of Plaintiff's Motion for Summary Judgment (Sept. 8, 1993) 139

Certification of Michael Adam Kivetz (Aug. 13, 1993) 149

Certification of Reverend Donald K. Hummel in Support of Defendants' Cross-Motion for Summary Judgment (Nov. 3, 1993) 155

Selected Exhibit to Certification of Reverend Donald K. Hummel

A Scout is Reverent – A Manual for Scouts of Catholic Faith (excerpts) 162

Certification of Adam S. Bogner in Support of Defendants' Cross-Motion for Summary Judgment (Nov. 4, 1993) 168

Selected Exhibits to Certification of Adam S. Bogner

Boy Scouts of America Mission Statement 184

The Scout Oath 184

The Scout Law 184

Boy Scout Handbook (1992 Printing) (excerpts) 185

Scoutmaster Handbook (1990) (excerpts) 232

Woods Wisdom Troop Program Features (excerpts) 274

Order of the Arrow Handbook – Boy Scouts of America (1992) (excerpts) 291

Troop Committee Guidebook – Boy Scouts of America (1992 Printing) (excerpts) 299

Certification of James W. Kay in Support of Defendants' Cross-Motion for Summary Judgment (Nov. 9, 1993) 306

Exhibits to Certification of James W. Kay

Charter of Boy Scouts of America 314

Bylaws of Boy Scouts of America 322

Rules and Regulations of the Boy Scouts of America 373

Certification of Dr. Ricky L. Slavings in Support of Defendants' Cross-Motion for Summary Judgment (Oct. 26, 1993) 443

Certification of P. Karl Rowley in Support of Defendants' Cross-Motion for Summary Judgment (Nov. 9, 1993) 450

Exhibits to Certification of P. Karl Rowley

Boy Scouts of America Position Statement (Mar. 17, 1978) 453

Boy Scouts of America Position Statement (June 6, 1991) 457

Boy Scouts of America Position Statement (Feb. 15, 1991) 458

Boy Scouts of America Position Statement (May 6, 1992) 459

Boy Scouts of America Position Statement (Jan. 1993) 460

Certification of Earl C. Wightman in Support of Defendants' Cross-Motion for Summary Judgment (Oct. 16, 1993) 462

Transcript of a Segment of the Joan Rivers Show of July 16, 1993 entitled "Gays in Uniform" 466

Transcript of Deposition of James Dale (May 10, 1993) (excerpts) 474

Selected Exhibits to the Deposition of James Dale

Speech by Jim Dick (May 10, 1993) 505

From an Eagle Scout to Persona Non Grata, *The New York Times* (Aug. 5, 1992) 510

Ex-Eagle Scout Sues Over Ban on Homosexuals, *The New York Times* (July 30, 1992) 513

Seminar Addresses Needs of Homosexual Teens, *The Star-Ledger* (July 8, 1990) 515

The Gay Boy Scout, *Philadelphia* (Jan. 1993) 519

Scoutmaster's Handbook (1972) (excerpts) 542

Expelled Scout Is Taking Lessons to Heart, *The Seattle Times* (July 10, 1992) 548

United Press International article (Apr. 30, 1981) 551

Homosexual Loses Bid to Become Scout Leader, *United Press International* (July 7, 1981) 554

Affidavit of Reverend George Wayne Freyberger in Support of Plaintiff's Motion for Summary Judgment (Jan. 3, 1994) 556

Affidavit of Reverend Richard Giffen in Support of Plaintiff's Motion for Summary Judgment (Jan. 4, 1994) 562

Affidavit of Bishop Thomas Gumbleton in Support of Plaintiff's Motion for Summary Judgment (Jan. 6, 1994) 567

Affidavit of Reverend William A. Hanson (Dec. 31, 1993) 573

Selected Exhibit to the Certification of Patrick G. Marette, Attorney for Respondent

Brief of *Amici Curiae* James E. Andrews as Stated Clerk of the Presbyterian Church (U.S.A) General Assembly, *et al.* in *The Presbytery of New Jersey of The Orthodox Presbyterian Church et al. v. Florio et al.*, No. 92-5339 (3rd Cir.) 578

Affidavit of Rabbi Alexander Schindler in Support of Plaintiff's Motion for Summary Judgment (Jan. 4, 1994) 596

Selected Exhibits to Affidavit of Rabbi Alexander Schindler

Resolution by Central Conference of American Rabbis (Apr. 9, 1992) 605

Resolution of the National Federation of Temple Youth (1992-93) 606

Affidavit of Bishop John S. Spong in Support of Plaintiff's Motion for Summary Judgment (Jan. 5, 1994) 607

Affidavit of Father Paul Surlis in Support of Plaintiff's Motion for Summary Judgment (Jan. 6, 1994) 614

Certification of Bishop Melvin Wheatley, Jr. in Support of Plaintiff's Motion for Summary Judgment (Dec. 30, 1993) 618

Certification of Dr. Michael Cahn in Support of Plaintiff's Motion for Summary Judgment (Dec. 21, 1993) 623

Exhibit to Certification of Dr. Michael Cahn

Resolution of Troop Commitee of Scout Troop 260 (Dec. 30, 1991) 630

Supplemental Affidavit of James Dale in Support of Motion for Summary Judgment (Dec. 31, 1993) 631

Certification of Mary Lou Goeke (Dec. 31, 1993) 635

Exhibit to Certification of Mary Lou Goeke

Letter from Dean R. Crafton to Mary Lou Goeke (Feb. 10, 1993) 637

Certification of Robert Gwinn (Jan. 5, 1994) 638

Exhibits to Certification of Robert Gwinn

Letter from Robert Gwinn to National Board of Boy Scouts of America 640

Resolution of Executive Board of Baden-Powell Council, Inc. (Apr. 29, 1992) 644

Resolution of Baden-Powell Council, Inc. (May 13, 1993) 645

Affidavit of William A. J. Kirkner in Support of Plaintiff's Motion for Summary Judgment (Dec. 30, 1993) 647

Certification of David A. Rice in Support of Plaintiff's Motion for Summary Judgment (Dec. 23, 1993) 658

Affidavit of Robert L. Smith, Jr. in Support of Plaintiff's Motion for Summary Judgment (Jan. 3, 1993) 665

Affidavit of Dr. Bryant L. Welch in Support of Plaintiff's Motion for Summary Judgment (Jan. 4, 1994) 675

Certification of Charles Albert Wolfe (Aug. 30, 1993) 685

Transcript of Deposition of Charles D. Ball (Mar. 18, 1993 (excerpts) 691

Selected Exhibits to the Certification of Steven M. Knecht, Attorney for Respondent

1991 Annual Report — Boy Scouts of America (excerpts) 698

United Way Threatens to Cut Aid to Boy Scouts, *The New York Times* (Dec. 17, 1993) 700

Scouts' Ouster of Gay Ends United Way Aid, *Chicago Tribune* (Dec. 18, 1993) 704

Go for the Eagle – A Guide to Achieving Scouting's Highest Rank (excerpts) 705

Certification of Reverend John Giffin (Jan. 27, 1994) 707

Certification of Rabbi Arthur Vernon (Jan. 26, 1994) 710

Certification of Reverend Jerald C. Joersz (Jan. 25, 1994) 714

Certification of Elder Jack H. Goaslind in Support of Defendants' Cross-Motion for Summary Judgment (Jan. 26, 1994) 719

Supplemental Certification of Reverend Donald K. Hummel (Jan. 26, 1994) 722

Certification of Reverend Sam Houston in Support of Defendants' Cross-Motion for Summary Judgment (Jan. 24, 1994) 724

Certification of Reverend Dr. Barry M. Walker (Jan. 25, 1994) 727

Certification of Dr. Park Dietz in Support of Defendants' Cross-Motion for Summary Judgment (Jan. 24, 1994) 731

Supplemental Certification of Dr. Ricky L. Slavings (Jan. 26, 1994) 736

Certification of Parvin L. Bishop (Jan. 26, 1994) 745

Supplemental Certification of David K. Park (Jan. 26, 1994) 748

Transcript of Deposition of James William Kay (Jan. 19, 1993) (excerpts) 750

The following opinions and statutory provisions have been omitted in printing this Joint Appendix because they appear at the following pages in the appendix to the printed Petition for a Writ of Certiorari:

Opinion of the Supreme Court of New Jersey 1a

Opinion of the Superior Court of New Jersey, Appellate Division 102a

Opinion of the Superior Court of New Jersey, Chancery Division 155a

N.J. Stat. Ann. §§ 10:5-4, 10:5-5(l), and 10:5-5(hh) 255a

Selected Exhibits to the Deposition of James Dale

5-10-93

JIM DICK

Good evening, my name is James Dick. I am 17 years old and in my senior year of high school at The Marine Academy of Science and Technology located at Sandy Hook. I am also a Life Scout working toward my Eagle Scout award with Troop 73, sponsored by Matawan First United Methodist Church.

Tonight I would like to share with you some thoughts about my involvement in Scouting. I started in Scouting as an 8 year old Cub Scout in Pack 142, sponsored by Village Elementary School in Middletown. We did many exciting and interesting things as Cub Scouts, but what stands out most in my mind about Cub Scouting is the fun we had racing the Pinewood Derby cars. A Pinewood Derby car is made from a one foot long solid box piece of pine wood. The Cub Scout and his dad or mom carves the car into the shape they desire. Now you would think the toughest part of building a car would probably deal with its design, but in reality the toughest part is keeping your parents from playing with it. It was a very interesting phenomenon to see mature, intelligent adults getting overly excited about graphite wheels and decals.

But all kidding aside, the fun of working with my parents in building that car will be a memory I will treasure forever. Because of Cub Scouting, I was able to have fun and learn different aspects about myself, my parents, and others in my community.

I went from Cub Scouting to being a Boy Scout in 1981. For those of you who don't understand, let me explain the significance involved in that transition. The Cub Scout program is based upon family participation. It's a good chance for the whole family to come together as a unit and participate in fun and interesting events. And although I enjoyed it tremendously, becoming a Boy Scout opened up the door to adventure and self reliance. One of the proudest moments of my life was the day I crossed the bridge in a Scouting ceremony from the Cub Scouts to Boy Scouts. The transition made me feel like I was embarking upon new opportunities in my life. From that day on I knew that people would rely on me to do things, and it was my responsibility to get those things done. For example, in Cub Scouts adult leaders planned meetings and events for you. However, in Boy Scouts it is the responsibility of the youth leadership to plan and organize the events and meetings.

Unlike most Scouts, I have had the opportunity to be involved in three different troops, which in itself is a unique experience. Because Scouting is so widespread throughout our community, I had the opportunity to make friends in three different areas. One gentleman I am proud to call my friend is a man named Norman Eugene Powell. Mr. Powell was my second Scoutmaster. He is an Englishman who was born in South Africa and is related to Lord Baden Powell, the founder of the Scouting movement. Mr. Powell is an unselfish individual who taught me all the outdoor skills I possess and more importantly the empathy that I have toward individuals. My association with Mr. Powell has made me a better person and I am thankful that I had that opportunity. And speaking of opportunities, Scouting has offered me plenty.

While I was a First Class Scout, I was elected into the Order of the Arrow. The Order of the Arrow is the Boy Scouts honor camper organization. As a member of the OA, I took an interest in Indian lore and joined the ceremonies team. Later I became the chairman. For myself, there are few things I enjoy more than acting, especially when it is something you strongly believe in. The OA has helped teach me leadership and the importance of working together with a group to get a goal completed. The OA, like the Boy Scouts itself, is a service organization. The OA helps Boy Scouts and the community. An example of a community activity the OA takes part in is the Columbus Day landing at the Asbury Park boardwalk. At this event the OA ceremonies team and dance team dress in Indian regalia and take part in a reenactment of meeting Columbus. This event is one that I always enjoy, even though it gets quite cold in Asbury Park in October wearing an Indian costume. Perhaps you saw my picture in color on the front page of the Asbury Park Press a couple of weeks ago.

Another opportunity Scouting has afforded me was attending the 1985 National Jamboree held at Fort A. P. Hill in Virginia. When we (that is, our council contingent) arrived at 4:00 p.m. on the day prior to the Jamboree, there were little more than a few hundred people there. However, by the next day Fort A. P. Hill became the third largest city in Virginia.

The experience of meeting people from all over the world, the rigors of living for a week in a tent, the lesson learned about cooperation and teamwork will stay with me for the rest of my life.

Yes, Scouting offers many opportunities, but the one most important presently to me, is the opportunity to become an Eagle Scout. Being an Eagle represents the best one can be. It symbolizes everything good that this country stands for. It says to others that you stand for what is righteous, virtuous, and moral. It marks you as a person concerned with your town, community, and nation. It also identifies you as a person concerned enough to care, and hopefully in the near future I can count myself among this honored group.

This brief little history of my personal Scouting life has hopefully left with you the impression that Scouting is fun, exciting, challenging, and most importantly worthwhile.

But what it hasn't done up to this point (although I am sure you assumed from my speech) is to express my personal thanks and gratitude and to say thank you to you on behalf of the over 15,000 youth of our county presently benefiting from Scouting. Your support of Scouting is gratefully appreciated, and believe me, I should know because I am benefiting presently from the program.

It costs Scouting a lot of money yearly to offer the opportunities extended to youth like me, but the dollars are well spent and modest as compared to the other less productive possibilities that exist for young people to pursue.

Without concerned people like yourselves, I may never have joined the Boy Scouts. As a youth, I know that there are many things that prevent boys from joining Scouting. Many youth are misled into lives that lead to trouble, whether it is because of drugs or peer pressure from other misguided youth. But Scouting offers an alternative. In closing let me offer this analogy, most youth have two different doors to

choose from in life -- the right one and the wrong one. If the right door is not available or open, there is only one door left to choose. With that in mind, I ask for your continued support of the Scouting program and I thank you for your support thus far. Scouting is something that has helped structure my life and I know that it is a beneficial program for the development of all the youth of our county.

Thank you and good night.

The New York Times 8/5/92 [Handwritten]
New Jersey

From an Eagle Scout To Persona Non Grata

In June 1990, James Dale, a former Eagle Scout, was an assistant Scoutmaster and self-described scouting "poster boy," with 30 merit badges and uncounted hours of service to his name.

By that July, Mr. Dale was an ex-Boy Scout.

In the interim, scouting officials had learned he was gay.

Last week, Mr. Dale went to court against the Monmouth Boy Scout Council in New Jersey; the suit he filed is one of several nationwide pressuring the scouts to abandon their policy of barring homosexuals.

Mr. Dale, a 21-year-old senior at Rutgers University, is seeking reinstatement to the Scouts. There is a principle at stake in his suit, he said, but there is also the simple wish to resume his connection to the scouts, which he said had provided a sense of belonging since he was 8 years old.

"I want to get back my right and privilege to be active as an adult scouter," Mr. Dale said in a recent phone interview. "This isn't a vendetta against every Boy Scout in Monmouth County or in America. There's nothing wrong with the Boy Scouts except that they discriminate."

An Issue of Control

The Monmouth Council of the Boy Scouts of America maintains that Mr. Dale does not meet the standards of leadership set by the national organization, which prohibits

homosexuals. And James Kay, the executive director of the Monmouth Council said: "The issue is purely and simply one that says we have a right to set standards for membership."

The suit has brought Mr. Dale recognition, a mixed blessing.

"It's been hard being seen as somebody who is a gay activist," said Mr. Dale, who studies sociology, communications and theater. "People know one small part of my life without knowing the other facets."

Occasionally, those people are also gay Boy Scouts, young men who Mr. Dale has found himself counseling, against his instincts, to keep their sexual orientation private.

"There's a lot to gain through scouting," he said, "and the fact is if they want to be a part of that, they have to hide who they are. It sends the wrong message to gay people and it is against everything scouting teaches about honesty and character.

Mr. Dale, the younger son of a lieutenant colonel in the Army reserves, is a graduate of the Marine Academy of Science and Technology in Sandy Hook, N.J., a military high school. By his senior year, he was a company commander, the second-highest student rank.

"I didn't really know for sure that I was gay until my second year at college," he said. "I remember hoping to God that I wouldn't be gay. It wasn't part of my big picture."

Two years ago, he told his parents he was gay. Months later, after his photograph appeared in a local newspaper article on a gay youth conference, he received a letter telling him he was expelled from the scouts.

"I realized I'd be risking things, and I knew this would be one of them," Mr. Dale said. "But I also realized they could be pretty sexist, pretty classist, and pretty homophobic, and because of that for the first time I questioned whether this was an organization I wanted to be involved with anymore."

Still, the formal rebuke was chilling.

"When they wrote me that expulsion letter saying basically they want nothing to do with me, I took all my scouting stuff, my merit badges, my uniform, knapsack, every bit of paraphernalia and put it in a box, and put the box in the attic," Mr. Dale said. "I felt very, very betrayed."

This betrayal seemed particularly sharp because it came at a time when the scouts are hunting for adult volunteers.

"They were thrilled to have me as a leader because I had all this experience," said Mr. Dale, who had been an assistant Scoutmaster with Troop 73 in Matawan, N.J.

"I've realized that it's wrong to walk away from an entire organization just because some people at the top are preaching hate," said Mr. Dale, who is spending the summer as a volunteer with Forgotten Scouts, an educational lobby in San Francisco run by a growing number of other young men who, like Mr. Dale, have been cast out of the organization because of their sexual orientation.

"The Scouts taught me to believe in things with conviction, and that's exactly what I'm doing," Mr. Dale said. "Now, they don't seem to like it so much."

The New York Times July 30, 1992 [Handwritten]
New Jersey

Ex-Eagle Scout Sues Over Ban on Homosexuals

TRENTON, N.J., July 29 (AP) — James Dale says the Boy Scouts taught him to take pride in who he is. Today he sued the organization, saying his membership was revoked two years ago after the Scouts found out he was gay.

"I owe it to the organization to point out to them how bad and wrong this policy is," said Mr. Dale, a 21-year-old Rutgers student and former Eagle Scout. "Being proud about who I am is something the Boy Scouts taught me. They taught me to stand up for what I believe in."

The Monmouth Council of the Boy Scouts of America said Mr. Dale did not meet the standards of leadership set by the national organization, which prohibits homosexuals.

Blake Louis, spokesman of the Boy Scouts of America, based in Dallas, said: "We don't think a homosexual presents a role model that's consistent with the expectations of mainstream American families."

And James Kay, the executive director of the Monmouth Council, said: "The issue is purely and simply one that says we have a right to set standards for membership."

30 Merit Badges

Mr. Dale, of Port Monmouth, was an Eagle Scout, the highest rank in scouting, with Troop 73 in Matawan and held 30 merit badges. He received a letter in August 1990 saying his membership was terminated, said his lawyer, Evan

Wolfson. When asked why, the Monmouth Council told Mr. Dale it was because he was gay, the lawyer said.

The Boy Scouts learned of Mr. Dale's sexual orientation after a newspaper article appeared about a seminar on gay and lesbian youth at which he was a speaker.

The lawsuit in Monmouth County Superior Court, against the Monmouth Council and the Boy Scouts of America, was filed under a state law that took effect this year prohibiting discrimination on the basis of sexual orientation. The suit asks the court to reinstate Mr. Dale's membership and award him compensatory damages.

A similar case against the Boy Scouts is pending in California, said Mr. Louis, the Scout spokesman.

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Seminar Addresses Needs of Homosexual Teens

By KINGA BORONDY

Homosexual teenagers have no true peers or support group to help them through the turbulent adolescent period of their lives, when even heterosexual youths are confused and insecure about their sexuality, according to a lecturer at a recent seminar.

"It (sexuality) is an issue facing all teenagers," said Mary Leddy, director of community and counseling services for the Planned Parenthood League of Middlesex County. She was speaking at a day-long seminar held at Rutgers University on the human and social service response to the needs of the lesbian and gay community.

The conference was sponsored by several groups, including the National Association of Social Workers-New Jersey Task Force on Lesbian/Gay Issues, the Personal Liberty Fund of the New Jersey Lesbian and Gay Coalition, and the Planned Parenthood League of Middlesex County, with the Rutgers University School of Social Work.

While youths start developing toward sexual maturity at an early age — girls at about 12 years old and boys at 13 — they are not emotionally mature, and society does not accept them as sexual beings, Leddy said.

"They aren't supposed to get pregnant, get AIDS or get a socially transmitted disease (syphilis, gonorrhea), but society doesn't give them a healthy, positive form of sexual

expression," Leddy said, finding fault with many family life curriculums, which she claims are more like courses in plumbing.

"Adults can't handle seeing teenagers being sexually active," Leddy said.

She feels existing family life curriculums don't help adolescents talk about their problems, gain a positive body image or make decisions about their sexuality.

Many teenagers are driven underground in their quest for information about sex when the adults in their lives project a sense that they are uncomfortable talking about the topic.

In addition to adult aloofness, there is pressure for the adolescents to fit into a rigid mold established by their peer group — boys are pushed to prove their masculinity and girls to be feminine

The girls are unsure whether there are any advantages to being a woman; they dislike their bodies, Leddy said.

On top of this maelstrom of emotion — insecurity, isolation — homosexual teenagers are burdened with feelings of self-hate, shame, guilt and self-loathing.

"They will deny their sexuality. They don't understand what's going on," Leddy said.

Some youngsters block out same-sex experience or become promiscuous with members of the opposite sex in an effort to deny their orientation, she said.

"The homosexual teenagers have no role models or true peers," Leddy said.

Many of the teenagers withdraw in fear that their orientation will be discovered. Many feel invisible, as if they don't exist, or they feel they are horrible people, especially in light of the homophobic nature of adolescence, Leddy said.

James Dale, 19, co-president of the Rutgers University Lesbian Gay Alliance with Sharice Richardson, also 19, said he lived a double life while in high school, pretending to be straight while attending a military academy.

He remembers dating girls and even laughing at homophobic jokes while at school, only admitting his homosexuality during his second year at Rutgers.

"I was looking for a role model, someone who was gay and accepting of me," Dale said, adding he wasn't just seeking sexual experiences, but a community that would take him in and provide him with a support network and friends.

Richardson said that while she was growing up, she never understood her female classmates' crushes on boys. "I would say 'that's nice' and go play basketball."

When she told her mother and stepfather about her relationship with a female friend, it prompted her family to move to another town. The change in schools, the loss of her girlfriend and the isolation she felt triggered suicidal thoughts.

At her new school, she tried to talk to a sympathetic-appearing teacher who froze her in mid-sentence, ordering her never to mention the topic again. In desperation, she turned to the school chaplain, who "helped, he was open-minded and understanding."

When she started telling her peers about her homosexuality, she finally found the support she needed. "My friends didn't react badly at all," Richardson said.

Teenagers are particularly at risk from AIDS and other sexuality transmitted diseases, substance abuse and violence from their self-destructive behavior, Leddy said. They have secret, anonymous sexual encounters which they deny, and they fail to practice safe sex, she said.

Many suffer from depression and a lack of social coping skills, and 20 percent to 35 percent have tried suicide, Leddy said.

"At least 50 percent of the homeless teenagers in urban areas are gay. May have been kicked out by their parents, some have been victims of gay bashing," Leddy said.

Philadelphia (Jan. 1993)

THE GAY BOY SCOUT

EVEN NOW, MOVING ACROSS THE RUTGERS University campus in blue jeans and a white T-shirt, a backpack slung over his shoulder, James Dale looks like a Boy Scout. He propels his 6'1" frame through the crowds with long, loping strides that make him appear still gangly at the age of 22. His clean-shaven face seems symmetrical, chiseled and strong from certain angles, lopsided and vulnerable from others. It would surprise no one to learn that Dale devoted 12 years of his life to scouting, earning 30 merit badges and rising to Eagle Scout, the highest rank. The only deviations from this Normal Rockwell portrait are the black combat boots and the Dr. Seuss characters on his T-shirt, meant to symbolize diversity: "One fish, two fish, red fish, blue fish." It's not the sort of thing scouting officials in Monmouth County, New Jersey, would have noticed. But then again, they were the last ones to discover that their perfect scout had a secret.

James Dale was five years old when he first fell in love with the dark olive shorts, knee-high socks and epaulets and badges that conferred authority and honor. The uniform reminded him of the one his father wore as a lieutenant colonel in the U.S. Army Reserves. Since Dale couldn't become a Boy Scout until he was 11, he joined the Cub Scouts at eight, then a preparatory program called Webelos, short for "We'll Be Loyal Scouts." Finally, one glorious

[PICTURES OMITTED]

day at the Middletown (New Jersey) Village School, he was admitted to Boy Scout Troop 220. He stood at attention among his closest friends, made the three-finger Scout sign and swore to live in accordance with the Scout Oath:

> On my honor, I will do my best
> To do my duty to God and my country and
> to obey the Scout law;
> To help other people at all times;
> To keep myself physically strong, mentally
> awake, and morally straight.

WHEN BOYS REACH A CERTAIN AGE, OF COURSE, SUCH SENTIMENTS begin to sound like a crock. Parading about in paramilitary uniforms and earning merits badges in traffic safety can seem pretty dorky to a teenager. By the time they had reached puberty, most of Dale's friends had blown off scouting.

But Dale was different. He loved learning to survive in the wilderness—building fires, cooking, navigating, backpacking, watching the stars. His first summer he earned one of the most difficult merit badges, environmental science. Over the next two years, he quickly moved up in rank: Tenderfoot, Second Class, First Class, Star....

As he got older, the Scout Oath meant more to Dale than ever before. He had completely absorbed the values of his middle-class, Protestant, Republican family. He decided to enroll in a military high school in Sandy Hook that required a uniform two days a week and regular marching drills. He made the honor society at the Marine Academy of Science and Technology and rose to lieutenant commander, the

second-highest rank in his school. His ambition was to get a degree in economics and become a stockbroker. Later—at 18—he would vote for George Bush.

Scouting fitted seamlessly into such a highly structured life. It also gave him a perfect escape from the social pressures of high school, which often left him feeling awkward and inadequate. Though Dale had friends, he wasn't especially popular. He was not a great athlete, spending his time during most soccer games riding the bench.

"At Boy Scouts, I was always doing something that was considered important and valuable," he says today. "And that was really good for me as an adolescent." As long as he adhered to Scout Law, Dale knew, he would always be welcome. Being trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean and reverent was no problem." Those were the values he'd grown up with.

Dale embodied those virtues so well, in fact, that when he was 13, his troop gave him one of its highest honors—electing him to a secret society called the Order of the Arrow, also known as the Brotherhood of Cheerful Service. He was inducted during a dramatic ceremony in the woods that incorporated Native American rituals and costumes.

As the years went by and his friends dropped out of scouting, the Order of the Arrow offered him an important peer group of adults. "A lot of the formality was gone," he says. "The adults weren't Mr. So-and-so anymore, but Tom and Joe." When officials at the Monmouth County Boy Scout Council needed a model scout to speak at their fund-raising banquets, they chose Dale. He rose to chairman of the Order

of the Arrow ceremonies team, inducting some adults twice his age. Dale was also becoming an important role model for the younger scouts. As he developed a man's shape and his voice deepened, he nevertheless could still enjoy a sweaty game of Capture the Flag. He was someone an 11-year old could confide in.

[PICTURE OMITTED]

When Dale turned 18, his Boy Scout days were officially over. But his adult career had just begun—he'd already become an assistant scoutmaster and spent his birthday driving to upstate New York to help run scout camp. Two of his troops in Middletown had folded after aging scoutmasters developed health problems, and by the time he'd settled into Troop 73 in Matawan, Dale understood just how precarious the entire scouting enterprise could be. Without adults willing to volunteer huge amounts of time and energy, a troop could simply vanish overnight. When he entered Rutgers University in the fall of 1988, Dale knew the Boy Scouts desperately needed leaders like him, and he couldn't wait to graduate so he could finally become a scoutmaster himself.

But them something extraordinary happened. At college, he began asking disturbing questions: Why do some people have to live under oppression? Why are others privileged? Why do women earn less than men? Should a woman have the right to choose an abortion? If people can't afford decent medical care, should the government provide it?

Until that moment, Dale and the Boy Scouts had essentially traveled down the same path. Now the road was forking. Dale took a hard left turn, plunging into Amnesty International and the Rutgers Pro-Choice Task Force. He

marched on Washington for women's reproductive rights. He switched his major from economics to communications and instantly regretted his vote for George Bush. He began using politically correct jargon and was careful to refer to girls on campus as "women." Finally, during a long telephone conversation in the early hours of the morning, he made a confession that would change his life forever. He told his friend Sherone that he was gay.

THE BOY SCOUTS HAD REACHED THEIR COMING-OF-AGE moment a couple of decades earlier, during the tumultuous '60s. Unlike Dale, however, the Scouts resisted change. Continuing to emphasize conformity, obedience and devotion to God and country was not exactly cool to a new generation of parents who'd come of age themselves during the '60s. That's one reason scouting lost more than a third of its ranks between 1972 and '79, membership plummeting from an all-time high of 4.9 million to 3.1 million.

The Scouts rebounded during the conservative '80s, becoming the darlings of the right for not caving in to liberals. The national office now claims 4.1 million members, and that number is expected to rise with an increase of boys in the Scouts' target age group. Fifty percent of all boys today between the ages of seven and ten are Cub Scouts, and 20 percent between 11 and 18 are Boy Scouts. Since its inception, scouting has attracted an astonishing 500 million members around the world, including famous Americans from Hank Aaron to Ross Perot, making it the most successful youth movement in history.

But the questions of the '60s remain, and James Dale is not the only Boy Scout in the '90s whose life is being

changed by them. Scouting today is under attack by gays, atheists, civil libertarians, feminists and minorities, and struggling with a range of modern-day issues from sexual molestation to drugs.

The Boy Scouts have made certain concessions to modern life, allowing female scoutmasters, starting troops in the toughest inner-city neighborhoods, trying to reach both girls and boys in public schools through their "Learning for Life" program and revising the Boy Scout handbook to include a special pullout section for parents about drugs and child abuse.

But the Scouts have also stridently resisted other changes they feel would betray their basic mission. Stirring up the most controversy is their "three G's" membership policy: No Gays, No Godless and No Girls. Established at BSA headquarters, which is just outside of Dallas, these rules have been challenged around the country, the cases ranging from the girl suing for admittance to a South Florida troop to twin ten-year old atheists in Southern California fighting their dismissal.

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Excluding gays has proved to be an especially nettlesome problem, especially now that even the U.S. military may soon drop its ban. While the Scouts have always been explicit about being a club for boys with faith in God, their policy against homosexuals has never been stated in the Scout handbook or in training. Meanwhile, an increasingly influential gay rights movement is making the issue a major battleground. The movement has been particularly successful in San Francisco, where a former Eagle Scout named Tim

Curran sued for reinstatement and the United Way of the Bay Area and corporations such as Levi Strauss and Wells Fargo have cut off funding to their local Boy Scout councils.

The debate is surging more discreetly in the Philadelphia area, but no less passionately. Last spring, the Philadelphia Bar Association quietly discontinued its after-school career awareness program with the Scouts' Explorer group because of the anti-gay policy. The bar cites its own internal resolution, passed in July 1991, prohibiting members from discriminating on the basis of sexual orientation. "If it's the policy of the Boy Scouts to discriminate, we have a problem with that," says a bar association source.

Meanwhile, the United Way of Southeastern Pennsylvania continues to donate money to the Philadelphia Boy Scout Council despite a policy that specifically prohibits giving to groups that discriminate against homosexuals (see sidebar on page 87).

By refusing to budge, the Boy Scouts have placed themselves into the middle of perhaps the most emotional component of the gay-rights debate: children. While resistance to gays and lesbians may be declining, many Americans are still uncomfortable with allowing them to supervise their children. A recent *Newsweek* poll found that 83 percent of Americans believe it would be appropriate to hire homosexuals as salespeople, but only 51 percent believe they should be elementary-school teachers.

The Boy Scouts argue that gays do not provide proper role models, and some officials worry privately that their boys may become "converted" to a gay lifestyle. Lurking in the

background is the darker fear of pedophilia, though the Scouts vigorously assert that they make no such connection.

Throughout the tumult, the Boy Scouts contend they are a private organization that can set its own rules. But they've always been much more—a self-described "movement" that seeks to influence millions of boys and set standards for what it means to be an American. That's why, in the story of James Dale and the national battle over traditional values, much more is at stake than just the future of the Boy Scouts.

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WHEN JAMES DALE FINALLY REVEALED HIS HOMOSEXUALITY as a sophomore at Rutgers, he felt like a huge burden had been lifted. "It was like having a nail pulled out of your head and suddenly realizing the pain you've been in," he said. Life, he figured, was too short to waste on lying and hiding. Friends who couldn't handle it were not worth having. Some were shocked, but others said, "Yeah, tell us something we didn't already know."

Dale still earnestly believed in the rules that had been drilled into him since he was eight years old: *A Scout tells the truth. . . . He respects those with ideas and customs that are different from his own. . . . He has the courage to stand for what he thinks is right even if others laugh at him or threaten him.*

The Boy Scouts had also taught him to be a leader. So when he attended meetings of the Rutgers University Lesbian, Gay & Bisexual Alliance, Dale noticed that the male co-president had essentially vacated the position. Since nobody else wanted the job, he ran and was elected. Dale became

deeply involved in gay-rights issues and maintained a high profile on campus.

His quieter gay friends warned him of the homophobic backlash always lurking around the corner. "You're *too* out," they told him. But Dale thought he was invincible in his ivory-tower world, where ideals were supposed to be *lived*, not merely discussed. "Just wait," his friends said. "It's going to hit him."

The following summer, Dale was asked to speak at a conference for social workers, principals and guidance counselors about why gay and lesbian adolescents commit suicide at three to four times the frequency of straight kids. Remembering the self-loathing he carried throughout his own teenage years, Dale agreed to speak. A reporter from the *Newark Star-Ledger* was there, but Dale didn't worry about the publicity. Just a month earlier, he'd finally hurdled the most difficult obstacle by coming out to his parents. His father had tremendous difficulty with the news at first, but eventually accepted it so completely that he later would walk alongside his son at gay-pride marches.

With his parents solidly behind him, Dale had nothing to fear by having his photograph appear in the next day's *Star Ledger*. But soon afterward, he understood what his gay friends had been warning him about. On July 19, 1990—11 days later—the Monmouth County Boy Scout Council sent Dale a letter informing him that his membership in the Boy Scouts had been revoked and asking him to "sever any relations that you may have with the Boy Scouts of America."

Dale wrote back, asking for an explanation, and received this reply a few days later: "The grounds for this membership

revocation are the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals." Though he'd never been told of this rule, Dale later discovered that the Boy Scouts contended he had violated his oath to be "morally straight."

On his next trip home, Dale marched into his room, took every bit of Boy Scout paraphernalia—knives, uniform, merit badges, awards, bugle, everything—threw it all into a box and stuffed it into the attic. The gay activist in him wanted to fight them. But the former Boy Scout wanted to erase them from his life forever.

Back at Rutgers that fall, Dale returned to his position as co-president of the Lesbian, Gay & Bisexual Alliance. He convinced himself that his friends in scouting didn't hate him—it was just some stupid rule concocted by some bigots in Texas. And the rule was morally wrong. His expulsion contradicted everything they'd taught him, especially the part about scouting being for *all* boys. With two of his troops having folded—and the third teetering on the brink of collapse—he thought about how much the Scouts needed people like him. Challenging the Boy Scouts would be the best thing that ever happened to them.

For the next year and a half, Dale hunted for a law firm to take his case pro bono. After being rejected several times, it was finally accepted by the Lambda Legal Defense and Education Fund, a gay-rights organization in New York City. Last July, he filed a lawsuit asking the courts to force the Boy Scouts to re-admit him.

No federal laws exist to protect homosexuals from losing their jobs because of sexual preference, but New Jersey

happens to be one of seven states with a statute barring discrimination against gays and lesbians. It was passed by the legislature in January 1991 with little opposition.

Suddenly, James Dale became a national figure in the battle between the Boy Scouts and the modern world. "The Scouts taught me to believe in things with conviction," he told the *New York Times* soon after his suit was filed. "Now, they don't seem to like it so much."

"PEANUUUUUUUUUT! PEANUT BUTTER! JELLY! PEANUUUUUUUUUT! Peanut butter! JELLY!" Twelve little boys stand in a tiny, unventilated room, screaming and laughing their favorite song. All are black. And homeless. Most look healthy, but the boy without front teeth has the emaciated, bony look of a Somalian child.

This Cub Scout pack in the Perkins-Morris Shelter in North Philadelphia places the inherent contradictions of modern scouting on full display. In some ways, though, the scene shows the Boy Scouts at their best. A flexible national structure allows a troop to quickly appear where people are in crisis—here and in the tent cities in South Florida after Hurricane Andrew.

Strangely enough, such public shelters are ideal places to launch a Boy Scout troop. This former nursing home, which opened in 1989 as the city's largest facility for the homeless, fulfills the administrative duties as the sponsoring agency (usually, it's a church). Kenneth Edwards, a social worker on staff, serves as scoutmaster for Cub Scout Pack and Boy Scout Troop 981. And the shelter can recruit kids from a captive village of 70 families, each of which has a separate

room in the building. It's easy for parents to volunteer and drop their kids off.

One drawback is that turnover is high, as families ideally stay here for only three to six months. Edwards, a former Cub Scout himself, hopes the kids will join another troop after they leave, but he also realizes that this scouting experience may be their last. If he does his day job properly, he loses members of his troop—an irony that Edwards doesn't dwell upon.

Without the Boy Scouts, these kids would not be able to take their weeklong camping trip to Treasure Island Scout Reservation, where they swim and shoot bows and arrows. And they'd never be able to build and race miniature cars in the Pinewood Derby. "We use the Boy Scouts as an enhancement to programs that are already here," says Edwards, a gentle, soft-voiced man. "The Boy Scouts provide structure, instill values like cooperation, self-esteem and belief in God. Self-esteem is a big issue. Because they're homeless, they're told to think badly of themselves."

The ideological battles over scouting rules can seem trivial when compared to the brutal conditions of life in the ghetto. None of the boys are wearing uniforms. They've made scouting T-shirts, but wear those only on public occasions. Nobody even notices that a chubby girl is taking part in the activities, breaking a rule that even President Bush has publicly supported.

A young female den leader in a miniskirt, wheeling a baby in a stroller, enters the room and leads the pack in more songs. Three mothers sit quietly to the side clutching their

children, far more concerned about holding a job and finding somewhere to live than about having their boys corrupted by the godless and gay. Edwards has enough to worry about trying to raise money for his troop from people in this building who don't have any.

When the kids start fooling around, Edwards raises his hand in the three-finger Scout salute, the symbol of authority and order. Though it may seem incongruent for a white, conservative organization to come into the ghetto preaching about authority and order to black people stuck at the bottom rung of society, it's actually in keeping with Lord Robert S.S. Baden-Powell's original vision of the Boy Scouts: defenders of the status quo.

Today, the political conservatives who run the Boy Scouts of America insist that adherence to their values leads to self-sufficiency and success, but that's revisionist thinking. Baden-Powell did not have upward mobility in mind when he created the Scout Oath and Law: "If you are discontented with your place or with your neighbors or if you are a rotten brick, you are no good to the wall," Baden-Powell wrote in *Yarns for Boy Scouts* in 1909, "You are rather a danger. If the bricks get quarreling among themselves the wall is liable to split and the whole house to fall."

The house he was trying to preserve was the British empire, whose grip on its colonies around the world was crumbling. Edwardian England was based on the belief that a superior white race was morally justified in using force to bring peace, God and civilization to primitive peoples, and few men embodied that notion better than the Boy Scouts

founder. He fought in Britain's Afghan Wars in 1880 and in later battles against the Zulus, Ashantis and Matabeles in Africa.

Baden-Powell actually based scouting on an innovation he developed during the historic battle of Mafeking during the Boer War, when he used a uniformed cadet corps of boys to serve as messengers, lookouts and orderlies. He miraculously held off 7,000 Dutch settlers with just 700 men, and returned to England a national hero. Soon thereafter, he decided to create a "character factory" that would produce a new generation of men who would end the laziness, bad health and corrupt morals he was convinced were causing the decline of the empire. Following orders was a high priority. "A dull lad who can obey orders," he wrote, "is better than a sharp one who cannot."

The boys in the homeless Cub Scout Pack 981 know nothing about all this, of course. But when Scoutmaster Edwards holds upon the three-finger salute, they suddenly fall silent.

ALL-WHITE SUBURBAN TROOPS LIKE TROOP 155 IN PENN WYNNE ARE more typical, serving as the main stage in the national debate about the Boy Scouts and traditional values. At tonight's meeting, in the auditorium of the picturesque Penn Wynne Presbyterian Church on Haverford Avenue, all the boys are in full uniform—some sporting impressive rows of merit badges on sashes hanging from their belts. They line up and recite the Scout Oath before practicing their marching drills. Survival is an issue for these kids only during camping trips—the troop owns enough gear

to take 70 kids overnight, even though it has only 24 members.

The meeting is led by 16-year-old Life Scout Andy Byers while scoutmaster Richard Martin, a tall, grandfatherly man with a ruddy face and white hair, handles paperwork and whispers to three assistant scoutmasters. The boys fidget during Byers' lecture on civic duty until it's time for a dodgeball game they call bombardment, when the room turns into pandemonium, the boys shrieking and frenetically trying to duck the fat rubber ball.

Off to the side, Martin says that during next weekend's camping trip his boys will bring a handicapped troop to the beach at Cape May. "They can't get onto the beach in their wheelchairs," he says, "so we figured out a way to take snow fences, these wooden slats, and lay them out on the beach through the soft sand."

Martin has also decided to break precedent and bring a Girl Scout troop along. "This 12-year-old girl—maybe she has some glitches on her face, but she's still capable of doing some of the things a boy is capable of," he says. "The only structure these young boys and young girls have is the school yard. That can be pretty wicked. He can't show any respect for girls because the other boys call her a knucklehead or whatever. I can't change the world, but I can affect how these young boys look at things."

Standing next to him is assistant scoutmaster Kerry Sherin, another leap into the modern world for the Boy Scouts. She's wearing a scouting dress and looking after her two-year-old son. The organization finally made its

concession to the women's movement in 1988, when they allowed female scoutmasters. "My husband wouldn't be caught dead in a tent, never mind the bugs," she laughs. "So he says, 'Go ahead, have fun!"

Camping with girls and permitting female scoutmasters are enormous changes for an organization that has always believed the backwoods represents a boys-only retreat from the complexities of modern life. Baden-Powell's genius was understanding the deep yearning for outdoor adventure that boys would have in an increasingly urban and industrial society. While that hasn't changed—boys still consider camping the best part about scouting—the social climate of turn-of-the-century England bears little resemblance to that of the 20th-century America Baden-Powell's creation is struggling so hard to adapt to.

The boys in Troop 155, for example, have to contend with enormous social pressure to drop out of scouting by the time they reach high school. Sitting around after their meeting, they're asked why there aren't more older kids in this troop.

"Because it's kind of gay," says Chris, a 14-year-old. This is his last meeting, because he's losing interest and is tired of getting teased in school.

"If you're a scout, that means you're a wimp or a geek," says another.

"Yeah, they say, 'Fags go out on camping trips together, cook food, sleep in a tent together'."

Several kids asked that their names not be published because they were worried about being harassed at school.

One even thought he'd get beaten up, because his older brother, an Eagle Scout, had gotten jumped from behind after his name appeared in a story about scouting.

This homophobia reflects a cruel irony—if you're a Boy Scout, your friends will ridicule you for being a homosexual. But if you really are gay, the Boy Scouts can kick you out.

Scouting officials argue privately that the gay issue is virtually nonexistent for most Boy Scouts. No boy has ever been expelled for being gay, and scoutmasters are usually sensitive on those rare occasions when a boy brings up the subject. All five lawsuits, they point out, including James Dale's, have been filed by gay adults, four of whom were already—or wanted to become—Scoutmasters.

But Ken McPherson of Forgotten Scouts, a camp of primarily gay former Boy Scouts formed recently in San Francisco, says his organization is considering bringing forward one or more gay scouts, with the complete support of their parents, to challenge the Scouts' anti-gay rule. He says there are many gays throughout the scouting organization—from boys to scoutmasters to council executives—who are faced with the choice of violating their oath of honesty or being expelled. "This is not about whether it's okay to be gay," says McPherson. "The Boy Scouts have a problem with people telling the truth."

If McPherson is to be believed, the boys in Troop 155 actually have a salient point—there may be more gays in scouting than in society at large. Fully 50 percent of all gay men in the San Francisco Bay area were once Boy Scouts, McPherson estimates. "Some of us consciously knew we

were gay and wanted to do masculine things as a cover," he says. "Others just wanted to be around boys—not on a sexual basis, but a social basis."

Homosexuals tend to be exemplary scouts, he says. More than half of the 1,000 members of Forgotten Scouts had achieved Eagle Scout, which only about 3 percent of all scouts attain. "There are so many Eagle Scouts," he says, "because we're trying to prove we're man enough."

In other words, there may be many exemplary gay scouts hoping to take the next step to scoutmaster. National BSA spokesman Blake Lewis declines to estimate how many gays there might be among scouting's 1.2 million volunteers and 3,700 professional staff members, or among the 1 million Boy Scouts scattered over 51,000 troops and 2.1 million Cub Scouts in nearly 53,000 packs. In the general population, the number of homosexuals is usually estimated at 10 percent.

Scouting officials become extremely squeamish when the subject of gays comes up. Richard Marion, the Philadelphia Scout Council executive, refused to even say the word "gay" during a recent interview, answering a question by pointing at the tape recorder and mouthing the words "Turn that thing off!" He referred all questions on the subject to Lewis.

"We've never denigrated the rights of these people to have their own values and viewpoints," says Lewis, who works for Edelman Worldwide, the Chicago public-relations firm that the Boy Scouts pay about $178,000 a year to run a regular spin-control office at BSA headquarters in Texas. "We've merely said these are our values and standards, and they are what families expect from the BSA. We do not

believe homosexuals provide role models that are consistent with the expectations of mainstream American families."

Middle America, however, seems deeply ambivalent on this issue. In the *Newsweek* poll, published last September, 78 percent of the respondents thought homosexuals should have equal rights in job opportunities, but 53 percent did not believe homosexuality was an acceptable alternative lifestyle. Boy Scouts officials say privately that their entire structure, which is based on troops sponsored by church groups and community leaders, could fall apart if they began admitting gays. The Catholic and Mormon churches, in particular, are outspoken against homosexuality.

Conservatives also fear that gay scoutmasters would try to "convert" boys. Like Dan Quayle, they cling to the old-fashioned view that homosexuality is a matter of choice, not an orientation one is simply born with, like heterosexuality.

Discussed less openly is the fear that gays may be pedophiles, which enrages gay activists. "For society to use gays as scapegoats for sexual child abuse is more denial," says McPherson of Forgotten Scouts, "and we're not going to take it."

The Boy Scouts have had serious problems with sexual molestation for some time. An investigation by the *Washington Times* in 1991 showed that, in the last 19 years, at least 1,151 scouts nationwide have reported being abused by their leaders, an average of more than one a week. Locally, former Northeast Philadelphia scoutmaster William J. Fried was convicted last August of sexually assaulting a 12-year-old boy during two camping trips in 1989.

After years of denying that the problem exists, the Scouts have acknowledged that their organization "provides a natural hunting ground for pedophiles" and toughened their screening process, enforced more strictly the requirement that two adult leaders be present on all camping trips, and outlawed private, one-on-one activities between adult leaders and scouts. Their sex-abuse education program, including a video for boys on how to recognize a sexual advance, is considered among the best in the nation by some experts in the field.

The BSA is careful not to publicly draw any connection between its policy against gays and its problem with pedophiles. "Some people assume that we do not allow homosexuals because of concern for child abuse," says Lewis. "They're two totally separate issues. Child abuse is a matter of protection of young people. Homosexuality is a question of our values."

In fact, the "Youth Protection Guidelines" distributed to Boy Scouts leaders is quite explicit on this issue, calling it a myth that "children are at greater risk of sexual victimization from gay adults than from straight adults." Some studies contend that most child abusers are heterosexual and that pedophilia appears to be an entirely separate sexual orientation, unrelated to the adult preference of the abuser.

This sensitive area seems to be one of the few issues that the Boy Scouts and gay activists agree on. But the connection nevertheless persists, perhaps for one rather shocking reason: Some historians who have studied the life of Baden-Powell believe that the Boy Scouts founder was both a repressed homosexual and pedophile.

At the least, Baden-Powell had some rather odd ideas about sex. According to Tim Jeal, author of *The Boy-Man: The Life of Lord Baden-Powell*, Baden-Powell preached to boys that thinking about sex with women was "dirty" and sneered at boys who paired with girls as having a disease he called "girlitis." He warned in one advice book that sexual desire seizes boys for only a few months, and then they "get over it just as they would get over the measles." Baden-Powell didn't marry until the age of 55, and after doing what he considered his "duty" of siring three children, stopped sleeping with his wife altogether.

Baden-Powell's biographers have argued over whether he ever consummated his close lifetime relationship with colleague Major Kenneth McLaren. But most agree that his writings clearly show a repressed homosexual who lived at a time when such a disclosure, especially in the military, often resulted in suicide.

The charge of pedophilia emerges in part from Baden-Powell's diary entries, on microfilm at Boy Scouts headquarters; one entry reads: "Tod's photos of naked boys and trees are excellent." He wrote a letter to the same A.H. Tod asking if "possibly I might get a further look at those wonderful photographs of yours." His other writings, coupled with observations from those who knew him, indicate that Baden-Powell was enchanted by boys and their physiques.

Nobody claims Baden-Powell ever had sex with children, and Jeal argues that by channeling his affection for boys into the creation of scouting, he accomplished something very positive and important. But at least one Boy Scouts official has conceded publicly that, by today's standards, Baden-

Powell's obsessions would have marked him as a potential child molester and gotten him thrown out.

JAMES DALE SITS ON A BED IN A SMALL dorm room at Rutgers University with about a dozen friends. They're taking turns reading aloud from an article about the Stonewall riots in Greenwich Village in 1969, the birth of the modern gay-rights movement. It's a weekly meeting of a group of gay and lesbian students who live in a wing of Demarest Hall. Soon they begin debating the merits of medical research into whether there is a biological basis for homosexuality.

"Why look at this in terms of homosexuality?" says Robert Zamitis, who sits on the floor wearing denim shorts, a Minnie Mouse T-shirt and high-laced combat boots. His hair is a crewcut except in the front, where it's teased up into a stiff curl, like a overhanging roof. His manner is so classically gay—soft, sibilant voice, hands flitting about his face and neck—that his friends sometimes tease him about it. "I'd like to discover the causes of heterosexuality!" he cries. "What if homosexuality is the norm? Maybe we're among the privileged few."

Everybody laughs. "That's right," says Dale. "In ancient Greece, it was considered divine love."

Lounging on the bed among his friends, Dale loses some of the stiff body language he learned in the Boy Scouts and military school. As he tucks his knees up to his chin, his whole body relaxes and his manly affectations fade. "In some cultures, people were not defined by what kind of sex they had, because everybody did both," he says. "You want natural, *that's* natural."

About to graduate from college, James Dale has finally grown up. Now he's able to have the kind of intellectual discussions he never had in the Boys Scouts. Lord Baden-Powell didn't have much patience for such claptrap, and neither does the current leadership. But Dale and the shifting mores of modern society are forcing the Boy Scouts to consider some uncomfortable new questions, especially this one: How long can they cling to Baden-Powell's curious dream of keeping boys out in the pristine forest, away from modern civilization, adolescent forever?

SCOUTMASTER'S HANDBOOK
(excerpts)

[PICTURES OMITTED]

THE SCOUT OATH OR PROMISE

On my honor

I will do my best

To do my duty to God
and my country and

To obey the Scout Law;

To help other people at
all times;

To keep myself physically
strong,

Mentally awake, and
morally straight.

Copyright 1972

BOY SCOUTS OF AMERICA
North Brunswick New Jersey
ISBN 0-8395-6504-6
No. 6504 Printed in U.S.A. 75M273

* * * *

[PICTURE OMITTED]

4. Adult Male Association

You may not think of yourself as a "method." Yet your role as friend, coach, and counselor to Scouts is one of the most valuable parts of the program.

In his quest for manhood, every boy needs contact with men he can copy. Living, breathing men provide models of what manhood is like. Boys copy whatever models are available to them. Not all of these are really good models. So just by doing things and talking with Scouts, you are carrying out one of the methods of Scouting. You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons.

* * * *

9. Sharing Leadership.—

With leadership goes responsibility. You can and must learn to share your leadership, but you never give up the final responsibility for the welfare of your troop. The secret lies in realizing that you can let others share in making decisions without giving up your final responsibility.

10. Setting the Example.—

This is fairly obvious to any Scoutmaster. What you are speaks louder than what you say. This ranges from simple things like wearing the uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.

11. Managing Learning.—

This may be a new term, but Scoutmasters have done this since 1910. The only difference is that today we are warning Scoutmasters not to assume that boys have learned just because we have done some teaching. The proof lies in what they can do. If they can do something, then you have successfully taught it. The trick is to actively involve boys in the learning process by giving them choices as to what they can learn, and by checking constantly to see what they can do. Find out what Scouts know, put them in a situation where they see the need for some knowledge, and then offer them the help they need to meet the situation they face. The idea is to put the emphasis on the needs of the learner instead of concentrating solely on what the instructor does.

Fuller descriptions, in boys' language, are contained in *Patrol and Troop Leadership*. These skills are also learned in special boy leadership courses put on by local councils.

* * * *

[PICTURE OMITTED]

Lack of Parental Guidance

Some of your Scouts may not have either parent at home, and are being brought up by others. Some may have only one, having lost the other by death, divorce, or separation. Boys live with alcoholism, infidelity, greed, stupidity, and about any other kind of poor influence you may be able to think of. The home they come from usually shows, somehow, in what they are and do. In such situations, Scouting offers

some of what is missing at home. The Scouting influence rises to its fullest height when this happens.

It is impossible even to speculate on the many ways in which the troop and its leaders may substitute for parental guidance. It may be a matter of table manners. It may be some of the problems we have noted earlier: drugs, swearing, smoking, etc. A boy without proper parental guidance may be handicapped in dozens of different ways. He needs your interest and attention.

Inattention

It is typical of boys of the younger Scouting years to be rather weak on paying attention. This suggests some rules for you and other leaders.

- Don't talk until you have boys' attention. They can't take in two things at once.
- Keep activities in meetings short. As a general rule, no activity should go beyond 20 minutes, to guard against overrunning the attention span of younger boys.
- Keep distractions out or at least down.

Sex Curiosity

In the age span covered by the Scouting program, boys discover sex as one of the realities of living. They are naturally curious about it, and they may have limited opportunity to find out about it.

It seems to be general belief that boys should learn of sex and family life at home, from their parents. While there are few objections to this principle, it is not borne out in fact that this teaching actually occurs.

You must respect the right of parents to teach their sons about life. You must also recognize that

[PICTURE OMITTED]

many of them will not do this very well, and some won't do it at all. Some of their failings will come to light in your troop.

You may find magazines at practically any level of obscenity being circulated during a camp-out.

You may have boys asking you for information or advice about sexual matters.

You may overhear dirty stories or dirty talk, both informed and uniformed, in the troop.

You may discover or hear about incidents of sexual experimentation among troop members.

How should you handle such matters?

Rule number 1: You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area, and that you are probably not well qualified to do this.

Rule number 2: If Scouts come to you to ask questions or to seek advice, you would give it within your competence. A boy who appears to be asking about sexual intercourse, however, may really only be worried about his pimples, so it is well to find out just what information is needed.

Rule number 3: You should refer boys with sexual problems to persons better qualified than you to handle them. If the boy has a spiritual leader or a doctor who can deal with them, he

should go there. If such persons are not available, you may just have to do the best you can. But don't try to play a highly professional role. And at the other extreme, avoid passing the buck.

And now how about some of the questions we raised?

Publications that you judge unacceptable should be removed from the scene, and those who brought them told that you don't want them around, and why.

Incidents of sexual experimentation that may occur in the troop could run from the innocent to the scandalous. They call for a private and thorough investigation, and frank discussion with those involved. It is important to distinguish between youthful acts of innocence, and the practices of a confirmed homosexual who may be using his Scouting association to make contacts. A boy of 15 or so cannot be assumed to be acting out of innocence, and should be separated from the troop for the protection of younger boys.

It is of greatest importance that such occasions be kept quiet. Avoid accusations and any loose talk. Avoid making a small and innocent act into a mammoth offense.

* * * *

The Seattle Times

July 10, 1992, Friday, Final Edition

HEADLINE: EXPELLED SCOUT IS TAKING LESSONS TO HEART

BYLINE: BY CAROL M. OSTROM

BODY

James Dale thought he was being a good Boy Scout when he spoke out at a conference on adolescent suicide.

"I was doing exactly what the Boy Scouts taught me," said Dale. "I was standing up for what I believed in, being true to myself."

The problem was that James Dale, 20, was not only an Eagle Scout and the recipient of a roomful of top awards, including the Order of the Arrow - he was also gay. And he talked about it. In public. In front of reporters.

Before he could say "merit badge," the Boy Scouts had contacted him. The message: You're out. Period.

Dale, a student at Rutgers University in New Jersey who was then an assistant scoutmaster, was crushed.

He'd been a Scout for 12 years, following the footsteps of his brother and his father. Until the past few years, he hadn't even known for sure he was gay.

He went home, gathered up his knives, bugles, badges and threw everything into a box. "I went through denial," he recalls. "I didn't want anything to do with them.

"I put everything in a box and tried to close that door in my life, to mentally block it out."

But after a while he started thinking. He had friends in the Scouts who knew he was gay and were supportive. He missed the camping trips, the camaraderie.

"The years in the Boy Scouts were the best years of life," he said. "I was accepted; I was rewarded. It was very reaffirming of myself and my identity."

Dale, now 21, was contacted at the San Francisco office of the Forgotten Scouts, an organization of some 1,000 former Scouts, most openly gay, who seek to pressure the Boy Scouts of America to change its policy.

One of the organization's three co-founders is William Boyce Mueller, the grandson of William Dickson Boyce, the founder of the Boy Scouts of America.

Because the Boy Scouts in New Jersey refused to even hear his case, Dale is strongly considering filing suit under that state's non-discrimination law.

He laments the controversy, but places the blame squarely at the feet of the Boy Scouts.

"They're turning the Boy Scouts into a political circus," said Dale, a sociology and theater-arts major at Rutgers. "It's not about sexuality. It's about giving adolescent boys a role model. And you can't close out 10 percent of the population.

"I want to be able to go back in there and be who I am. I want to be able to give to other kids what I took out of the organization."

What the Scouts taught him most of all, he says, is to be a leader.

"What is core about me is standing up for what I believe in," Dale said. "I take that right out of the Boy Scout handbook . . . . They taught me to be a leader, and that's what I'm doing now."

United Press International

April 30, 1981, Tuesday, AM cycle

BYLINE: By DOUGLAS DOWIE

LEAD: An Eagle Scout who was featured in a newspaper story on gay youth filed a $520,000 discrimination suit Thursday charging the Boy Scouts of America kicked him out because of his open homosexuality.

BODY

An Eagle Scout who was featured in a newspaper story on gay youth filed a $520,000 discrimination suit Thursday charging the Boy Scouts of America kicked him out because of his open homosexuality.

Timothy Curran, 19, with the assistance of the American Civil Liberties Union and National Gay Task Force, filed the suit seeking $500,000 punitive damages and $20,000 actual damages against the Mt. Diablo Council of the Boy Scouts in the San Francisco Bay Area.

"What's ridiculous," Curran said in an interview, "is that the Boy Scouts are saying that because I am homosexual, I am immoral.

"I think that's absurd. I am not an immoral person."

ACLU attorney Susan McGreivy said Curran, a journalism major at UCLA, was kicked out of the Boy Scouts after a series of articles on gay youth in Bay Area appeared last June in the Oakland Tribune-Eastbay Today.

The articles, which were accompanied by a photograph of Curran attending the Skyline High School senior prom with a male date, quoted his belief that going to the dance as an open homosexual was a "political statement."

Ms. McGreivy said the Boy Scouts have taken an unconstitutional position that Curran is "per se immoral" because he is homosexual.

"Timothy has an outstanding track record as a young Scout," Ms. McGreivy said.

"He founded a Scout troop for the deaf in Oakland and was heartbroken when the Boy Scouts kicked him out and refused to allow him to attend the National Jamboree in Virginia."

Dave Park, Boy Scout general counsel at the organization's national headquarters in Dallas, said Curran had applied for re-registration as a "Scouter," an adult leader, and was refused because "he is an avowed homosexual."

"We feel homosexuality and membership in scouting are not compatible," Park said. "We feel we have the right to determine our own criteria for membership."

Curran said he had no trouble functioning as both a Scout and an open homosexual for three years before he was forced out of his troop.

"I was annoyed, to say the very least," he said. "I felt that my rights had been abridged. I felt like I'd been hit in the face."

Curran said he joined the Boy Scouts in 1975.

"I have enjoyed being a Boy Scout," he said. "I made a lot of friends, I gained a lot of skills and it was very beneficial for me.

"I thought that it was ridiculous of these people who knew my record, who knew that I was a good Scout, to say that simply because I was a homosexual -- and for no other reason -- that I was going to be kicked out."

United Press International

July 7, 1981, Tuesday, AM cycle

HEADLINE: Homosexual loses bid to become Scout leader

Gayscout

A Superior Court judge turned down a request Tuesday from a teenage homosexual to force the Boy Scouts of America to allow him to become an adult troop leader.

Judge Robert Weil ruled the Boy Scouts is a voluntary, private organization, which does not have to allow Timothy Curran, 19, of Oakland, to become a "Scouter," or adult leader.

Curran, a former Eagle Scout who took a male date to his high school prom last year, said he was "disappointed, but not distressed" with the decision.

"I'm not the sort of person who gives up after a skirmish," he said.

Curran asserted in his suit that Mt. Diablo Council of the Boy Scouts in Berkeley unconstitutionally denied his membership in the organization solely because he is homosexual.

Curran said Boy Scouts executives had told him "homosexuals do not set good moral standards to be emulated by younger Scouts."

The Boy Scouts denied Curran membership a short time after the Oakland Tribune featured the teenager in an article

about the gay youth movement and published a photograph of Curran escorting his male date to the prom.

Attorney George Slaff, who represented Curran, said he may appeal the decision.

"Nothing in the rules states homosexuals may not be members," Slaff said.
Boy Scout leaders said when Curran filed the suit that the organization has the constitutional right to define its membership standards.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

AFFIDAVIT OF REVEREND GEORGE WAYNE FREYBERGER IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY)
) ss.
COUNTY OF ESSEX)

REVEREND GEORGE WAYNE FREYBERGER, being duly sworn, deposes and says:

1. I reside in Essex County, New Jersey. I make this Affidavit in support of plaintiff James Dale's motion for summary judgment. I have personal knowledge of the facts set forth herein.

2. I am a Lutheran Pastor and am currently the Dean of Students at Upsala College, a Lutheran college in East Orange, New Jersey. I received a Bachelor of Arts degree in History from Muhlenberg College, a Lutheran college in Allentown, Pennsylvania, in 1958, and a Master of Divinity degree from the Lutheran Theological Seminary in Philadelphia, Pennsylvania in 1962. I was ordained a Lutheran Pastor in the United Lutheran Church in America (the "United Lutheran Church") in 1962. For fifteen years following my ordination, I served as a pastor at Lutheran parishes in Tom's River, Newark and Teaneck, New Jersey.

In 1977, I became chaplain at Upsala College and, since 1990, have been its Dean of Students.

3. Some time after my ordination, the United Lutheran Church became, by way of merger with other Lutheran church bodies, the Lutheran Church in America (the "Lutheran Church"). The foregoing event represented essentially only a name change as there was general theological and biblical agreement involved in the merger. In 1988, the Lutheran Church joined with the American Lutheran Church and the Association of Evangelical Lutheran Churches to form the Evangelical Lutheran Church in America (the "Evangelical Lutheran Church"), the largest Lutheran body in the United States. Policy statements of each of the Evangelical Lutheran Church's three predecessor bodies which have not been specifically repudiated by the Evangelical Lutheran Church remain valid Lutheran teachings and interpretations of scripture for Evangelical Lutheran Church members. Although policy statements of the Evangelical Lutheran Church are only guides, and it is possible for individuals to disagree with church policies, policy statements of the Evangelical Lutheran Church are widely subscribed to by members of the Evangelical Lutheran Church and reflect the views of the vast majority of its members.

4. The Evangelical Lutheran Church and its predecessor bodies have been active sponsors of units of Boy Scouts of America ("BSA") in New Jersey. Lutheran churches in New Jersey currently sponsor more than 50 Boy Scout troops. In fact, James Dale was for several years a member of BSA Troop 220, which was sponsored by King of Kings Lutheran Church, Middletown, New Jersey.

5. On the basis of the teachings of the Evangelical Lutheran Church, a Lutheran should not conclude that lesbians or gay men are immoral or unclean because of their sexual orientation. This conclusion comports with the Lutheran belief that all persons, regardless of their sexuality, are born with "original sin" and must seek out God's redemption. Lesbians and gay men are at no disadvantage, as a result of their sexual orientation, in seeking God's redemption. Members of the Evangelical Lutheran Church, including those who are also members of BSA, are not taught by their religion to equate homosexuals with "immorality" or "uncleanliness."

6. Bishop Stanley E. Olson, a retired bishop of the Evangelical Lutheran Church who served for 39 years in the ordained ministry, stated the following when asked whether, in his opinion, God regards homosexuality as a sin:

> Of course not. . . . God made all of us and did not make all of us alike. Diversity is beautiful in creation. How we live our lives in either affirming or destructive ways is God's concern, but being either homosexually oriented or heterosexually oriented is neither a divine plus or minus.

Like Bishop Olson, I believe that the morality of sexual behavior is appropriately judged by considering whether a person engages in such behavior as an expression of a committed love or in a destructive or exploitative fashion. I do not believe that a person's sexual orientation is relevant to that judgment.

7. A recently distributed draft of an Evangelical Lutheran Church Social Statement entitled "The Church and

Human Sexuality: A Lutheran Perspective" affirms that we as Lutherans do not view homosexuality as immoral or unclean. A true and correct copy of the 1993 Social Statement (the "Statement"), prepared by a 17-member Task Force of the Division for Church in Society of the Evangelical Lutheran Church (the "Task Force"), is attached to this Affidavit as Exhibit A. In the Statement, the Task Force states clearly that "[s]exual orientation should not become the basis for judging a person's overall character. We must challenge stereotypes that do not fit gay or lesbian Christians who seek faithfully to live out their baptismal vocation." Ex. A at 12. The Task Force also makes clear that "[d]isowning a relative or a friend because of their sexual orientation is morally unacceptable." Id. (emphasis added). BSA's policy of discrimination against homosexuals, by adopting sexual orientation as the sole basis for judging a person's overall character and by disowning those BSA members who are homosexual, is in clear contradiction of the Lutheran values expressed by the Task Force.

8. In 1991, Bishop E. Roy Riley, Jr. of the New Jersey Synod of the Evangelical Lutheran Church, the Lutheran Office of Governmental Ministry in New Jersey (the "LOGM/NJ") and the Synod Council (the "Synod Council") of the New Jersey Synod of the Evangelical Lutheran Church lent their support to passage of Bill A-634, which, as passed, amends the New Jersey Law Against Discrimination (the "NJLAD") to prohibit discrimination on the basis of sexual orientation in public accommodations. Attached to this Affidavit as Exhibit B is a true and correct copy of a letter sent by the LOGM/NJ to New Jersey state legislators urging their support of Bill A-634. Attached to this Affidavit as

Exhibit C is a true and correct copy of a resolution adopted by the Synod Council, declaring its support for the revision of the NJLAD to prohibit discrimination on the basis of sexual orientation.

9. The Evangelical Lutheran Church's condemnation of discrimination on the basis of sexual orientation was clearly expressed earlier this year in a resolution of the Church Council of the Evangelical Lutheran Church (the "Council"). A true and correct copy of the Council's resolution dated March 27-29, 1993 (the "Resolution") is attached to this Affidavit as Exhibit D. The Resolution "reaffirm[ed] that the historical position of the Evangelical Lutheran Church in America is . . . support for legislation, referendums, and policies to protect the civil rights of all persons, regardless of their sexual orientation, and to prohibit discrimination in housing, employment, and public services and accommodations." Exhibit D.

10. As support for the Resolution, the Council cited policy statements of two of the Evangelical Lutheran Church's predecessor bodies, each of which condemned in strong tones discrimination on the basis of sexual orientation. Specifically, the 1970 statement of the Lutheran Church entitled "Sex, Marriage, and Family" recognized that lesbians and gay men "are often the special and undeserving victims of prejudice and discrimination in law, law enforcement, cultural mores, and congregational life" and concluded that "[i]t is essential to see such persons as entitled to understanding and justice in church and community." Exhibit D. A 1980 statement of the American Lutheran Church entitled "Human Sexuality and Sexual Behavior" declared that Christians "need to take leadership roles in changing public opinion,

civil laws, and prevailing practices that deny justice and opportunity to any persons, homosexual or heterosexual" and urged concern for "laws that foster justice, mercy, equality of opportunity, and the protection of basic human rights." Exhibit D.

11. As a minister, I reject the notion put forth by BSA that homosexuals cannot constitute appropriate role models for young people. Sexual orientation is simply an irrelevant consideration in this regard.

12. As the statements in this Affidavit attest, the Lutheran religion does not believe that homosexuals are immoral or unclean.

/s/ The Rev. George Wayne Freyberger
Reverend George Wayne Freyberger

Sworn to before me this
3 day of January, 1994

/s/ Anita L. Leake
Notary Public

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

AFFIDAVIT OF REVEREND RICHARD GIFFEN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY)
) ss.
COUNTY OF UNION)

REVEREND RICHARD K. GIFFEN, being duly sworn, deposes and says:

1. I am Executive Presbyter of the Presbytery of Elizabeth. I reside in Middlesex county in the State of New Jersey. I make this Affidavit in support of plaintiff James Dale's motion for summary judgment. I have personal knowledge of the facts set forth herein.

2. I graduated from Muskingum College in Ohio and received my Master of Divinity, Master of Theology and Doctor of Ministry degrees from Pittsburgh Theological Seminary. I also received a Master of Education degree from the University of Pittsburgh. I served as pastor of four congregations before being appointed 12 years ago to my present position as the chief administrative officer of the Presbytery of Elizabeth. As Executive Presbyter of the Presbytery of Elizabeth, I am responsible for 51 New Jersey congregations with 21,000 members. Additionally, I preach on most Sundays to one of those 51 congregations.

3. BSA's discrimination against homosexuals is inconsistent with the well-established condemnation by the Presbyterian Church (U.S.A.) (the "Presbyterian Church"), and its predecessor bodies, the Presbyterian Church (U.S.) and the United Presbyterian Church in the U.S.A., of discrimination on the basis of sexual orientation. Specifically, the General Assembly, which is the national governing body of the Presbyterian Church, has repeatedly called upon Presbyterians to work for the elimination of discrimination against homosexuals. As early as 1977, and again in 1978, the 117th and 118th General Assemblies of the Presbyterian Church (U.S.), respectively, asserted "the need for the church to stand for the just treatment of homosexual persons in our society in regard to their civil liberties, equal rights and protection under the law from social and economic discrimination which is due all its citizens."

4. In 1979, the 119th General Assembly of the Presbyterian Church (U.S.) (the "119th General Assembly") proclaimed as follows:

> The Christian community can neither condone nor participate in the widespread contempt for homosexual persons that prevails in our general culture. Indeed, beyond this, it must do everything in its power to prevent society from continuing to hate, harass, and oppress them.

Elsewhere in the Statement, the 119th General Assembly affirmed that:

> Persons who manifest homosexual behavior must be treated with the profound respect and pastoral tenderness due all people of God. There can be no

> place within the Christian faith for the response to homosexual persons of mingled contempt, hatred, and fear that is called homophobia.

BSA's discrimination against homosexuals fails to accord such persons the respect recognized by the Presbyterian Church as "due all people of God."

5. In 1978, the 190th General Assembly of the United Presbyterian Church in the U.S.A. (the "190th General Assembly") called "on United Presbyterians to reject in their own lives, and to challenge in others, the sin of homophobia . . ."

6. The 190th General Assembly stated that "[t]here is no legal, social, or moral justification for denying homosexual persons access to the basic requirements of human social existence" and, even more significantly, proclaimed the following:

> Vigilance must be exercised to oppose federal, state, and local legislation that discriminates against persons on the basis of sexual orientation and to initiate and support federal, state, or local legislation that prohibits discrimination against persons on the basis of sexual orientation in employment, housing, and public accommodations.

To this end, the 190th General Assembly called "upon United Presbyterians to work for the passage of laws that prohibit discrimination in the areas of employment, housing, and public accommodations based on the sexual orientation of a person."

7. In 1991, numerous Presbyterian ministers wrote letters to New Jersey legislators supporting the amendment of

the Law Against Discrimination to prohibit discrimination on the basis of sexual orientation.

8. In 1992, the 204th General Assembly (the "204th General Assembly") of the Presbyterian Church, meeting in Wisconsin, passed a "Commissioner Resolution in Support of [Presbyterian Church] Policy as Reflected in the New Jersey Law Against Discrimination" (the "Resolution"). The Resolution responded to the action of the Orthodox Presbyterian Church, a denomination of only 12,000 members nationwide which separated from the Presbyterian Church in the 1930s, in bringing a lawsuit claiming that the New Jersey Law Against Discrimination, as amended to prohibit discrimination on the basis of sexual orientation, was unconstitutional and denied their right to discriminate against homosexuals. In the Resolution, the 204th General Assembly resolved to "declare its support for the New Jersey Law Against Discrimination, as amended" to prohibit discrimination on the basis of sexual orientation.

9. I concur with the recent statement of Reverend Dr. George R. Edwards that "God does not regard homosexuality as a sin any more than heterosexuality. Sin is lack of respect or love for God; it is lack of love or respect for other persons." (Reverend Dr. Edwards is Professor Emeritus of New Testament Theology at Louisville Presbyterian Theological Seminary, where he taught between 1958 and 1985, and a member of the Society of Biblical Literature). As a minister, I do not believe that homosexuality is a sin. Rather, I believe that sin comes from what individuals, whether heterosexual or homosexual, do with their sexuality. Thus, as a Presbyterian minister, I reject the notion that homosexuals are "immoral" or "unclean."

10. I further reject the suggestion of BSA that homosexuals cannot constitute appropriate role models for young people. I believe that the question of whether an individual is an appropriate role model for young people depends on whether that individual, in their words and their actions, teaches a lesson of love, responsibility, respect and decency, not whether that person happens to be heterosexual or homosexual.

11. The Presbyterian Church has been and continues to be a significant supporter of BSA on a national basis. It is my understanding, based upon the list of BSA chartering organizations in New Jersey produced to plaintiff by defendants during the discovery phase of this lawsuit, that over 180 BSA troops in New Jersey are sponsored by Presbyterian Church parishes. That support is founded on the Presbyterian Church's admiration of BSA's general commitment to values such as reverence, personal integrity, and tolerance. Those same values, however, are compromised by BSA's policy of discrimination against homosexuals.

/s/ Rev. Richard K. Giffen
Reverend Richard K. Giffen

Sworn to before me this
4th day of January, 1994

/s/ Maria B. Rodriguez
Notary Public

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

AFFIDAVIT OF BISHOP THOMAS GUMBLETON IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

BISHOP THOMAS GUMBLETON, being duly sworn, deposes and says:

1. I am Auxiliary Bishop of the Roman Catholic Diocese of Detroit. I reside in Wayne County in the State of Michigan. I make this affidavit in support of plaintiff James Dale's motion for summary judgment. I have personal knowledge of the facts set forth herein.

2. I am a graduate of Sacred Heart Seminary and have been Auxiliary Bishop of the Roman Catholic Diocese of Detroit since 1978. I also serve as pastor of an inner-city parish in Detroit and as Vicar General of the Archdiocese of Detroit.

3. As a youth, I was a member of Boy Scouts of America ("BSA") Troop #259, which was sponsored by Epiphany Church in Detroit. I was the first member of Troop #259 to achieve the status of Eagle Scout.

4. It is true that the Catholic Church in Rome presently views homosexual activity as immoral.* However, as recognized some ten years ago by the Washington State Catholic Conference, "prejudice against homosexuals is a greater infringement of the norm of Christian morality than is homosexual . . . activity." Statement of Washington State Catholic Conference, a true and correct copy of which is attached to this Affidavit as Exhibit A.

5. Catholics in the United States have repeatedly condemned the injustice and immorality of discrimination against individuals on the basis of their sexual orientation. In fact, a Gallup poll conducted in 1992 showed that U.S. Catholics overwhelmingly support civil rights for lesbians and gay men in the area of employment (78% support with a margin of error of plus or minus 4%). A true and correct copy of the 1992 Gallup Poll is attached to this Affidavit as Exhibit B. This finding is not surprising in light of the numerous instances in which Catholic leaders, including individual

* It is also true that the teachings of Rome regarding the morality of homosexual activity are not classified among the "infallible" teachings of the Church and thus, like the teachings of the Church in past centuries regarding, e.g., slavery and separation of church and state, they may one day be recognized as false. The importance of this fact, for present purposes, is that rejecting the current teachings of the Vatican regarding the morality of homosexual behavior does not disqualify one from being considered a Catholic in good standing.

bishops and state conferences of bishops, have condemned discrimination against homosexuals on the basis of their sexual orientation.

6. For example, as early as 1976, the National Conference of Catholic Bishops (the "National Conference") stated that "[h]omosexuals . . . should not suffer prejudice against their basic human rights. They have a right to respect, friendship and justice. They should have an active role in the Christian community." 1976 statement of the National Conference, a true and correct copy of which is attached to this Affidavit as Exhibit C. More recently, the National Conference called "on all Christian citizens of good will to confront their own fears about homosexuality and to curb the humor and discrimination that offend homosexual persons." 1991 report of the National Conference entitled "Human Sexuality: A Catholic Perspective for Education and Lifelong Learning," a true and correct copy of which is attached to this Affidavit as Exhibit D (the "Bishops' Report"), at 55.

7. In 1982 the Archbishop of Milwaukee supported the passage of the nation's first statewide gay rights bill in Wisconsin. Similarly, Catholic bishops have opposed ballot initiatives which would have legalized discrimination against homosexuals. Some fifteen years ago, bishops from the dioceses of Los Angeles, San Francisco and Oakland opposed an anti-gay legislative proposition in California and last year the Catholic bishops of Oregon and Colorado opposed the anti-gay referenda voted on in their respective states. Recently, the President of the National Conference of Catholic Bishops, Archbishop Daniel Pilarczyk of Cincinnati, issued a statement urging voters in his city to reject a ballot initiative that would have prohibited anti-discrimination

protection for homosexuals, noting with concern that "the proposed amendment would make it possible to discriminate freely against persons of homosexual orientation in such matters as housing, employment and public accommodation." Cardinal Roger M. Mahony, leader of the second-largest Catholic diocese in the United States, also voiced his opposition to discrimination on the basis of sexual orientation earlier this year when he stated his view that homosexuals should be allowed to enlist in the nation's armed forces.

8. Last year, I joined Bishop Walter Sullivan of Richmond, VA and retired Bishop Charles Buswell of Pueblo, Colorado, as well as thousands of other U.S. Catholics, in signing a statement in support of the civil rights of lesbians and gay men (the "Statement"). A true and correct copy of the Statement is attached to this Affidavit as Exhibit E. I did so because, as a minister of God's Word and as an agent of the Roman Catholic Church, I believe that discrimination against homosexuals on the basis of their sexual orientation is immoral and contrary to the command of Jesus that we are to love our neighbors as ourselves (Mk. 12:31). Discrimination such as that represented by BSA's exclusion of homosexuals from membership and from leadership positions is the very type of discrimination I had in mind when I signed the Statement and voiced my opposition to discrimination against homosexuals.

9. In 1986, Joseph Cardinal Ratzinger asserted that "[i]t is deplorable that homosexual persons have been and are the object of violent malice in speech and action. Such treatment deserves condemnation . . . wherever it occurs . . . . It . . . endangers the most fundamental principles of a healthy society." A copy of Cardinal Ratzinger's 1986 letter was

attached to the certification of Father Hummel submitted by BSA in support of its cross-motion for summary judgment. Unfortunately, discriminatory policies such as BSA's exclusion of homosexuals can only serve to reinforce the prejudice and ill will that are the source of the violence condemned by Cardinal Ratzinger.

10. As an Eagle Scout myself, I share the commitment of the Roman Catholic Church to BSA and to the values represented by BSA. From my own experiences as a Scout, I have always believed those values to include duty to God and reverence. Those same values are compromised, however, by BSA's policy of discrimination against homosexuals. During my years of involvement in BSA, I never understood sexual orientation to be relevant to the mission or values of Scouting.

11. As a Roman Catholic Bishop, I believe that a homosexual orientation is not immoral or unclean. I further believe that one can be homosexual in orientation and at the same time be a good Catholic. These beliefs comport with the teachings of the Bishops' Report. In the Bishops' Report, the National Conference clearly stated that a "[homosexual] orientation . . . is not sinful." Ex. D at 55. The Washington State Catholic Conference built on this notion by stating that "[t]he Church does not morally condemn homosexual orientation . . . . nor are homosexual persons to be blamed for not changing their orientation." Ex. A.

12. I reject the notion suggested by BSA that homosexuals cannot be appropriate role models for young people. I believe that appropriate role models for young people are persons who exhibit values such as reverence, commitment, honesty and fairness. As homosexuals are just

as likely as heterosexuals to display such values, homosexuals are just as likely as heterosexuals to be appropriate role models for young people, and sexual orientation is an irrelevant consideration in such a determination.

/s/ Thomas J. Gumbleton
Bishop Thomas Gumbleton

Sworn to before me this 6th day
of January, 1994

/s/ Louise A. Cowan
Notary Public

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

AFFIDAVIT OF REVEREND
WILLIAM A. HANSON

STATE OF NEW JERSEY)
) ss.
COUNTY OF MONMOUTH)

REVEREND WILLIAM A. HANSON, being duly sworn, deposes and says:

1. I reside in Monmouth County in the State of New Jersey. I make this affidavit in support of the summary judgment motion of plaintiff James Dale. I have personal knowledge of all of the facts set forth herein.

2. I am pastor of the King of King's Lutheran Church, located in Middletown, New Jersey. I have held this position for 27 years. Prior to my affiliation with King of King's Lutheran Church, I was the assistant pastor of First Lutheran Church, located in East Orange, New Jersey, for two years. I obtained my theological training at Northwestern Lutheran Theological Seminary and was ordained in 1965.

3. In addition to being pastor of King of King's Lutheran Church, I hold several community and church-related positions: I sit on the Alcohol and Drug Task Force of the New Jersey Synod of the Evangelical Lutheran Church; I am the Vice Chairman of the Monmouth County Board of

Alcohol and Drug Abuse Services, and the Chairman of the Board's Youth Committee; and I serve as Secretary of the Institutional Review Board of Riverview Hospital.

4. The Dick family -- James Dale, his brother Robert, and his parents -- moved to Port Monmouth, New Jersey in 1976, and joined my congregation at that time. The family has always been active in the church community, attending services and church programs regularly.

5. From about the age of 5 through his high school years, James Dale spent a significant amount of time in church-related activities. He sang in the Cherub Choir, attended Sunday School, was an active member of our church youth group, and, when he grew older, taught Vacation Bible School and Sunday School to children in the congregation. For several years, James Dale was also a member of a Scout troop chartered by our church, but when the troop folded because of lack of adult leadership, James joined a different troop.

6. Over the years, I came to know James Dale quite well. I respected his commitment to the Church, the Scouting program, and his community. I valued his sincerity, his caring nature, and his sense of responsibility. My high opinion of James Dale's character can be summarized quite simply: he is a young man with whom I would be comfortable leaving my grandchildren. I know that my grandchildren would learn many positive lessons from James Dale if, for example, they went on a camping trip together.

7. I learned that James Dale is gay in approximately 1992, when I read an article in a local newspaper about this lawsuit and about his expulsion from Scouting on the basis of

his sexual orientation. Although I did not know that James was gay before he left Monmouth County to attend college at Rutgers University, learning of his sexual orientation did not in any way change my opinion of him.

8. I became aware that Boy Scouts of America has a policy excluding homosexuals from youth and adult membership in Scouting when I learned of the lawsuit in which James Dale is involved. I did not know of this policy during the period when King of King's Lutheran Church chartered a Scout troop. Had I known of the policy, I would have discouraged the leaders of the church from affiliating themselves or our church with Scouting.

9. I have been informed by James Dale's attorneys that Boy Scouts of America contends that homosexuality is inconsistent with the requirement in the Scout Oath that a Scout be "morally straight." I strongly disagree with this interpretation of the term "morally straight," and do not believe that sexual orientation is relevant to a definition of what it means to be morally straight. I have never suggested to my congregation that homosexuals are not morally straight.

10. There was a time in history when left-handed people were thought to be of the Devil. Today we know that they can be as morally straight as anyone else, and that left handedness has nothing to do with morality. James Dale has conducted himself as the Scouts taught him to, and has grown to be a responsible leader and a young man of integrity. If James Dale did not admit his homosexuality, he would not be being honest with himself or with society; and that kind of dishonesty would <u>not</u> be "morally straight."

11. I have been informed by James Dale's attorneys that Boy Scouts of America claims that homosexuality is inconsistent with the requirement in the Scout Law that a Scout be "clean" in body and mind and in thought, word and deed. I strongly disagree with this interpretation of the term "clean," and do not believe that sexual orientation is relevant to a definition of what it means to be clean. I have never suggested to my congregation that homosexuals are not clean, either in a literal sense, or in the context of cleanliness of spirit.

12. I have also been informed by James Dale's attorneys that Boy Scouts of America claims that James Dale cannot be a good role model for Scouts because he is gay. I strongly disagree with this claim. I do not believe that sexual orientation is relevant to whether an adult is a good role model. Had I known that James Dale was gay during the period when he was growing up, I would nevertheless have wanted him to be just as actively involved in church programs as he was. I would still have considered him an ideal role model and would have encouraged him to lead church youth groups, and to teach Sunday School and Vacation Bible School. In short, my admiration for James Dale, and my willingness to entrust him with the care and responsibility of the children in my congregation during his teenage years, would not have been affected in any way had I known that he is gay.

13. Were James Dale to indicate to me that he is interested in working with church youth groups or teaching Sunday School today, I would not hesitate to encourage him to do so. It strikes me as sad and ironic that -- at a time when it is increasingly difficult in our society to find young adults

willing to devote their time and energy to serving their communities and helping others -- a young man who would be welcome as a leader in his church is not similarly welcome in the Scouting organization.

/s/ Rev. William A. Hanson
Rev. William A. Hanson

Sworn to before me this
31st of December, 1993

/s/ Marion Theisen
Notary Public

Selected Exhibit to the Certification of Patrick G. Marette, Attorney for Respondent

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 92-5339

THE PRESBYTERY OF NEW JERSEY OF THE ORTHODOX PRESBYTERIAN CHURCH, a New Jersey Corporation, CALVARY ORTHODOX PRESBYTERIAN CHURCH OF WILDWOOD, a New Jersey Corporation, and REV. DAVID B. CUMMINGS, Plaintiffs,

v.

JAMES FLORIO GOVERNOR OF NEW JERSEY in his official capacity; ROBERT J. DEL TUFO, ATTORNEY GENERAL OF NEW JERSEY, in his official capacity; ROBERT J. DEL TUFO, MARILYN FLANZBAUM, ANGEL ROMAN, BETTY CARSON, OLGA L. VAZQUEZ-CLOUGH, FELTON LINGO, SR., REINHOLD W. SMYCZEK and CASEY TAM, all in their official capacities as members of the DIVISION ON CIVIL RIGHTS, and C. GREGORY STEWART, in his official capacity as Executive Director of the DIVISION ON CIVIL RIGHTS, Defendants.

On Appeal From The United State District Court For The District of New Jersey

No. 92-1641 (WGB)

Civil Action
Hon. William G. Bassler

BRIEF OF AMICI CURIAE JAMES E. ANDREWS AS STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A) GENERAL ASSEMBLY, THE DIOCESAN COUNCIL OF THE EPISCOPAL DIOCESE OF NEWARK, RIGHT REV. JOHN S. SPONG, BISHOP OF THE EPISCOPAL DIOCESE OF NEWARK, THE LUTHERAN OFFICE OF GOVERNMENTAL MINISTRY IN NEW JERSEY, AND THE NEW JERSEY-WEST HUDSON VALLEY COUNCIL OF THE UNION OF AMERICAN HEBREW CONGREGATION

DAVID L. GROVE
MONTGOMERY, MCCRACKEN, WALKER & RHOADS
THREE PARKWAY, 20TH FLOOR
PHILADELPHIA, PENNSYLVANIA 19102
(215) 665-7200

ERIC J. GRANINGER
PRESBYTERIAN CHURCH (U.S.A)
ASSOCIATE GENERAL COUNSEL
100 WITHERSPOON STREET
LOUISVILLE, KENTUCKY 40202
(502) 569-5369

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF JURISDICTION
STATEMENT OF THE ISSUES
STATEMENT OF THE CASE
STATEMENT OF THE FACTS
STATEMENT OF RELATED PROCEEDINGS
STATEMENT OF THE STANDARD OF REVIEW..... iii

STATEMENTS OF INTEREST OF THE AMICI CURIAE 1

ARGUMENT 3

I. MAJOR RELIGIOUS ORGANIZATIONS SUPPORT BASIC CIVIL LIBERTIES FOR GAY AND LESBIAN PEOPLE 3

II. ORTHODOX PRESBYTERIAN CHURCH'S BROADBASED ATTACK ON THE NEW JERSEY LAW AGAINST DISCRIMINATION INVITES AN IMPERMISSIBLE ESTABLISHMENT OF RELIGION..... 7

CONCLUSION 10

CERTIFICATE OF BAR MEMBERSHIP 11

CERTIFICATE OF SERVICES 12

STATEMENT OF JURISDICTION

STATEMENT OF THE ISSUES

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

STATEMENT OF RELATED PROCEEDINGS

STATEMENT OF THE STANDARD OF REVIEW

*For all of the above, amici curiae adopt the statements as set out in Appellees' brief.

STATEMENTS OF INTEREST OF THE *AMICI CURIAE*

James E. Andrews, as stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.)

James E. Andrews, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 3,000,000 active members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all

disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

Since 1978, General Assemblies of the Presbyterian Church have stood firmly in support of equal rights for homosexual persons under the law. These statements include a call for civil rights in housing, employment, and public accommodations.

The Diocesan Council of the Episcopal Diocese of Newark

The Diocesan Council of the Episcopal Diocese of Newark is a representative body of clergy and lay people from throughout the Diocese of Newark. The Diocesan Council is composed of members elected by church convocations, members elected by the Annual Convention of the Diocese, and members appointed by the Bishop. The Diocesan Council performs the ongoing business of the church between meetings of the Annual Convention.

Right Rev. John S. Spong, Bishop of the Episcopal Diocese of Newark

The Right Reverend John S. Spong is the Bishop of the Diocese of Newark, within the Episcopal Church of the United States, in affiliation with the worldwide Anglican communion. As bishop, he is the spiritual and governing ecclesiastical leader for some 30,000 confirmed communicants and approximately 275 clergy. Within his jurisdiction are 130 congregations, spread across the upper seven counties of the State of New Jersey.

Bishop Spong and the leadership of the Diocese of Newark do not claim to represent all Episcopalians, either

within the diocese or across the national church. There is, however, an acknowledged strong leadership within this Diocese and by its Bishop to honor human rights on all levels for all people as a basic tenet of the Christian faith.

The Lutheran Office of Governmental Ministry in New Jersey

The Lutheran Office of Governmental Ministry in New Jersey was established in 1985 to advocate justice for the poor and powerless. It is a partnership of the New Jersey Synod-Evangelical Lutheran Church in America, the New Jersey Council of Churches, and Lutheran Social Ministries in New Jersey.

The Policy Board is responsible for the policy decisions of the Lutheran Office of Governmental Ministry in New Jersey. Policy positions are developed for interpretation to public officials, Lutheran pastors and lay members and institutions of the Synod, after study of Evangelical Lutheran Church in America (ELCA) social statements, statements of the predecessor church bodies, statements of the New Jersey Council of Churches, and specifics of public policy issues impacting the poor and the powerless. The Policy Board is composed of nine members. Seven members are appointed by the Bishop of the New Jersey Synod-ELCA and approved by the New Jersey Synod Council. In addition, one person is appointed by each of the following agencies: the New Jersey Council of Churches and Lutheran Social Ministries of New Jersey. The Policy Board does not speak for its member denominations or organizations.

The New Jersey-West Hudson Valley Council of the Union of American Hebrew Congregations

The New Jersey-West Hudson Valley Council of the Union of American Hebrew Congregations is the representative office of the national Union of American Hebrew Congregations in New Jersey. The Union of American Hebrew Congregations is a religious and educational organization dedicated to the principles of Reform Judaism. Reform Judaism has consistently proclaimed that just as all people are equally the children of God, so too do we all deserve full protection of and equal treatment under the law, regardless of race, gender, religion or sexual preference. Towards this end, the New Jersey-West Hudson Valley Council has consistently supported both equal rights for gay people and strong protection of religious freedom and separation of church and state. The regional office serves 46 member synagogues in the state of New Jersey with a combined estimated membership of 50,000 people.

ARGUMENT

I. MAJOR RELIGIOUS ORGANIZATIONS SUPPORT BASIC CIVIL LIBERTIES FOR GAY AND LESBIAN PEOPLE

Governing bodies of the Orthodox Presbyterian Church have brought the immediate action challenging the amendments to New Jersey's Law Against Discrimination which added affectional or sexual orientation to the state statute. In light of this challenge by Orthodox Presbyterian Church, it is vital that this Court know of the firm support of such anti-discrimination laws by major United States religious organizations and their affiliates.

Presbyterian

Since 1978, predecessor bodies of the Presbyterian Church (U.S.A.) have called upon their members and civil government to ensure the civil liberties and equal rights of homosexual persons:

> There is no legal, social, or moral justification for denying homosexual persons access to the basic requirements of human social existence . ....
>
> Vigilance must be exercised to oppose federal, state, and local legislation that discriminates against persons on the basis of sexual orientation and to initiate and support federal, state, or local legislation that prohibits discrimination against persons on the basis of sexual orientation in employment, housing, and public accommodations.

The Church and Homosexuality. Minutes of the 190th General Assembly, United Presbyterian Church, U.S.A. at 265 (1978).

> The 117th and 118th General Assemblies asserted "the need for the church to stand for just treatment of homosexual persons in our society in regard to their civil liberties, equal rights and protection under the law from social and economic discrimination which is due all its citizens."

Homosexuality and the Church: A Position Paper. Minutes of the 119th General Assembly. Presbyterian Church in the United States at 208 (1979).

Episcopalian

General Conventions of The Episcopal Church have endorsed equal rights for homosexual persons since 1976. The Diocese of Newark has reaffirmed that call in its specific support of the amendments to the New Jersey Law Against Discrimination:

> [I]t is the sense of this General Convention that homosexual persons are children of God who have a full and equal claim with all other persons upon the love, acceptance, and pastoral concern and care of the Church.

Homosexuals are the Children of God. Action of the Episcopal Church General Convention (1976).

> [T]his General Convention expresses its conviction that homosexual persons are entitled to equal protection of the laws with all other citizens, and calls upon our society to see that such protection is provided in actuality.

Homosexuals-Equal Protection. Action of the Episcopal Church General Convention (1976).

> That the 67th General Convention reaffirms the actions taken by the General Conventions of 1976 and 1979 affirming that homosexual persons are children of God and are entitled to full civil rights.

Civil Rights of Homosexuals. Action of the Episcopal Church General Convention (1982).

> RESOLVED, that to maintain fidelity and faith with its mission, the Episcopal Diocese of Newark hereby

> declares that it is a violation of church policy to discriminate in hiring, firing, conditions of employment and salary, deployment, membership and admission, on the basis of affectional and sexual orientation, and calls upon all congregations and members of the diocese to continue, in their daily lives, to support the human rights of all God's people in understanding, public witness, and practice ....

Anti-Discrimination Bill. Resolution III. Journal of the 117th Convention of the Diocese of Newark Protestant Episcopal Church (1991).

Lutheran

In 1986, the New Jersey Synod-Lutheran Church in America Convention specifically endorsed the inclusion of sexual orientation in the New Jersey Law Against Discrimination. Although the present Evangelical Lutheran Church in America (formed in 1988) has not yet established its denominational policy on civil liberties for homosexual persons, two of its predecessor denominations stood in favor of legal protections:

> Scientific research has not been able to provide conclusive evidence regarding the causes of homosexuality, nevertheless, homosexuality is viewed biblically as a departure from the heterosexual structure of God's creation. Persons who engage in homosexual behavior are sinners only as are all other persons-alienated from God and neighbor. However, they are often the special and undeserving victims of prejudice and discrimination in law, law enforcement, cultural mores and congregational life. In relation to

this area of concern the sexual behavior of freely consenting adults in private is not an appropriate subject for legislation or police action. It is essential to see such persons as entitled to understanding and justice in church and community.

Sex, Marriage and Family. 5th Lutheran Church In America Convention, p.4, paragraph 1 (1970).

Truth, mercy, and justice should impel members of congregations of the American Lutheran Church to review their attitudes, words, and actions regarding homosexuality. Christians need to be more understanding and more sensitive to life as experienced by those who are homosexual. They need to take leadership roles in changing public opinion, civil laws, and prevailing practices that deny justice and opportunity to any persons, homosexual or heterosexual. We all need recognition and acceptance as human beings known to and loved by God.

Human Sexuality and Sexual Behavior. 10th American Lutheran Church Convention, p. 8, paragraphs 3, 4,5, and 6; and p. 9, paragraph 1. (1980).

Reform Judaism

Since 1977, the Union of American Hebrew Congregations (UAHC) has urged its membership to oppose discrimination against homosexuals in all areas, including employment and housing:

WHEREAS the UAHC has consistently supported civil rights and civil liberties for all persons, and

WHEREAS the Constitution guarantees civil rights to all individuals,

BE IT, THEREFORE, RESOLVED that homosexual persons are entitled to equal protection under the law. We oppose discrimination against homosexuals in areas of opportunity, including employment and housing. We call upon our society to see that such protection is provided in actuality.

BE IT FURTHER RESOLVED that we affirm our belief that private sexual acts between consenting adults are not the proper province of government and law enforcement agencies.

BE IT FURTHER RESOLVED that we urge congregations to conduct appropriate education programming for youth and adults so as to provide greater understanding of the relation of Jewish values to the range of human sexuality.

Human Rights of Homosexuals. Resolution. Biennial Convention of the General Assembly of the Union of American Hebrew Congregations (1977).

II. ORTHODOX PRESBYTERIAN CHURCH'S BROADBASED ATTACK ON THE NEW JERSEY LAW AGAINST DISCRIMINATION INVITES AN IMPERMISSIBLE ESTABLISHMENT OF RELIGION

The Orthodox Presbyterian Church (OPC) broadly and vigorously attempts to enjoin the enforcement of the new amendments to the New Jersey Law Against Discrimination prohibiting discrimination on the basis of affectional or

sexual orientation. In so doing, OPC seeks to breach the wall of separation between church and state and apply its own moral precepts squarely within the realm of civil government.

The District Court clearly and properly ruled the amendments regarding sexual orientation do not apply to OPC when it acts as an employer, when it provides housing and accommodations, or when it engages in speech. As determined by the District Court; the statute itself exempts religious organizations; the history of its enforcement exempts religious organizations; and, the future plans for enforcement exempt religious organizations. These are correct and proper rulings guaranteeing OPC its rights of free exercise.

The District Court could not have been more clear in declaring OPC's protected rights of free exercise. In employment, the Court noted "it is lawful for a religious association or organization in this state to use the tenants [sic]* of its religion in establishing and utilizing criteria for hiring an employee ...." *D. Ct. Op. at 14 (June 19, 1992).* As determined by the District Court, the statute makes the religious exemption explicit:

> [I]n fact, not only does [the statute] not preclude a religious organization from hiring or firing based upon

* Throughout the trial court transcript, the term "tenets" is misspelled as "tenents." Subsequent quotations of the transcript in this brief will use the corrected spelling.

> its own membership, but it goes, in my opinion, beyond and specifically permits a religious organization to make employment decisions based upon the tenets of its own religion regardless of whether or not the effected [sic] person is a member of that religious profession.

Id. at 7.

Regarding OPC's real estate, the Court quoted New Jersey law:

> [Nothing herein contained shall be construed to bar any religious or denominational institution or organization or any organization operated for charitable or educational purposes which is operated, supervised or controlled by or in connection with a religious organization in the sale, lease, or rental of real property from limiting admission to or giving preference to persons of the same religion or denomination, or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

Id. at 6.

In regards to accommodations, Orthodox Presbyterian Church is once again exempt from the New Jersey amendments: "[T]here is a clear conclusion that this statute is not intended to apply to exercise of religion and religious houses of worship." *Id. at 7.* Further, as found by the Court, "the language of the statute and prior case law evidenced no intention of the Legislature to extend the law against discrimination to religious exercises whether in church or in the synagogue, or a park or auditorium ...." *Id. at 13.*

In regards to speech, OPC declared the New Jersey amendments would infringe on its rights to condemn homosexuals and homosexual activity. As with its prior rulings, the District Court pointed out OPC was incorrect: "The concern that the civil rights or the law against discrimination reaches religious exercises has no basis in the statute itself or in the history of the statute." *Id. at 5.* "Nothing in the statute in any way precludes the preaching of the moral code of any particular religious organization...," *id. at 7*, "or in any way to inhibit public statements disapproving of certain sexual morays [sic]." *Id. at 13.*

> [T]he Division of Civil Rights has not in the past prosecuted and has no intention to prosecute, essentially, exempt religious organizations for sincerely held religious beliefs or practices or speech consistent with that belief or for a refusal to engage in certain speech or for following their religious tenets.

Id. at 10.

Undaunted by these clear rulings throughout the District Court's opinion, Orthodox Presbyterian Church persists in its singleminded attack on the amendments. As noted above, in so doing, OPC overreaches and seeks to enforce its own sincerely held moral orthodoxy on the civil government of New Jersey and the citizens of the state.

The first amendment to the United States Constitution, as applied to the states through the fourteenth amendment, ensures both the free exercise of religion and that civil government shall not establish religion. *U.S. Const., Amend I.* As detailed above, the District Court properly declared OPC's guaranteed free exercise throughout its opinion.

Nevertheless, OPC pursues this action in its quest to have the new amendments entirely nullified. The first amendment establishment clause prohibits such a result.

According to the United States Supreme Court's decision in *Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)*, the first amendment's establishment clause fundamentally proscribes "an excessive government entanglement with religion." If Orthodox Presbyterian Church's particular religious views were applied to enjoin the enforcement of the New Jersey amendments, the excessive entanglement cautioned by the Supreme Court would result.

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views.

United States v. Ballard, 322 U.S. 78, 87 (1944).

Both the State of New Jersey and the District Court carefully adhered to these guiding principles. Both the State of New Jersey and the District Court recognized and respected OPC's constitutional rights of free exercise--its right as a religious institution to discriminate in employment, housing, accommodations, and speech on the basis of its sincerely held religious beliefs. Both the State or New Jersey and the District Court declined, however, to establish Orthodox Presbyterian Church's religious views as the civil law of New Jersey. In so doing, they properly avoided

excessive entanglement between government and religion and secured the widest possible toleration of conflicting views.

There is no doubt that the line between the first amendment's free exercise clause and the establishment clause is a narrow one. Yet, in this case, it was carefully traversed by both New Jersey and the District Court. The essence of this narrow but carefully drawn constitutional line was simply stated by the District Court:

> [I]t is this Court's reading of the law against discrimination that the purpose of the statute is to accommodate the legislature's decision to protect certain protected categories of individuals from discrimination and, at the same time, to accommodate...and respect the religious tenets of religious organizations.

D. Ct. Op. at 4-5 (emphasis added).

The District Court's judgment carefully and scrupulously preserves all of the constitutional free exercise rights to which Orthodox Presbyterian Church is due as a religious organization. To provide even more, as urged by OPC, would violate the first amendment establishment clause. Predating both the United States Constitution and its Bill of Rights, amicus Presbyterian Church has stood firm by this guiding principle: "We ask no ecclesiastical establishments for ourselves; neither can we approve of them when granted to others." *Hanover Presbytery's Memorial to the Virginia Legislature (Oct. 7, 1776).* Today, over 200 years later, this basic principle remains true.

CONCLUSION

For the foregoing reasons, *amici curiae* urge this Honorable Court to affirm the judgment of the District Court.

Respectfully submitted,

By: /s/ David L. Grove
DAVID L. GROVE
MONTGOMERY, MCCRACKEN,
WALKER & RHOADS
THREE PARKWAY, 20TH FLOOR
PHILADELPHIA, PENNSYLVANIA
19102
(215) 665-7200

/s/ Eric J. Graninger
ERIC J GRANINGER
PRESBYTERIAN CHURCH (U.S.A.)
ASSOCIATE GENERAL COUNSEL
100 WITHERSPOON STREET
LOUISVILLE, KENTUCKY 40202
(502) 569-5369

Counsel for Religious
Amici Curiae

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

Civil Action No. Mon C 330-92

JAMES DALE,

Plaintiff,

v.

THE BOY SCOUTS OF AMERICA
and THE MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,

Defendants.

AFFIDAVIT OF RABBI ALEXANDER SCHINDLER IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

RABBI ALEXANDER SCHINDLER, being duly sworn, deposes and says:

1. I reside in Fairfield County in the State of Connecticut. I submit this affidavit in support of plaintiff James Dale's motion for summary judgment. I have personal knowledge of the facts set forth herein.

2. Since 1973, I have been President of the Union of American Hebrew Congregations (the "UAHC"). The UAHC is the governing body of Reform Judaism, North America's largest Jewish body. As UAHC President, I head the synagogue movement of Reform Judaism in the United States and Canada, composed of 1.3 million persons in 860 synagogues.

3. I was born in Germany in 1925 and fled the Nazis with my family when I was 12, settling in the United States. I earned a Purple Heart and a Bronze Star for my service as a ski-trooper in World War II. Thereafter, I graduated from the City College of New York before studying for the rabbinate at Hebrew Union College, where I was ordained. In addition to my service as UAHC President over the past 20 years, I served as chairperson of the Conference of Presidents of Major Jewish Organizations from 1976 to 1978. Additionally, I am a vice president of the World Jewish Congress, a member of the Governing Board of the Jewish Agency, secretary of the Joint Distribution Committee and a vice president of the Memorial Foundation for Jewish Culture. I have received honorary doctorates from several American colleges and universities and in 1978, I was awarded the Bublik prize of the Hebrew University, an honor bestowed earlier on President Harry Truman and Prime Minister David Ben Gurion, among others.

4. Under the teachings of Reform Judaism, homosexuality is not a sin and a Reform Jew should not conclude that homosexuals are immoral or unclean. Reform Judaism believes that God values loving, committed relationships, regardless of the sexual or affectional orientation of those involved.

5. Reform Jews are aware of the costs to individuals, families and society of the oppression of those who differ from society's majority. In part for this reason – and in part in accordance with the teaching of our faith that all human beings are created "betselem elohim" (in the divine image) – numerous bodies of Reform Judaism have strongly condemned discrimination on the basis of sexual or affectional orientation – including the policy of Boy Scouts of America ("BSA") of excluding homosexuals from membership and leadership positions.

6. On April 9, 1992, the Executive Board of the Central Conference of American Rabbis (the "Central Conference Board") – citing the inconsistency between BSA's policy of excluding homosexuals and the UAHC's well-established support for "civil rights for all, regardless of sexual orientation" – called upon BSA "to open its membership and leadership to all men and boys without regard to their sexual orientation." The Central Conference Board further resolved to "begin discussion with the Boy Scouts on this matter." A true and correct copy of the April 9, 1992 resolution of the Central Conference Board is attached to this Affidavit as Exhibit A.

7. In the same spirit, the Executive Board of the National Federation of Temple Youth (the "NFTY") – the largest youth organization of Reform Judaism – called upon "the Boy Scouts of America and all other organizations affiliated with the Boy Scouts which have the same policy on homosexuals, to open [their] membership and leadership to all men, women, and boys without regard to their sexual orientation." A true and correct copy of the statement of

NFTY's Executive Board is attached to this Affidavit as Exhibit B. Indeed, to demonstrate the gravity of its objections to BSA's discriminatory policy, the Executive Board further resolved "that NFTY encourage[s] all its members to divest from the Boy Scouts of America and all other organizations affiliated with the Boy Scouts which have the same policy on homosexuals, financially and to withdraw their membership from the Boy Scouts and all other organizations affiliated with the Boy Scouts which have the same policy on homosexuals, until basic civil rights are extended to include homosexuals." Ex. B. In support of its dramatic action, the Executive Board cited the inconsistency between the policy of excluding homosexuals from Scouting and the firmly established support of the UAHC and the NFTY for "civil rights for all, regardless of sexual orientation." Id.

8. In 1992, I conveyed my own deeply-held objections to the BSA policy of excluding homosexuals from membership and leadership positions in a letter to Mr. Richard Leet, president of BSA. A true and correct copy of my letter to Mr. Leet is attached to this Affidavit as Exhibit C. In my letter, I praised the Scouts' emphasis on what are often referred to as "family values" as being "necessary components of a strong, healthy society," but registered my firm disagreement with the view that such values exclude persons who are homosexual. Ex. C.

9. In my letter to Mr. Leet, I also underscored the conflict between BSA's policy of discrimination and the UAHC's "strongly held and public position in support of human rights, including the rights of lesbian and gay men,

and specifically in support of full inclusion of lesbian and gay Jews in all aspects of synagogue life." Ex. C (emphasis added). I concluded by expressing "my hope [that] the Boy Scouts of America will reconsider its position." Id.

10. As I mentioned in my letter to Mr. Leet, I do not believe that BSA's policy of discrimination can be considered in a vacuum. Beyond my deeply-held moral objections to a bigoted and discriminatory policy, I am further concerned by the effects which flow from such a policy. As I stated in my letter, "[w]e Jews are too aware that the denial of basic human dignity can lead to a denial of civil rights and violence based on bigotry. We are aware of the prevalence of anti-gay violence in our society and the percentage of this violence which is perpetrated by adolescents." Ex. C. My letter expressed my hope that BSA might "play a leadership role in fostering respect for the basic human dignity of all." Id. This is not possible as long as the policy of excluding homosexuals from membership and leadership positions stands.

11. Reform Judaism's condemnation of the kind of discrimination represented by BSA's policy of excluding homosexuals is not new. In 1977, the UAHC General Assembly called for an end to discrimination against homosexuals, and in 1987 the same body called for the full inclusion of gay and lesbian Jews in all aspects of synagogue life. A true and correct copy of the 1977 resolution of the UAHC General Assembly is attached to this Affidavit as Exhibit D and a true and correct copy of the 1987 resolution of the UAHC General Assembly is attached to this Affidavit as Exhibit E. The UAHC General Assembly urged

congregations and affiliates to "encourage lesbian and gay Jews to share and participate in the worship, general congregational life, employment, and leadership of all synagogues; implement programs supportive of Jewish lesbians and gays; and, continue to develop educational programs in the synagogue and the community which promote understanding and respect for lesbians and gays." Ex. H (below).

12. In 1986, the American Jewish Committee Board of Governors declared its opposition to "discrimination based on sexual orientation in employment, housing, education and public accommodation." A true and correct copy of the 1986 Statement of the American Jewish Committee Board of Governors is attached to this Affidavit as Exhibit F.

13. In 1990, the Central Conference of American Rabbis, recognizing that "[a]ll Jews are religiously equal regardless of sexual orientation," adopted a report recommending that "all rabbis, regardless of sexual orientation, be accorded the opportunity to fulfill the sacred vocation which they have chosen." A true and correct copy of the 1990 Report adopted by the Central Conference of American Rabbis is attached to this Affidavit as Exhibit G. As Reform Jews, we refuse to discriminate on the basis of sexual orientation in accepting those who are otherwise qualified to occupy this most sacred position of spiritual leadership. As Reform Jews, we cannot accept a policy such as BSA's which shuts out many who might be exemplary leaders for our young people.

14. On November 1, 1991, the National Association of Temple Educators (the "NATE") unanimously adopted a

resolution which "[w]elcome[d] openly gay and lesbian educators to serve in positions of leadership in NATE" and "[s]upport[ed] the rights of all individuals within [its] profession to equal consideration and equal opportunities regardless of sexual orientation." A true and correct copy of the November 1, 1991 resolution of the National Association of Temple Educators is attached to this Affidavit as Exhibit H.

15. At its 38th Biennial Assembly in 1991, the National Federation of Temple Sisterhoods, citing the teaching of our faith that all human beings are created "betselem elohim" (in the divine image), called on member Sisterhoods to:

a. Support legislation and regulations on the state and federal levels which provide full opportunity and civil protection to gay men and lesbian women.

b. Advocate the full integration of gay and lesbian Jews within our congregations and communities.

c. Accept gay and lesbian individuals and families into congregations and affirm their right to affiliate as individuals or as families with all the privileges thereof.

d. Educate their members that commitment to human rights requires that gay and lesbian Jews have the opportunities to fulfill their aspirations to serve as rabbis, cantors and other professionals in our synagogues.

e. Urge their religious schools to sensitize our youth to the diversity of families and life styles.

A true and correct copy of the 1991 resolution of the National Federation of Temple Sisterhoods is attached to this Affidavit as Exhibit I.

16. As these statements reflect, Reform Judaism has long recognized the importance of ending discrimination against people on the basis of their sexual or affectional orientation. Our religion embraces all its members – including gay men and lesbian women – and encourages interested and committed members to undertake leadership roles. Nothing in our religion supports BSA's claim that gay men cannot be appropriate role models for youth.

17. The UAHC has also been active in the diverse coalition pressing for the extension of federal anti-discrimination legislation to encompass discrimination on the basis of affectional or sexual orientation. Toward this end, I have joined other prominent national figures, including other religious leaders, in signing a letter requesting endorsement of a bill introduced in the United States Congress which seeks to do just that. Federal anti-discrimination legislation is needed so that all of our nation's citizens, no matter which state they call home, can enjoy the security now enjoyed by citizens of New Jersey, knowing that if they work hard and play by the rules, they cannot legally be subjected to discrimination on the basis of their affectional or sexual orientation by employers or landlords or in public accommodations. New Jersey citizens enjoy that security because the state legislature and the Governor listened to the will of the people of this State – including the UAHC's New Jersey Council (representing 45 Reform Jewish congregations with over

20,000 members), the Jewish Family Service of Northern Middlesex County and the New Jersey Regional Office of the Anti-Defamation League of B'nai B'rith – and amended the New Jersey Law Against Discrimination to include sexual and affectional orientation.

/s/ Alexander Schindler
Rabbi Alexander Schindler

Sworn to before me this 4th day
of January, 1994

/s/ Rosaly Lofaso
Notary Public

Selected Exhibits to Affidavit of Rabbi Alexander Schindler

ADOPTED BY THE EXECUTIVE BOARD OF THE CENTRAL CONFERENCE OF AMERICAN RABBIS
April 9, 1992

WHEREAS, the Boy Scouts of America has taken a position that excludes gay *scouts and scout leaders, and*

WHEREAS, the Central Conference of American Rabbis passed a resolution in 1990, that expresses the full acceptance of our gay and lesbian colleagues, and

WHEREAS, the Union of American Hebrew Congregations, in more than one resolution, has promoted civil rights for all, regardless of sexual orientation;

THEREFORE BE IT RESOLVED, that the Central Conference of American Rabbis call upon the Boy Scouts of America to open its membership and leadership to all men and boys without regard to their sexual orientation, and that the CCAR begin discussion with the Boy Scouts on this matter.

Resolution on the Boy Scouts of America

WHEREAS the Boy Scouts of America has taken a position that excludes homosexual scouts and scout leaders, and

WHEREAS NFTY has passed a resolution at Convention 1991 expressing full acceptance of gay and lesbian members, and

WHEREAS the Union of American Hebrew Congregations, in more than one resolution, has promoted civil rights for all, regardless of sexual orientation,

THEREFORE LET IT BE RESOLVED that NFTY call upon the Boy Scouts of America and all other organizations affiliated with the Boy Scouts which have the same policy on homosexuals, to open its membership and leadership to all men, women, and boys without regard to their sexual orientation, and that NFTY begin discussion with the Boy Scouts of America and all other organizations affiliated with the Boy Scouts which have the same policy on homosexuals, on this matter through the efforts of the TYG,

LET IT FURTHER BE RESOLVED that NFTY encourage all its members to divest from the Boy Scouts of America and all other organizations affiliated with the Boy Scouts which have the same policy on homosexuals, financially and to withdraw their membership from the Boy Scouts and all other organizations affiliated with the Boy Scouts which have the same policy on homosexuals, until basic civil rights are extended to include homosexuals.

Submitted by,
The NFTY Executive Board 92-93

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

AFFIDAVIT OF BISHOP JOHN S. SPONG IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEW JERSEY)
) ss.
COUNTY OF ESSEX)

BISHOP JOHN S. SPONG, being duly sworn, deposes and says:

1. I am Bishop of the Episcopal Diocese of Newark. I reside in Morris county in the State of New Jersey. I make this affidavit in support of plaintiff James Dale's motion for summary judgment. I have personal knowledge of the facts set forth herein.

2. I am a Phi Beta Kappa graduate of the University of North Carolina at Chapel Hill. I received a Master's degree in Divinity and an honorary Doctor of Divinity degree from the Protestant Episcopal Theological Seminary in Virginia. I also received an honorary Doctor of Divinity degree from St. Paul's College. I have been president of the Alumni Association of my seminary and a trustee of both my seminary and St. Paul's college. In 1986, I was appointed to serve on the Episcopal Church's Standing Commission on Human Affairs and Health. I have authored 14 books and

over 70 published articles and am the most published member of the House of Bishops of the Episcopal Church.

3. In a 1992 report of the Task Force on Episcopal Identity of the 118th Convention of the Diocese of Newark (the "Task Force Report"), the Episcopal Diocese of Newark reiterated the Episcopal Church's traditional commitment to inclusiveness and its opposition to unjust forms of discrimination. A true and correct copy of the Task Force Report is attached to this Affidavit as Exhibit A. The Task Force Report recognized that "[o]ur human nature wants to expel; Jesus commands us to accept." Ex. A, Appendix H at v. That lesson has particular relevance with respect to the discrimination faced by lesbians and gay men, such as the plaintiff in this case.

4. The Task Force Report "affirm[s] not only the civil rights of gays and lesbians but also their right to ecclesiastically-endorsed unions." Ex. A, Appendix E at iii. The Task Force Report goes on to state that "non-celibate homosexual persons may be ordained to the priesthood," Id., and endorses "the attempt by the church to welcome people with same-sex orientation (even if not celibate) . . . because the basis for their inclusion at all levels is clearly justified and demanded by the sources of our faith." Ex. A, Appendix H at ii (emphasis added). The Task Force Report thus concluded that the inclusion of lesbians and gays "is beyond dispute." Id.

5. On the basis of these teachings, a member of the Episcopal Diocese of Newark should conclude that gay men are neither immoral nor unclean as a result of their sexual orientation. As stated by Bishop R. Stewart Wood, Jr., the

Bishop of the Episcopal Diocese of Michigan, God does not regard homosexuality as a sin; rather, how we as humans -- whether heterosexual or homosexual -- relate to one another "-- caring or exploiting -- is the source of sin." As I have myself expressed before, there is nothing unnatural about any shared love, even between two of the same gender, if that experience calls both partners into a fuller state of being.

6. The teachings of the Episcopal Diocese of Newark have never been contradicted by the highest decision making body of the national Episcopal Church. In fact, that same body has also condemned discrimination on the basis of sexual orientation. As early as 1976, the General Convention of the Protestant Episcopal Church passed a Statement on Human Sexuality. A true and correct copy of the 1976 Statement on Homosexuality is attached to this Affidavit as Exhibit B. The statement expressed the Church's "conviction that homosexual persons are entitled to equal protection of the laws with all other citizens" and called upon "our society to see that such protection is provided in actuality." Ex. B. The same statement recognized that homosexuals "have a full and equal claim with all other persons upon the love, acceptance, and pastoral concern and care of the Church." Id. In 1982, the General Convention of the Episcopal Church reaffirmed its position that "homosexual persons are children of God and are entitled to full civil rights." A true and correct copy of the 1982 General Convention of the Episcopal Church Resolution on Civil Rights of Homosexuals is attached to this Affidavit as Exhibit C.

7. In 1991, I wrote to New Jersey state legislators on behalf of the Episcopal Diocese of Newark urging them to

amend the Law Against Discrimination to prohibit discrimination based on sexual and affectional orientation. A true and correct copy of my 1991 letter is attached to this Affidavit as Exhibit D. In separate remarks in support of the same amendment of the Law Against Discrimination ("Remarks"), I emphasized the need to "extend to gay and lesbian people . . . the basic protection of the law that would prohibit those still under the power of their prejudices from acting out those prejudices in discriminatory ways against those whose sexual orientation is different." Remarks, a true and correct copy of which are attached to this Affidavit as Exhibit E, at 6. Boy Scout of America's policy of excluding people from membership on the basis of sexual or affectional orientation is precisely the type of discrimination which prompted me, on behalf of the Diocese, to request and support such legislation.

8. In my Remarks, I spoke of the power of prejudice. That power is such that prejudice causes us not only to act in certain ways "but even to feel justified in doing so." Ex. E at 3. Speaking specifically of the prejudice faced by lesbians and gay men in our society, I looked forward to the day "when this prejudice has joined the prejudice against blacks [and] women . . . in the graveyard of prejudices that mark the path of human progress" and commented that on that day "we will see how cruel we as a society acting out of ignorance have been." Ex. E at 5. It is never easy, as human beings, to face and to overcome the prejudices which hold sway over us but, as God's children, we must have the courage and the compassion to do so and to turn our attention to loving our gay and lesbian brothers and sisters, supporting them, and

relating to them as part of God's good creation. Now is the time to break the bondage of this prejudice that prevents that gift of life promised to all by the Christ from being realized.

9. As noted above, the Task Force Report concluded that "non-celibate homosexual persons may be ordained to the priesthood" in our Church. Ex. A, Appendix E at iii. In fact, our Diocese has several openly gay and lesbian priests, some of whom are single and others of whom live in faithful monogamous relationships, and "we are honest about and welcoming of" them. Ex. E at 6. As I observed in my Remarks, our Diocese's openly gay and lesbian priests "are serving with incredible faithfulness." Id. Further, they are "open and honest about who they are to their congregations and communities [and] are accepted, loved and trusted by their people as agents of the Christian Church." Id. As I said in my Remarks, "I honor them and treasure their friendships." Id. Those who are worthy to serve as the agents of the Church are certainly also worthy to serve as leaders of organizations such as BSA. In fact, nothing in the teachings of my religion supports BSA's claim that gay men cannot be appropriate role models for youth.

10. The Diocese of Newark has long been and continues to be an active sponsor of Boy Scouts of America ("BSA"). In New Jersey alone, over 50 BSA units are sponsored by local Episcopal parishes.

11. In March 1993, the Council of the Diocese of Newark (the "Council") passed a resolution that confirms that the Diocese's commitment to Scouting is based on our "support [for] the high ideals of scouting." A true and correct

copy of the 1993 Council resolution (the "Resolution") is attached to this Affidavit as Exhibit F. Ironically, those same high ideals are compromised by BSA's policy of excluding homosexuals from membership and leadership positions, because such a policy fosters in our youth a disrespect for those who are different from them.

12. The Resolution, unanimously passed, resolved to "ask the Boy Scouts of America to admit to full membership otherwise qualified homosexual persons." Ex. F. The Council also resolved to "ask all Episcopal congregations in our diocese which now sponsor troops to review the terms of sponsorship and to meet with local Boy Scout councils to explore appropriate ways together to end the BSA's national policy of discrimination." Id.

13. As support for its Resolution, the Council observed that BSA's policy of excluding homosexuals from membership "potentially contributes to lesbians' and gays' disproportionate share of teen suicides." Ex. F. The Resolution expressly repudiated BSA's "claims that it upholds/enforces family/religious/moral values," noting that "Jesus established the 'family value' that it is better that a millstone be hung about our necks and that we be cast to the bottom of the sea than that we should harm one of the least of God's little ones." Id.

14. The Resolution emphasizes that the aim of the Council in urging BSA to abandon its discriminatory policy is to allow "BSA to disentangle itself from captivity to a bigoted and prejudiced agenda," so that it can focus on fulfilling the "high ideals of scouting" - such as trustworthiness, honesty

and personal integrity - which have always provided the basis of our Church's support for the BSA. Ex. F. Simply stated: "[w]e want gays in, not the diocese out." Id.

/s/ John S. Spong
Bishop John S. Spong

Sworn to before me this 5th day
of January, 1994

/s/ Gail Deckenbach
Notary Public

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

AFFIDAVIT OF FATHER PAUL SURLIS
IN SUPPORT OF PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.
COUNTY OF QUEENS)

FATHER PAUL SURLIS, being duly sworn, deposes and says:

1. I am a Roman Catholic priest and Associate Professor of Moral Theology and Social Ethics at St. John's University in Queens, New York. I make this affidavit in support of plaintiff James Dale's motion for summary judgment. I have personal knowledge of the facts set forth herein.

2. I received Bachelor of Divinity, Master's Licentiate in Theology, and Doctoral Licentiate in Theology degrees from Saint Patrick's College, Pontifical University, in Maynooth, Ireland. I also received post-Doctoral training at Muenster University in Muenster, West Germany. I have taught at Notre Dame University in Indiana and Trinity College in Dublin, Ireland.

3. The numerous instances in which Roman Catholic bodies and religious leaders, particularly those within the United States, have condemned and actively opposed discrimination on the basis of sexual orientation are well documented. Similarly, it is clear that Catholic teaching does not regard homosexual orientation as sinful; thus one may be homosexual in orientation and at the same time be a Catholic in good standing.

4. Despite this clear teaching, it is commonly misperceived that anyone who does not accept the position of the Catholic Church in Rome that homosexual conduct is immoral -- a position relied upon by Defendants, see Certification of Donald K. Hummel, dated November 3, 1993, thereby forfeits their right to be considered a Catholic in good standing. The true position regarding the doctrinal status of the statements of the Catholic Church in Rome on the morality of homosexual conduct can only be appreciated when one also appreciates the distinction between the "infallible" teachings of the Roman Catholic Church and other, non-infallible teachings of the Church. Teachings presented to Catholics on the basis of infallible authority, whether of a general council or of the Pope, are guaranteed to be free from error and, though they do not represent the full truth on the issue in question, such teachings may not be rejected by Catholics. The statements of the Catholic Church in Rome on the morality of homosexual conduct are not -- and have never been -- among the infallible teachings of the Church. Because the teachings of the Catholic Church in Rome on the morality of homosexual conduct are not classified among the infallible teachings of the Church, they may be false, and thus they cannot require an assent that is absolute.

5. In the course of history, many non-infallible teachings of the Roman Catholic Church which were presented with real vigor and defended with great severity were subsequently shown to be false and are no longer taught by the Vatican or others in the Catholic Church. This is so despite the fact that many such teachings had as long a history and a more central position among the teachings of the Church than statements regarding the morality of homosexual conduct.

6. For example, for about 1,400 years the moral legitimacy of the institution of slavery was part of a non-infallible Catholic teaching, as was the view that a woman is a misbegotten male. Likewise, married people who engaged in sex for pleasure were considered guilty of venial sin. Non-infallible teachings also once held that there is no salvation outside the Catholic Church, that unbaptized infants go to limbo and that only a bishop may confirm. Such teachings also held that, where feasible, the Catholic Church should be established; thus, separation of church and state, as exists in the United States, was contrary to the non-infallible teachings of the Roman Catholic Church until an American priest spearheaded a move just three decades ago to change Church teaching on the subject.

7. From the foregoing it is clear that the individuals who refused to accept the non-infallible teachings of the Roman Catholic Church that were subsequently shown to be false were, in fact, the ones who upheld truth. Thus, Catholics who take the position that homosexual conduct is <u>not</u> sinful -- as some theologians and bishops and numerous

lay Catholics do -- are <u>not</u> disqualified from being considered Catholics in good standing. Indeed, before long, time may show them to be the ones who upheld truth on the issue of the morality of homosexual conduct.

/s/ Paul Surlis
Father Paul Surlis

Sworn to before me this 6 day
of January, 1994

/s/ Felicia Busto
Notary Public

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF BISHOP MELVIN WHEATLEY, JR. IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

BISHOP MELVIN WHEATLEY, JR. certifies:

1. I am an ordained elder and Bishop of The United Methodist Church, retired as of September 1, 1984. I reside in Orange County in the State of California. I make this certification in support of plaintiff James Dale's motion for summary judgment. I have personal knowledge of the facts set forth herein.

2. I received an A.B. from American University, Washington, D.C., in 1936 and a Bachelor of Divinity of Drew Theological Seminary, Madison, New Jersey, in 1939. I served for 33 years as the pastor of Methodist congregations in Delaware and California and for 12 years as bishop of the Denver area. Following my retirement, I taught for one year at the School of Theology Claremont in Claremont, California.

3. The United Methodist Church has a particularly strong relationship with and commitment to Boy Scouts of America ("BSA") and the values represented by BSA. BSA is an organization which fosters values such as honesty, loyalty, reverence, integrity and commitment in boys and young men. It is because of these values that The United Methodist Church has been the largest single supporter of BSA nationally, sponsoring more than 200 BSA troops in New Jersey alone. BSA's discrimination against homosexuals, however, is inconsistent with the clearly expressed condemnation by The United Methodist Church of discrimination on the basis of sexual orientation and has no apparent relation to the values that form the basis of The United Methodist Church's commitment to BSA.

4. BSA's discrimination against homosexuals offends the human dignity of such persons. The United Methodist Church has been very clear in condemning discrimination on the basis of sexual orientation. The Book of Discipline of the United Methodist Church--1992 (the "1992 Book of Discipline"), the law book of the Methodist denomination, adopted by the General Conference of the United Methodist Church at its 1992 meeting in Louisville, Kentucky, states the following: "We insist that all persons, regardless of age, gender, marital status, or sexual orientation, are entitled to have their human and civil rights ensured." 1992 Book of Discipline ¶ 71, Section F ("Human Sexuality") at 91.

5. The 1992 Book of Discipline also affirms that "[h]omosexual persons no less than heterosexual persons are individuals of sacred worth." Id. at 92.

6. The 1992 Book of Discipline adds further that "[c]ertain basic human rights and civil liberties are due all persons." 1992 Book of Discipline ¶ 71, Section G ("Rights

of Homosexual Persons") at 92. This passage continues by stating that as Methodists, "[w]e are committed to support those rights and liberties for homosexual persons." Id. The 1992 Book of Discipline further recognizes "a clear issue of simple justice" in protecting the rightful claims of homosexuals to, among other matters, "equal protection before the law." Id. (emphasis added). Simple justice is offended by BSA's policy, which judges individuals not on the content of their character or the quality of their contributions to the organization or to society, but on a trait bearing no relation to integrity, commitment or decency.

7. The 1992 Book of Discipline's statement regarding the rights of homosexuals concludes by stating our support, as Methodists, for "efforts to stop violence and other forms of coercion against gays and lesbians." Id. Unfortunately, as long as discriminatory policies such as BSA's remain in place, the lesson taught to our youth is not one of respect for those who are different but one of intolerance. Such intolerance only handicaps us further in our struggle to curb the increasing and disturbing tide of "hate crimes" in this country, of which homosexuals are a primary target.

8. BSA contends that most of its members would be led by the dictates of their respective religions to view homosexuals as "immoral" or "unclean." However, in my opinion God does not regard homosexuality as a sin. The preponderance of evidence now available identifies homosexuality to be as natural a sexual orientation for a significant percentage of persons as heterosexuality is the natural sexual orientation for the majority of persons. Homosexuality is an authentic condition of being with which some persons are endowed (a gift of God, if you please).

Certainly one's sexuality -- heterosexual or homosexual -- may be acted out in behaviors that are sinful: brutal, exploitative, selfish, superficial. But just as surely, one's homosexual orientation as well as another's heterosexual orientation may be acted out in ways that are beautiful: tender, considerate, mutual, responsible, loyal, profound.

9. Rev. Dr. Professor John B. Cobb, Jr., Ph.D., the son of Methodist missionaries, received his Master's and Ph.D. degrees from the University of Chicago Divinity School and has been a professor of theology at universities across this country and overseas. Dr. Cobb was my colleague at the School of Theology Claremont. Throughout his career, Dr. Cobb has been recognized internationally as an outstanding theologian. When asked whether he thinks that God regards homosexuality as sinful, Dr. Cobb responded as follows:

> Surely being attracted to persons of the same sex is not, as such, a sin. But of course how we act in our attractions, towards whichever sex, is often sinful. The ideal is to be responsible and faithful rather than self-indulgent. Unfortunately, society does not encourage responsible and faithful relations with persons of the same sex.

As Dr. Cobb recognizes, our focus in considering the morality of sexuality should be on the manner in which people use sexuality -- whether, for example, as a means of expressing a committed love or, alternatively, as a means of exploitation -- and not on the sexual orientation of the persons involved.

10. As a minister, I reject BSA's suggestion that homosexuals cannot constitute appropriate role models for children. The appropriateness of a role model turns on qualities such as the personal integrity and decency of the

individual and not on the individual's sexual or affectional orientation.

11. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

/s/ Bishop Melvin Wheatley, Jr.
Bishop Melvin Wheatley, Jr.

Dated: December 30, 1993

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF DR. MICHAEL CAHN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

MICHAEL CAHN, M.D. certifies:

1. I, Michael Cahn, M.D., reside in San Jose, California. I make this certification in support of the motion for summary judgment of plaintiff James Dale.

2. I first became a registered member of Boy Scouts of America ("BSA") in 1940. In 1948, I earned my Eagle Scout badge and subsequently earned the Bronze, Gold and Silver Palms. I have been active in Scouting almost continuously since then.

3. Beginning in approximately 1973, I became active in Troop 260 in San Jose, California as an Assistant Scoutmaster. At first, my involvement was limited to leading the Troop on camping trips and other outdoor events. From 1983 until 1989, I served as Chairman of the Troop Committee of Troop 260. I have been the Scoutmaster of the Troop since 1989.

4. As an adult volunteer in Boy Scouts of America, I have completed Scoutmaster Trainer and High Adventure

Training. I received the District Award of Merit from the Mene Oto District of Santa Clara County Council, Boy Scouts of America.

5. I hold a B.S. in biology from Franklin and Marshall College and an M.D. from Thomas Jefferson University. From 1961 to 1963, I served as a Captain in the United States Army Medical Corps. I have been married for 36 years and have 3 grown children. I currently practice internal medicine in San Jose.

6. During my more than 50-year involvement in Boy Scouts of America, I have gained detailed knowledge of the policies of Boy Scouts of America. During this period and until approximately 1990, I was never aware that Boy Scouts of America had a policy of excluding homosexuals from membership. No one involved in Scouting ever told me that such a policy existed, nor did I ever read about such a policy in materials provided to me by Boy Scouts of America. I did not learn about such a policy during Scoutmaster Training or High Adventure Training sessions. Further, I have never learned anything during my time as a youth or adult volunteer in Scouting that suggests to me that homosexuals should not be eligible for membership in Boy Scouts of America.

7. The purposes of Boy Scouts of America as I have come to understand them are teaching young people outdoor and camping skills, developing their leadership abilities and sense of community responsibility, and providing them with the tools to make ethical choices over the course of their lives. I have never known the exclusion of homosexuals to be one of the purposes of Boy Scouts of America or to further any purpose of the Scouting program.

8. I first learned that Boy Scouts of America has a policy of excluding homosexuals from membership in 1990 when my son, Mark, told me about this policy. Mark teaches high school in San Jose and found out about this policy during a teacher sensitivity training session designed to educate teachers about the particular needs and concerns of their gay students.

9. I was extremely surprised to learn that Boy Scouts of America had this policy. In my tenure with Boy Scouts of America, I have known numerous gay men and lesbians who have served in various capacities in Scouting as adult volunteers and professionals. I never heard anyone object to their involvement in Scouting or suggest in any way that these individuals were immoral or unclean or not representative of the norms and values taught by Scouting. I never heard anyone suggest that Scouting was tolerating immorality or uncleanliness by allowing their participation in Scouting.

10. I also believe that this policy is antithetical to every principle I have ever learned in Scouting. I had always been told that Scouting was for all boys regardless of their differences, a notion which, as a Jew, I particularly cherished as a boy in the 1940s when many organizations and clubs were still closed to Jews. The first tenet of the Scout law holds that "a Scout is trustworthy." The Boy Scout Handbook describes this requirement to mean: "A Scout tells the truth. He keeps his promises. Honesty is a part of his code of conduct. People can always depend on him." It makes no sense to me that Scouting teaches Scouts to tell the truth but then expels gay Scouts if they are honest about their sexual orientation.

11. The Scout law also holds that "a Scout is reverent." Although duty to God has always been important in Scouting, I have always understood that Scouting does not impose any specific religious requirements on its members. Scouts need not believe in any one set of religious beliefs or even in a particular view of God. Rather, Scouting asks its members to understand and be faithful to the teachings of their own particular affiliations while tolerating the religious beliefs of others.

12. My religious beliefs are very important to me. I and my family are Reform Jews. We have worshiped at Temple Emanuel in San Jose for the past 30 years. I have served on the Board of Directors of that synagogue for eleven years, including for two years as President of the Board. I am currently Vice President of the Board. I have also served as a Regional Vice President of the Western Council of the Union of American Hebrew Congregations. My religious beliefs do not teach that homosexuality is immoral or wrong but that all loving, committed relationships are equal before God.

13. I have been told that Boy Scouts of America finds justification for its policy of excluding homosexuals from membership in the requirement of the Scout Oath that a Scout keep himself "morally straight". This position assumes and imposes a particular religion-based definition of morality on all Scouts. It is not only inconsistent with my beliefs and the beliefs of my religion, but it is also inconsistent with Scouting's general view that no particular set of religious beliefs should be imposed on all Scouts.

14. Scouting taught me to speak out for what I believe is right. It is very clear to me that Scouting's policy of

excluding homosexuals from membership is not right. I could not tell a Scout in my Troop that he has an obligation to be trustworthy and then kick him out of the Troop if he informs me that he is gay.

15. Therefore, on December 30, 1991, at a meeting of the Troop Committee of Troop 260, I voted in favor of a Resolution opposing the BSA's policy of excluding homosexuals as youth members or adult leaders. The Resolution, which the Troop Committee adopted unanimously, read as follows:

> Troop Committee troop 260 BSA, 30 Dec 1991
>
> **Resolved that the troop committee fully supports the tenets of the Scout Oath,** including the phrase " to keep myself .....morally straight." We do not agree that sexual orientation such as male or female homosexuality is immoral. Sexual preference is a private issue. We don't believe it to be relevant in the selection of adult leaders or in the awarding of the Eagle Scout rank.

A true and correct copy of this Resolution is attached hereto as Exhibit A.

16. Most people in Scouting with whom I spoke agreed with the principle of our Resolution, although they did not speak out as we had. None of the 26 boys in the Troop nor any of their parents objected to our voicing our opposition to the policy of excluding homosexuals from membership. In fact, many of the Scouts, in fulfillment of the requirement of the Citizenship in the Nation merit badge that the Scout write a letter to a public official addressing an issue of concern to him, wrote letters to the national office of BSA expressing

their opposition to this policy. Moreover, Rev. Jack Lundin, the pastor of Christ the Good Shepherd Church, the chartering organization of Troop 260, expressed his praise for the Resolution.

17. In February, 1992, Grant Robinson, the acting Scout Executive of Santa Clara County Council, Inc., Boy Scouts of America, having heard through media reports of our Resolution, sent a letter to Rev. Lundin requesting clarification of the Resolution. Our charter was up for renewal in March, 1992, and his request was explicitly aimed at obtaining information relevant to Charter renewal. Specifically, he asked the following two questions:

1. Do the chartered organization and the registered adults of Troop 260 agree that if a charter is granted to Troop 260 they will follow the established policies of the Boy Scouts of America?

2. With regard to the issue of homosexuals in Scouting, do the chartered organization and the registered adults of Troop 260 agree not to seek to register known or avowed homosexuals pending the appeal process in the Curran case?

18. In a subsequent letter, Mr. Robinson asked the Troop Committee of Troop 260 to clarify whether we intended to "actively seek to register known or avowed homosexuals." In responding to that question, we simply explained that we would not rescind our Resolution. Despite the fact that the Resolution declares that the Troop Committee will not enforce the BSA policy, our charter was renewed.

19. During the 50 years prior to the controversy spawned by Troop 260's opposition to the BSA policy, I was

never told that the term "morally straight" in the Scout Oath refers to sexual orientation or that homosexuals are not morally straight. I have never understood and have never known other Scouts to understand morally straight to refer to a specific set of moral values other than those which Scouting actively teaches, such as those contained in the Scout Law.

20. I have never been told that the term "clean" in the Scout Law refers to sexual orientation or activity of any kind, or that homosexuals cannot be "clean" within the meaning of the Scout Law. I have never interpreted the term "clean" in the Scout Law to refer in any way to sex or sexuality, and I have never been aware of any other Scout who interpreted "clean" in the Scout Law to refer in any way to sex or sexuality.

21. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

/s/ Michael Cahn, M.D.
Michael Cahn, M.D.

Dated: December 21, 1993

Exhibit to Certification of Dr. Michael Cahn

[LOGO OMITTED]

36 Years Active Service

SCOUT TROOP 260

SPONSOR • Christ The Good Shepherd Lutheran Church
1550 Meridian Ave • San Jose, CA 95124

Troop Committee troop 260 BSA, 30 Dec 1991

Resolved that the troop committee fully supports the tenets of the Scout Oath, including the phrase " to keep myself.....morally straight." We do not agree that sexual orientation such as male or female homosexuality is immoral. Sexual preference is a private issue. We don't believe it to be relevant in the selection of adult leaders or in the awarding of the Eagle Scout rank.

"ON THE TRAIL TO EAGLE"

[LOGO OMITTED]

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

SUPPLEMENTAL AFFIDAVIT OF JAMES DALE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

JAMES DALE, being duly sworn, deposes and says:

1. I am the plaintiff in the above-captioned litigation and submit this supplemental affidavit in support of my motion for summary judgment. I have personal knowledge of the facts set forth herein.

2. During my 12 years of Scouting experience, I was a member of three different Boy Scout Troops. As a young Scout, I was a member of Troop 220, which was chartered by the church to which I belonged -- King of Kings Lutheran Church. After Troop 220 folded due to lack of adult leadership, I joined Troop 128, which was chartered by Christ Church, a Presbyterian church. When Troop 128 also folded because there were not enough adult leaders, I joined Troop 73, which was chartered by a Methodist church in my community. I was a youth member of Troop 73 until I turned 18, and then became Assistant Scoutmaster of the Troop. I held this position until Defendants revoked my scouting membership in August 1990.

3. Although each of the Troops to which I belonged was chartered by a local church, all of my Scouting experience was non-sectarian. Some of my fellow Scouts went to church regularly; others were Jewish; and still others did not practice any religion, and did not attend any religious services. There was absolutely no requirement that members of Troop 220 be Lutheran, that members of Troop 128 be Presbyterian, or that members of Troop 73 be Methodist. In fact, the churches that acted as chartering organizations for my Troops did little more than provide meeting places and -- on occasion -- adult leadership; they provided no religious training whatsoever for me or my fellow Scouts.

4. My Scouting experience and training gave me confidence and self-esteem, and significantly improved my leadership, organizational, management and motivational skills. Prior to my expulsion from Scouting in August 1990, I intended to remain an active member of BSA for life. I planned to become a Scoutmaster after graduating from college because I felt an obligation to provide for other boys the type of Scouting program that had such a positive and significant impact on my own life. I also had less altruistic reasons for wanting to continue my involvement with Scouting: As an adult member of Scouting, I intended to continue to take advantage of training programs and other Scouters' expertise in order to learn skills that would be helpful not only in a Scouting context, but also in my personal and professional life.

5. When I left to attend college at Rutgers University, I was committed to my position as Assistant Scoutmaster of Troop 73. Because Rutgers was almost an hour's drive from my Troop's meeting place, I was unable to attend Troop

meetings regularly. Nevertheless, I retained my leadership position in my Troop because I intended to resume more active involvement in Scouting after graduating from college, and because I knew, from personal experience, that Troops often fold because they lack adult leaders. Despite the constraints of time and distance, I remained dedicated to my Troop, and made an effort to attend meetings whenever I was needed, and as often as possible.

6. Throughout my years in Scouting, I pledged to uphold the values in the Scout Oath and the Scout Law, including the values of being morally straight and clean. No one involved in Scouting ever told me -- and no Scouting literature with which I am familiar ever suggested to me -- that homosexuality is inconsistent with these values, or that a homosexual cannot be morally straight and clean. I never learned that it was a purpose of the Scouting program to exclude homosexuals. I never learned that admitting homosexuals would interfere with the fulfillment of Scouting's purpose of teaching boys to uphold the values in the Scout Oath and the Scout Law.

7. In fact, in my Scouting experience, boys were referred to their parents or religious leaders if they had questions or concerns about sexual issues. During my time as a youth and adult leader of my Troop, discussions regarding these issues never arose. Had any Scout approached me with questions regarding any such issues, I would have -- as instructed -- referred him to his parents or religious advisors. The Scouting program made clear only that sexual <u>conduct</u> of all kinds -- whether heterosexual or homosexual -- was inappropriate within the context of the Scouting experience. A person's sexual <u>orientation</u>, on the other hand, was neither

a subject of discussion, nor -- as far as I knew until my expulsion from Scouting -- remotely relevant to eligibility for membership.

/s/ James Dale
James Dale

Sworn to before me this 31 day
of December, 1993

/s/ Kevin W. Brown
Notary Public

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF MARY LOU GOEKE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CRUZ)

MARY LOU GOEKE certifies:

1. I, Mary Lou Goeke, reside in Santa Cruz County, California. I am the Executive Director of the United Way of Santa Cruz County (the "United Way"). I have personal knowledge of the facts set forth herein.

2. In the spring of 1992, the Board of Trustees of the United Way of Santa Cruz County decided that no organization would be eligible to receive funds from the United Way if that organization discriminated on the basis of sexual orientation in the provision of its services. Therefore, in connection with its funding request for the fiscal year ending in June, 1993, I requested that Monterey Bay Area Council, Inc., Boy Scouts of America, provide the United Way with a letter stating that it did not discriminate on the basis of sexual orientation in the provision of its services. Pursuant to that request, I received a letter from Dean R. Crafton, Council Scout Executive of Monterey Bay Area Council, Inc. A true and correct copy of that letter is attached to this certification as Exhibit A.

3. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

/s/ Mary Lou Goeke
Mary Lou Goeke

Dated: December 31, 1993

Exhibit to Certification of Mary Lou Goeke

[MONTEREY BAY AREA COUNCIL, INC., NO. 25 BOY SCOUTS OF AMERICA LOGO AND LETTERHEAD]

February 10, 1993

Ms. Mary Lou Goeke,
Executive Director
United Way of Santa Cruz County
P.O. Box 1458
Capitola, CA 95010

Dear Mary Lou:

The Boy Scouts Charter and Articles of Incorporation in the State of California require us to follow all laws that apply to our organization.

The Boy Scouts program, since its inception, has been designed to function at different age levels. The Tiger Cub program is for first graders, the Cub Scout program is for 2nd through 5th grades, the Boy Scouts program is for 6th through 8th grades, and the Explorer program is co-ed, 9th through 12th grades.

Our companion organization, the Girl Scouts of America, and the Boy Scouts reached an agreement many years ago on not being competitive. The Boy Scouts application for youth and the adult application do not discriminate on the basis of age, gender, sexual orientation, religion or national origin.

Sincerely,
/s/ Dean Crafton
DEAN R. CRAFTON,
Council Scout Executive

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF ROBERT GWINN

STATE OF NEW YORK)
) ss.
COUNTY OF TIOGA)

1. I, Robert Gwinn, reside in Tioga County in the State of New York. I make this certification in support of the summary judgment motion of plaintiff James Dale. I have personal knowledge of all of the facts set forth herein.

2. From June 1991 through June 1993, I held the position of Council President of Baden-Powell Council. On April 29, 1992, the Baden-Powell Council Executive Board passed a resolution urging the BSA National Executive Board to change its policy of excluding homosexuals from membership in BSA to allow individual chartering organizations to establish their own membership policies. Baden-Powell Council sent the text of the resolution along with an explanatory letter, over my signature, to the National Resolutions Committee at BSA's national office. A true and correct copy of the letter and the accompanying resolution sent to the National Resolutions Committee is attached hereto as Exhibit A. The letter accurately states the facts considered by the Council in connection with its discussions of the BSA policy excluding homosexuals from membership.

3. At my request, on May 13, 1993, Baden-Powell Council sent another copy of my letter and a copy of our April 29, 1992 resolution to BSA's National Resolutions Committee. A true and correct copy of the May 13, 1993 letter from Charles Love, Council-Commissioner of Baden-Powell Council, to BSA's National Resolutions Committee is attached hereto as Exhibit B. The April 29, 1992 resolution of Baden-Powell Council has not been altered, amended or changed in any regard since it was passed.

4. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

/s/ Robert Gwinn
Robert Gwinn

Dated: January 5, 1994

Letter to National Board, BSA

I am writing to you on behalf of the Executive Board of the Baden-Powell Council, Inc. to urge you to reconsider and reverse the policy of the National Council, BSA, prohibiting homosexuals from being members of the Boy Scouts of America. While it is our intention to conform to the membership standards policy, we urge serious discussion of this issue at the upcoming national meeting in Cincinnati.

At its meeting of April 29, 1992 the Executive Board of the Baden-Powell Council passed the following resolution:

> Whereas the membership policy of the National Council, BSA excluding homosexuals from membership in the Boy Scouts of America is endangering Scouting in both the Baden-Powell Council and across the nation, therefore we urge the National Executive Board of the Boy Scouts of America to revise its policy to give responsibility for choice of membership to local Chartered Partners.

Many of our Board members are morally troubled by the BSA position. In an Executive Committee meeting on this subject, one member pointed out that the Scout Law should apply to all people, and another said that Scouting itself has taught many of us tolerance. Others are troubled by the thought of homosexual leaders.

However, we are all in agreement on the consequences the BSA position is bringing to our movement, both in our Council and nation-wide. To quote another Board

member, one who is personally uncomfortable with homosexuals as members, we are just on the wrong side of history on this issue.

First, one of the three counties that make up our rural upstate New York Council has an antidiscrimination ordinance which explicitly applies to sexual preference. That ordinance reflects a widely held community value in that county, as we found out at our Fireside Chat, where we were pushed hard for discriminating. The issue is moving toward the front burner in another county. Whatever the legal niceties, our Council will be damaged by being out of compliance with this law and this community value.

Second, one of the three United Ways which provides significant funding to us has made it clear that we are in danger of losing that funding. The head of the committee which coordinates human services in the county has protested our policies privately, and is likely to go public soon. Another United Way is becoming interested in the question. Protests are beginning in two large cities near us, and it is, we think, inevitable that we will be the subject of a major uproar here. We cannot see the gain in the National BSA's picking a fight with the United Way. That organization has been intertwined with Scouting for many years and, because of the heavy involvement of local business people, does reflect the center of community values.

Third, issues from around the country about the Learning for Life Program are beginning to surface here. Two School Districts in the area we serve are

uninterested in LFL in part because of the BSA's perceived discrimination. So far, communication on this has taken place on an informal level, but if school boards are formally confronted with the question, we might well wind up losing the access to schools which our Units now have, never mind starting the new Learning for Life programs.

Fourth, the effect on Scouting's leadership -- the issue the National BSA constantly raises -- if this policy is reversed will in fact be slight. The choice of leaders is very much a local matter, and local Units, where parents are usually in control, are unlikely to choose people whose lifestyles are widely divergent from community values concerning youth leadership.

Finally, the national BSA's position interferes with the right of the local Chartered Partner to choose its own leaders. Since the national BSA has made clear in its own child abuse prevention training that homosexuals are no more likely to abuse children than heterosexuals, the question at stake here is whether any homosexual could ever serve as a role model for youth. We believe that that question should be left up to the parents close to the situation, those that typically make up a Unit Committee under the direction of the Chartered Partner.

If something isn't done about this situation, many Councils around the country will be in a lose-lose situation, faced with losing their charters or losing local funding. In either one of these cases, the children we serve are the ultimate losers. We urge the National Executive Board to reconsider and to reverse this

policy. Furthermore, we urge the organizers of the upcoming national meeting to plan and advertise a serious discussion of this question, so that the National BSA can hear from the many Councils for which this membership policy is a problem. Our delegates will come to Cincinnati looking forward to that discussion.

Sincerely yours,

Robert Gwinn
President

[LOGO OMITTED]

BOY SCOUTS OF AMERICA

Baden-Powell Council, Inc.
2127 Dryden Road
Freeville, New York 13068
607-844-8125
607-273-0072

RESOLUTION

PASSED UNANIMOUSLY BY THE EXECUTIVE BOARD, APRIL 29, 1992

Whereas the membership policy of the National Council, BSA excluding homosexuals from membership in the Boy Scouts of America is endangering Scouting in both the Baden-Powell Council and across the nation, therefore we urge the National Executive Board of the Boy Scouts of America to revise its policy to give responsibility for choice of membership to local Chartered Partners.

Serving the Youth of Cortland, Tioga and Tompkins Counties, Townships of Covert and Van Etten and Villages of Lodi and Mecklenburg

[UNITED WAY LOGO OMITTED]

[LOGO OMITTED]

BOY SCOUTS OF AMERICA

Baden-Powell Council, Inc.
2127 Dryden Road
Freeville, New York 13068
607-844-8125
607-273-0072

TO: National Resolutions Committee, BSA

FROM: Charles Love, Council Commissioner, Baden-Powell Council

RE: Resolution on Standards of Leadership

DATE: May 13, 1993

FAX: 214-580-7878, attention Ms. Helen Ray

At the request of Council President Robert Gwinn, I am sending you a copy of a resolution passed unanimously by our Council Executive Board on April 29, 1992, for consideration at the Annual Business Meeting of May 21, 1993.

We are sending this to you again for your reconsideration, since our situation with our local United Ways grows more and more difficult. We urge you to give this matter serious thought, particularly since all we urge upon the National BSA is to allow local Chartered Partners to make their own decisions about their leadership, a tradition of the BSA since its beginnings. Our current Council President, the immediate past Council President (myself) and the person who is likely

to be our new Council President all share the view represented in this resolution, and share a sense of urgency about the need for a change in National BSA policy.

The memorandum from Mr. Clandenin asks for a brief description of the resolution's purpose. I think the text of the resolution itself, together with a copy of the letter we sent last year (enclosed) should suffice.

Thank you for your consideration. Our delegates look forward to further discussion at the National Meeting.

Serving the Youth of Cortland, Tioga and Tompkins Counties, Townships of Covert and Van Etten and Villages of Lodi and Mecklenburg

[UNITED WAY LOGO OMITTED]

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

AFFIDAVIT OF WILLIAM A. J. KIRKNER IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

DISTRICT OF COLUMBIA) ss.

WILLIAM A. J. KIRKNER, being duly sworn, deposes and says:

1. I reside in the District of Columbia. I make this affidavit in support of plaintiff James Dale's motion for summary judgment. I have personal knowledge of the facts set forth herein.

2. I am currently employed at Walcoff & Associates, located in Alexandria, Virginia. In my capacity as a specialized consultant for the United States Department of Energy, I review contracts and legislation and circulate briefing materials related to technology transfers at the national laboratories.

3. I attended Loyola College in Baltimore, Maryland, a Jesuit college, and was the recipient of two merit scholarships that covered my tuition in full. I graduated cum laude in 1989, after spending five semesters on the Dean's list. During my college years, I volunteered as a peer counselor, sang with the Chapel Choir, and participated in student government. Following my graduation from college, I

attended Georgetown University Law Center, from which I received a Juris Doctorate in May 1992.

4. I became a registered member of Boy Scouts of America in 1975, when I joined as a Cub Scout, and I have remained an active member of Scouting through the present. In Boy Scouts of America ("BSA"), I achieved the rank of Eagle Scout and received numerous awards -- including the Explorer Achievement Award, and the Bronze Bighorn Award, a regional award for Explorers. I also received the Ad Alteri Dei Award, an award presented by the Catholic Committee on Scouting to Boy Scouts for religious service, and the Pius XII award, a similar award presented to Explorers for religious service. To earn these religious awards, I conducted research on various religious topics, participated in discussions on religious issues, and devoted a significant amount of time to community service projects.

5. In 1985, I attended the National Scouting Jamboree and served as Senior Patrol Leader for my troop, a Boy Scout troop made up of Scouts from the Baltimore Area Council and from the Transatlantic Council. In 1985, I was also inducted into the Order of the Arrow, the honor camping association of BSA. As an Order of the Arrow member, I received the Founder's Award for outstanding service to my Lodge, and the Vigil Honor, which signified that I had attained the highest level that can be reached in the Order of the Arrow. The Vigil Honor is an honor extended only to select Order of the Arrow members who have spent at least two years in service to their Lodge after achieving Brotherhood status.

6. In the Order of the Arrow, I served as a Section Chief and as National Vice Chief for Publications. In my capacity as National Vice Chief for Publications, a position I held from 1988 through 1989, I served under the National Chief of the Order of the Arrow, and was the Chairman for all publications related to the Philmont Trek, a national Order of the Arrow event. I was also the Order of the Arrow youth representative to the National Publications Committee, a committee of BSA's National Board. As the Order of the Arrow representative to the National Publications Committee, I was responsible for participating in the revision of the Boy Scout Handbook, including the section that deals with issues of sexuality.

7. Since turning 18 and becoming an adult Scouter, I have continued to be actively involved in Scouting programs. From 1991 to November 1992, I served as a Unit Commissioner in my district, acting as a liaison between the district office and the various Scout troops throughout the district. I helped provide program support to the chartering organizations in the district, and provided the chartering organizations with information and resources from the BSA national office. These resources included publications on how to recruit a Scoutmaster, training materials for adult committee members, and explanatory information regarding recent changes to the Scouting program. I currently serve as Assistant District Commissioner in my district, and am responsible for overseeing a group of Unit Commissioners and recruiting, training and certifying additional Unit Commissioners.

8. I have recently completed the requirements for the Arrowhead Honor and the Commissioner's Key. The

Arrowhead Honor is an award for proficiency in Commissioner service, and the Commissioner's Key is an award presented to Scouters who have served as Commissioners for at least three years. I expect to receive these awards at the next Commissioners' meeting in my district, which is scheduled to be held on January 4, 1994.

9. The Scouting program offers two intensive training programs for adult Scouters -- the Wood Badge Training Course and the National Camp School -- and I have participated in both of these programs. Professional Scouters are generally expected to complete at least one of these programs during the course of their Scouting careers; volunteers often do not complete either program, and it is fairly unusual for a volunteer to have completed both of these comprehensive training programs.

10. The Wood Badge Training Course is a one-week course that trains Scouters to train others. The Scouting organization considers this program integral to becoming a first-rate leader and manager of others, both within and outside of the Scouting context. In fact, when Scouters encounter resistance from their employers regarding the time away from work that the Wood Badge Training Course requires, they are encouraged to tell their employers that the course is one of the best business and management training courses available.

11. When I attended the Wood Badge Training Course in 1992, I learned a great deal about what it means to be entrusted with the responsibility of training my fellow Scouters, and the importance of fully and accurately conveying to those whom I train the aims and purposes of

Scouting. These aims and purposes of Scouting, as I understand them and as they have been explained to me, are to cultivate participating citizens who are physically and mentally fit, and to develop young men of good moral character. Since completing the Wood Badge Training Course, I have had occasion to put my training expertise and thorough understanding of the goals of Scouting to good use: over the past two years I have conducted four Commissioner training courses and two Fast Start training courses for new Unit Commissioners.

12. The National Camp School is also a one-week training program. Whereas the Wood Badge Training Course is particularly recommended for Scoutmasters, the National Camp School is specifically tailored to train Scouters who work at Scout camps in more specialized capacities. In 1988, I first served as a summer camp staff member at Camp Spencer at Broad Creek in the capacity of Pool Director. The following year I attended the National Camp School program, which was held that year at Hawk Mountain Scout Reservation, located outside of Redding, Pennsylvania. At the National Camp School, I was certified as a Camp Program Director and as a Camp Commissioner, and I returned to Camp Spencer to serve as the Camp Program Director from 1989 through 1991. As Camp Program Director, I was responsible for recruiting, interviewing, hiring, training and evaluating summer camp staff. I also wrote a staff manual, determined staff salaries, and drew up a budget for the summer camp program.

13. In 1990 I returned to the National Camp School to serve on its staff and help train Camp Commissioners, Program Directors, and others who serve in positions of camp

management. I have been on the staff at the National Camp School each summer since 1990, and currently hold the positions of School Commissioner and Section Director for the Commissioners' Section. As Section Director, I certify those who complete the Commissioner Section of National Camp School and provide input for the development of a training syllabus. As School Commissioner, my responsibilities include maintaining health and safety standards in every aspect of the program, promoting morale among the staff and students, and counseling students who have difficulty during training.

14. As a result of having spent almost two decades in the Scouting movement, I have been able to enjoy the many benefits and privileges that accompany Scouting membership. My Scouting accomplishments and the recognition I have received from my community for my Scouting achievements have contributed to my sense of self-esteem and my confidence in my ability to tackle new and difficult problems successfully. My Scouting experience is prominently displayed on my resume, and I have discussed Scouting in countless interviews. In fact, I have often found that when a prospective employer and I have Scouting in common, this shared experience leads to a better interview and a greater likelihood of success.

15. Scouting has also enabled me and my fellow Scouters to meet other professionals who volunteer their time to Scouting, and to expand the network of people with whom we regularly interact on both a social and professional level. My staff is currently planning a February 1994 reception for Scouters who work on Capitol Hill and other government employees who are interested in becoming Scouters. This

reception will be hosted by several members of Congress, including Richard Gephardt and William Richardson, and will allow many of those attending to speak with important governmental figures whom they would not otherwise have an opportunity to meet. For non-professional Scouters, the benefits and privileges of the kind of networking that Scouting offers are even more pronounced: Scouting connections give many people the opportunity to learn about a variety of employment opportunities, and to meet people who may be helpful to them in the fields in which they work.

16. Scouting also provides invaluable leadership, organizational, and management training that can be put to good use in many contexts. I have often employed the techniques I learned in Wood Badge Training and at the National Camp School not only in my Scouting experience, but also in my career and my personal life. I have also witnessed firsthand the benefits Scouting training has provided to others. For example, I worked with a welfare mother in my District who was unable to find a job, but was enthusiastic about becoming a Scouter. This woman is now a Den Mother, and can run meetings competently and plan activities successfully. She has received recognition and awards for her progress, and has gained considerable self-confidence from her Scouting experience. As a result of the leadership training offered to her by Scouting, she has learned organizational and managerial skills that will greatly increase her opportunities for future employment outside of Scouting.

17. As an Eagle Scout, an adult leader and a professional Scouter, I have a comprehensive knowledge and

understanding of the Scouting program. I do not recall seeing any reference to BSA's policy of excluding homosexuals from membership in any materials published by BSA prior to December 1992, when Scouting Magazine and a local Council newspaper printed articles on the exclusionary policy, and all of the other BSA materials with which I am familiar remain silent on the issue of homosexuality. Neither the Scoutmaster's Handbook, nor the Boy Scout Handbook, nor the Field Book refers to BSA's policy of excluding homosexuals from membership, and nothing that I have learned while involved in the Scouting program suggests to me that sexual orientation is relevant in any way to determining eligibility for membership in Scouting. In fact, I did not learn of BSA's policy of excluding homosexuals from membership until approximately 1989 or 1990, when the policy was brought to my attention by a professional Scouter.

18. I am extremely familiar with the voluminous training materials provided by BSA's national office to its adult leaders. I have not only studied these materials, I have trained others using these materials and have participated in substantive discussions aimed at revising these materials. None of the official BSA training materials with which I am familiar refer to BSA's policy of excluding homosexuals from membership. Nothing that I have learned while involved in the Scouting program suggests to me that sexual orientation is relevant in any way to determining eligibility for membership in Scouting. In fact, the materials for teaching Scoutmaster Fundamentals -- a basic training course for Scoutmasters -- simply suggest that Scoutmasters tell their Scouts to turn to their parents for advice concerning sexual issues and values.

19. It has been my experience as participant in and leader of BSA training courses that the issue of whether homosexuals are eligible for Scouting leadership positions is never raised formally by those conducting training courses or leading Boy Scout troops. When asked directly about the policy, I have made clear that the Scouting program considers sexual conduct of all kinds -- whether heterosexual or homosexual -- inappropriate within the context of the Scouting experience. However, in other contexts, I have also made clear that I personally do not consider sexual orientation to be relevant to eligibility for membership in Scouting, and that -- as a matter of deeply held moral and ethical principle -- I would refuse to dismiss a Scout or Scouter simply on the grounds that he is gay.

20. Since 1990, I have been involved in an ongoing dialogue with professional and volunteer Scouters about my opposition to Scouting's exclusionary policy. Because I believe that this policy is directly contrary to my moral, ethical and religious duties and obligations, I have tried to work within the Scouting movement to change the policy. Recently, one professional Scouter advocated that I be ousted from Scouting because of my opposition to the policy; but I have been assured that merely voicing my opposition to a policy that I believe is unfair and unjust is not grounds for revocation of my Scouting membership.

21. As a member of Boy Scouts of America, I pledge to uphold the values set forth in the Scout Oath and the Scout Law, including the values of being morally straight and clean. Prior to 1993, no one involved in Scouting ever told me -- and no Scouting literature with which I am familiar ever

suggested to me -- that the requirement that a Scout be morally straight and clean means that a Scout cannot be gay.

22. At no time during my Scouting career prior to 1993 did anyone ever suggest to me, or did I read in any Scouting literature, that the phrase "morally straight" in the Scout Oath refers to sexual orientation or that homosexuals are not morally straight. It has always been my experience that Scouting encourages its members to formulate their own definitions of what it means to be morally straight, based on values that Scouting teaches such as truthfulness, consideration, compassion and integrity, and on each Scout's religious beliefs, which may differ significantly. I have never understood and I do not believe that sexual orientation is relevant to the requirement that Scouts be "morally straight."

23. At no time during my Scouting career prior to 1993 did anyone ever suggest to me, or did I read in any Scouting literature, that the term "clean" in the Scout Oath refers to sexual orientation or that homosexuals are not clean. During my involvement in Scouting, I have been taught that a Scout should be clean in "body and mind," and in "thought, word and deed." In this context, I understand cleanliness to mean that a Scout should be presentable and tidy, and should not use foul language or behave in a dishonorable manner. I have never understood and I do not believe that sexual orientation is relevant to the requirement that Scouts be "clean."

24. Nothing I have learned while involved in the Scouting program has taught me that sexual orientation is relevant in any way to eligibility for membership in Boy Scouts of America, or to any aspect of the Scouting program. I do not believe -- and I was never told prior to 1993 -- that

admitting homosexuals would interfere with the fulfillment of Scouting's purpose of teaching boys to uphold the values in the Scout Oath and the Scout Law, including being morally straight and clean.

/s/ William. A. J. Kirkner
William A. J. Kirkner

Sworn to before me this 30th day
of December, 1993

/s/ Dorothy V. Baker
Notary Public

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF DAVID A. RICE IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SONOMA)

DAVID A. RICE certifies:

1. I reside in Sonoma County, California. I make this certification in support of the summary judgment motion of plaintiff James Dale. I am currently employed with the National Park Service. I hold an A.B. in Education with Honors from the University of California at Berkeley. I have been married for 38 years and have four grown children.

2. I have spent 55 years in Scouting, first as a youth member and later as a professional Scouter and volunteer adult leader. Scouting has always been one of the most important parts of my life, beginning in 1938 when I became a Cub Scout in Oakland, California. As a Boy Scout, I achieved the rank of Star Scout and served as Junior Assistant Scoutmaster of my troop. As a youth, I was also active in Exploring.

3. While a young man in Scouting, I was inducted as an Ordeal member of the Order of the Arrow, the honor camping association established by Boy Scouts of America

("BSA"). I eventually achieved the rank of Vigil Honor Chair, the highest honor that the Order of the Arrow bestows on its members in recognition of exceptional service and personal effort.

4. In 1947, I became the Assistant Scoutmaster of Troop 41 in Oakland, California. In 1949, I became the Assistant Scoutmaster of Troop 30 in Oakland, California and served as its Scoutmaster during 1950 and 1951.

5. I spent the first seventeen years of my professional life as a full time, paid employee of Boy Scouts of America. From 1953 -- when I was discharged from the United States Army after serving for two years under an ROTC commission as 1st Lieutenant -- until 1970, I served as a District Scout Executive in Marin Council, Verdugo Hills Council, Sonoma-Mendocino Area Council and Sequoia Council, all in California.

6. After leaving the Scouting profession, I earned a credential as a teacher in the State of California and taught elementary school from 1971 to 1986. Since 1986, I have been employed with the National Park Service as secretary and Park Ranger, and am currently Editorial Assistant, in the Golden Gate National Recreation Area.

7. Although I have not held any professional Scouting positions since 1970, I have continued to be active in Scouting. I was a Pack Committee member, and later Webelos leader, of Pack 101, Petaluma, California, from 1970 to 1972. In 1972, I became the Troop Committee Chairman of Boy Scout Troop 74, Petaluma, California. In 1973, I became the Assistant Scoutmaster of Troop 74, and I served as that Troop's Scoutmaster from 1977 to 1979 and

from 1980 to 1992. Since 1992, I have been an Assistant Scoutmaster in Troop 74.

8. I have been honored for my commitment to the Scouting program. Among the most prestigious honors I received are the Order of Merit for outstanding service to boys, presented to me in 1987 by the Miwok District of Sonoma-Mendocino Area Council, and the Silver Beaver, presented to me in 1991 by the Sonoma-Mendocino Area Council, also for outstanding service to boys.

9. Scouting has provided me with innumerable financial and non-financial benefits. Aside from providing me with a livelihood for sixteen-and-a-half years, my Scouting experiences provided me with tools that I have employed throughout my professional life. For example, Scouting provided me with training which enabled me to lead the outdoor environmental education program at the school where I taught. Scouting gave me experience working with young people which I, in turn, have used in working with youth groups at the National Park Service. Scouting also gave me practical experience upon which I have drawn in editing publications and in working in public affairs at the National Park Service. Scouting also taught me personnel and other management methods that I have used, for example, to recruit a Superintendent for the Sunday School at the church where my family worships. Moreover, Scouting has been an important stabilizing factor in my life. Scouting has given me peace of mind and kept me on an even keel in troubled times.

10. During my more than 45 years as an adult volunteer and professional in Scouting, I completed numerous training

programs, including training for District Scout Executives at the National Training School of Boy Scouts of America, Wood Badge training and Scoutmaster training.

11. I am intimately familiar with the policies of Scouting. From 1938 until approximately 1980, I was not aware that BSA had a policy or practice of excluding homosexuals from membership. No one involved in Scouting ever told me that such a policy or practice existed, nor did I ever read about such a policy or practice in materials provided to me by BSA.

12. I did not learn during any of the training sessions I attended -- including training for District Scout Executives at the National Training School of BSA, Woodbadge Training or Scoutmaster training, or at any time while a professional Scouter or an adult volunteer, that homosexuals were not eligible for membership in Scouting, either as youths or adults. I never received any communications from BSA while employed as a District Scout Executive informing me that homosexuals were not eligible for membership in Scouting. I never learned anything while I was employed as a professional Scouter, or while I was an active youth or adult volunteer in Scouting, that suggested to me that homosexuals should not be eligible for membership in Scouting.

13. The purposes of Scouting, as I have come to understand them over the course of my more than 50-year involvement, are teaching young people outdoor and camping skills, developing their leadership abilities and sense of community responsibility, and providing them with the tools to make ethical choices over the course of their lives. I have

never known the exclusion of homosexuals from membership to be one of the purposes of Scouting; nor do I believe that this exclusion furthers any purpose of the Scouting program.

14. In about 1980, I learned through media reports that Timothy Curran, a California resident, was excluded from Scouting because it became known that he is gay. This was the first time, in the more than 40 years since I had first joined Scouting, that I learned that BSA had a practice of excluding homosexuals from membership. At the time, I was a Scoutmaster in California and was asked numerous questions by parents and others about Mr. Curran's exclusion. No one at any level of Scouting would make any official statements to me about BSA's practice or policy of excluding homosexuals. Because there had never been any mention of the practice of excluding homosexuals in The Boy Scout Handbook, The Scoutmaster Handbook or any other materials generally available to Scouts or Scouters, I was forced to rely upon newspaper and other media reports -- rather than any material or other information produced by BSA -- in answering those questions.

15. Since 1992, I have made a significant effort to gather information about the practice of excluding homosexuals from Scouting, but have learned essentially nothing from official Scouting sources. I wrote to the Regional Director of the Western Region of BSA requesting written materials regarding the policy, but was only referred to Blake Lewis, a national media spokesperson for BSA. On numerous occasions, I have requested information regarding the policy, both verbally and in writing, from my local and District Scout Executives. I have never received any meaningful response.

16. As I understand them, the words "morally straight" in the Scout Oath are not susceptible to a precise interpretation applicable to all Scouts. A Scout must apply his own personal beliefs in determining what is "morally straight." Thus, the requirement that a Scout be "morally straight" means different things to different Scouts. Some concepts, such as honesty, would be included within any Scout's definition of "morally straight." However, many other standards of morality vary among Scouts. For instance, while millions of Scouts drink tea, coffee or cola without any concern that such acts are immoral, a member of the Mormon Church would probably conclude that drinking coffee is not "morally straight" because Mormon religious beliefs teach that it is wrong to ingest caffeine.

17. A Scout's religious beliefs are important in helping him to interpret the meaning of "morally straight." The discussion in The Boy Scout Handbook of the requirement to be morally straight counsels a Scout to "be . . . faithful in [his] religious beliefs." However, Scouting does not require its members to belong to any particular religion or adhere to a specific set of religious norms. Scouts are Catholic, Protestant, Muslim, Jewish and Buddhist, and each one follows his own religious beliefs.

18. Because a Scout's personal religious beliefs form an important aspect of his definition of "morally straight", all Scouts are not in agreement that homosexuality is inconsistent with the pledge to be morally straight. Although some religions teach that homosexual activity is immoral, many do not. As an Elder of the Presbyterian Church, my religious beliefs do not lead me to understand homosexuality as immoral. It is an essential part of my religious faith that Jesus taught us to love and accept others regardless of their differences and to treat others fairly and with

justice. I believe that my religion teaches that these precepts apply equally to all people. Therefore, it would be inconsistent with my religious values to believe that a homosexual could not be "morally straight" within the meaning of the Scout Oath.

19. During my entire 55-year experience with the Scouting program, I have never been told that the term "morally straight" in the Scout Oath refers to sexual orientation, or that homosexuals are not morally straight. I have never understood and have never known other Scouts to understand "morally straight" to refer to a specific set of moral values.

20. I have never been told that the term "clean" in the Scout Law refers to sexual orientation or activity of any kind, or that homosexuals cannot be "clean" within the meaning of the Scout Law. I have always understood and thought that other Scouts understood the term "clean" to refer primarily to cleanliness of mind and body. My understanding has been that "cleanliness of mind" means that a Scout should not use foul language or think unkind thoughts about others. In all my years in Scouting -- including my years as a professional Scouter and an adult leader -- I have never interpreted the term "clean" in the Scout Law to refer in any way to sex or sexuality, and I have never been aware of any other Scout or Scouter who interpreted "clean" in the Scout Law to refer in any way to sex or sexuality.

21. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

/s/ David A. Rice
David A. Rice

Dated: December 23, 1993

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

AFFIDAVIT OF ROBERT L. SMITH, JR. IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

ROBERT L. SMITH, Jr., being duly sworn, deposes and says:

1. I reside in Santa Clara County, California. I make this affidavit in support of the summary judgment motion of plaintiff James Dale. I am currently self-employed as a computer software engineer. I hold a B.A. and a Ph.D. in Philosophy from Stanford University. I have been married for 22 years and have four children.

2. I first became a registered member of Boy Scouts of America ("BSA") in 1953 as a Cub Scout with Tall Corn Area Council in Des Moines, Iowa. I continued my involvement with Scouting as a Boy Scout and Explorer Scout until 1961. As a youth, I achieved the rank of Eagle Scout, was awarded the God and Country Award, and was elected to the Brotherhood of the Order of the Arrow, the honor camping association established by Boy Scouts of America. During my youth membership in Scouting, I also held various offices in my Scout Troop and Explorer Post.

3. I never heard and am not aware of any discussion about homosexuality that occurred during any Scouting meeting or function in which I participated throughout the period in which I was a youth member of BSA. No one ever said that homosexuals could not be Scouts, or that homosexuality was immoral or in any way inconsistent with the principles of Scouting. None of the materials that I received and reviewed as a youth in Scouting ever mentioned the subject of homosexuality.

4. As a Scout in the late 1950's and early 1960's, I learned tolerance and acceptance of others; the Scouting principles of tolerance and diversity were important to my personal development. Scout leaders made a great issue about how all boys were welcome to join the program, and I remember frequently hearing that "Scouting is for everyone." It was at Boy Scout camps that I first met boys of other races and religions; the first Catholic friend I ever had I met at Camp Mitigwa in Central Iowa.

5. I returned to Scouting in the 1980's, first as a parent and then as an adult leader. My older son, David, became a Cub Scout in 1985 and a Boy Scout in 1987. My wife and I recently experienced one of our my proudest moments as parents when we attended the Court of Honor ceremony at which David advanced to the rank of Eagle Scout. I became an Assistant Scoutmaster of a troop in the Stanford Area Council in 1988, and my wife became a Merit Badge Counselor in 1991. My wife and I currently hold those positions.

6. Throughout this period, my family and I were very involved in Scouting. I attended many campouts and Council

functions, including the Scout camp at Camp Oljato. During some weeks, I attended Scout meetings nearly every night of the week. I talked to many other parents about their sons' participation in Scouting, and encouraged many to join the Scouting program. Although as a volunteer I do not receive monetary renumeration for the time I put in to Scouting, the leadership experience and recognition and respect in the community that adult volunteers in Scouting receive more than compensate for that time. In encouraging others to join the Scouting program, BSA officials constantly stress the magnitude of these non-financial benefits. There may be expenses involved in being an adult volunteer, but I have never known an adult volunteer in Scouting who did not feel that the non-financial rewards of Scouting greatly outweighed those costs.

7. As an adult leader, I received formal training and various training materials from Boy Scouts of America, including The Scoutmaster Handbook. On the issue of sex, The Scoutmaster Handbook, states:

> Accept all youth as they are. Your acceptance will reassure them that they are normal. Remember the differences between youth when you plan Scouting activities . . . . Be accepting of their concerns about sex. Be very open and clear when talking with them.

The Scoutmaster Handbook (1990 ed.) at 154-55. True and correct copies of pages from Scouting publications referred to in this affidavit are attached hereto as Exhibit A. Similarly, Scoutmastership Fundamentals states that:

> Scouting believes that boys should learn about sex and family life from their parents, consistent with their spiritual beliefs.

Ex. A. Scoutmastership Fundamentals (1991 ed.) at 98. I always understood these statements to mean that Scoutmasters should respond openly and honestly to specific questions about sexuality, but refer Scouts to their parents for training in this area because sex is not a part of the Scouting curriculum.

8. In addition to reading various training materials, in 1989 I attended the "Troop 101" training sessions conducted by Boy Scouts of America for new adult leaders. Although the training included components about the history, operation, and policies of Scouting, I recall only two discussions relating to sex at these sessions: (1) we were taught how to deal with accusations of child abuse, and how to protect ourselves from unjust accusations; and (2) we were told to avoid any discussion of sex or sexuality with Scouts since this was the responsibility of a parent, school, or church, and not a Scouting responsibility. There was no mention of homosexuality or of the policy of excluding homosexuals from membership during these training sessions.

9. Prior to September 1991, I never heard any mention whatsoever of homosexuality during any Scouting function in which I participated. I was never told, and was not aware, that homosexuals could not join Scouting, or that homosexuality was inconsistent with any purpose of Scouting.

10. In September 1991, I received a copy of the Scouter's Log from the Stanford Area Council stating that

homosexuals were not eligible to be members or leaders of Scouting because they were not "morally straight" and were not good role models. I was completely shocked at this statement because it was the first I had ever heard of such a policy in my nearly forty years as a Scout or as an adult leader. The policy of excluding homosexuals from membership completely contradicts everything I know about Scouting and goes against the principles of diversity and tolerance that I was taught as a boy. Thirty years earlier, I was always told that "Scouting was for everyone."

11. In the more than two years since I first learned about the policy, I have read a number of books about the history of Scouting. I have learned a lot about changes in Scouting policy concerning race, religion and handicapped youth, as well as the philosophical background of "Scouting values." There is no discussion of homosexuality in any of these materials, and none of these histories state that it is a purpose of Scouting to exclude homosexuals or to teach that homosexuality is immoral. In my research, the earliest document that I found that states a policy position about excluding homosexuals from membership in Scouting is dated 1978. This document was not among those provided to me during my time as an adult leader and, in fact, was difficult for me to obtain. (This document, dated March 17, 1978 and addressed to "Executive Committee Members," is the same document attached as part of Exhibit A to the affidavit of P. Karl Rowley, submitted by Boy Scouts of America in opposition to James Dale's motion for summary judgment.)

12. As a trained adult leader, I am responsible for teaching Scouting ideals. These ideals are not a complex set

of legalistic requirements, but rather simple concepts such as "loyal" and "thrifty." Scouting teaches young boys that these principles mean different things to different Scouts. A version of the Socratic method is often used to discuss these Scouting values: individual Scouts are asked to share with their Troop how they regard or interpret the Scout Oath or Scout Law with respect to some real-life situation or dilemma. For example, I once conducted a discussion among Scouts (in a "Scoutmaster's Minute" at the end of a meeting) about the goal of being "thrifty." The ensuing discussion raised a number of substantively different interpretations of thriftiness, some of which were probably inconsistent. Nevertheless, each of the Scouts had something relevant to say about thriftiness, even though there was not complete agreement and no definitive interpretation could be reached.

13. The concept of "morality" is certainly far more complex than the concept of "thriftiness." As Scoutmastership Fundamentals teaches, the emphasis in defining morality is not on any fixed set of ideas, but rather on "what the boy is himself: his personal qualities, his values, his outlook." Ex. A, Scoutmastership Fundamentals (1991 ed.) at A-12 (emphasis added). Similarly, The Scoutmaster Handbook recognizes that "Older Scouts may begin to develop a personal philosophy of life, re-evaluating values and standards. . . . [They] combine advanced thinking ability with feelings and are able to see good and bad as relative, not absolute." Ex. A, The Scoutmaster Handbook (1990 ed.) at 156 (emphasis added).

14. Although I personally believe that homosexuality is not inconsistent with the requirement that Scouts "be morally straight," I recognize, that there are people in Scouting who

disagree with me, in part because their own religions teach that homosexuality is immoral. However, Scouting's definition of "morally straight" does not include a particular set of beliefs for all Scouts. Like all the values taught in Scouting, the most important thing about the "morally straight" requirement is the idea that each Scout formulate, understand and adhere to his own moral and religious beliefs. Thus, The Boy Scout Handbook, in setting forth the guidelines for what is "morally straight" states:

> To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant.

Ex. A, The Boy Scout Handbook (1990 ed.) at 550.

15. The Scout Oath has always recognized a "duty to God." However, because of Scouting's commitment to diversity, tolerance and respect for others, Scouting does not require its members to belong to any particular religion or adhere to a specific set of religious beliefs. In fact, Jewish, Moslem, Buddhist, Protestant and Catholic members of Scouting all pledge the same oath to fulfill a "duty to God." Struggles throughout the history of the organization have established the importance of tolerance for diverse religious beliefs and have led to the decision not to establish any particular religion or religious-based view within Scouting; all that is required of a Scout is that he follow his own religious beliefs.

16. Therefore, although particular religions may take a stand on sexual issues such as abortion, contraception, premarital sex, adultery and homosexuality, it has always been my understanding that Scouting does not. Rather, Scouting leaves these issues to be dealt with by Scouts, their families, and their religions.

17. The many religions that support Scouting have diverse views about sexual matters, including homosexuality. I am aware that at least two of these religions -- Unitarianism and Reform Judaism -- have publicly requested that Scouting change its policy of excluding homosexuals because they do not consider homosexuality immoral. It is my understanding that other denominations -- including the Lutherans, the United Church of Christ and the Quakers -- similarly do not teach that homosexuality is immoral. Therefore, the policy of excluding homosexuals from membership cannot derive from the requirement that Scouts be faithful to their own religious beliefs because Scouts who are members of these denominations would not conclude that homosexuality is inconsistent with their duty to God or their oath to be morally straight.

18. Although the policy of excluding homosexuals from Scouting is now generally publicized in the press, there is still no discussion of homosexuality at Scout meetings, no mention of homosexuality in the Boy Scout Handbook, and no reference to the policy regarding homosexuals in the membership application or in any other materials that are provided to potential leaders or members of Scouting.

19. I have tried unsuccessfully to initiate discussions of this issue at meetings of the general adult leadership of the

Stanford Area Council. In fact, my wife and I met with the Council executive and five members of the board to propose that we should have a task force to discuss homosexuality and how it relates to Scouting, but were told that homosexuality will not be discussed because it is not a "Scouting issue."

20. Members of my troop and my local council know of my objections to the policy of excluding homosexuals and are aware of the following statements I have made:

A. I do not believe that homosexuality is immoral or incompatible with the Scout Oath or Law.

B. I believe that Scouting should be trying to eliminate discrimination based on sexual orientation.

C. While I will not raise the issue of homosexuality in a Scouting context (i.e., with the Scouts), if a Scout were to ask me if I think that homosexuality is immoral, I would answer that I do not believe so. I would then refer the Scout to his parents for further discussion.

D. If a Scout comes to me and expresses a concern about his sexual orientation or confides in me that he is homosexual, I will not seek to have that Scout expelled from Scouting as long as his conduct within Scouting is appropriate.

E. I will continue to publicly oppose the policy of excluding homosexuals from membership in Scouting and to try to change the policy from within Scouting.

21. I have received some agreement and support for the stands that I have taken in opposition to the exclusion of homosexuals from Scouting. While some people have disagreed with me, no one has accused me of violating the Scout Oath or Scout Law in any way, and no one has suggested that I should leave Scouting because my beliefs are incompatible with the principles of Scouting. I have been assured by everyone with whom I am involved in Scouting that I am welcome to express my views on this issue and to try to "change Scouting from within."

22. Despite my open opposition to the Scouting policy of excluding homosexuals from membership, I have been asked to continue in my role as an adult leader in Scouting. No one in Scouting has ever questioned whether I would be an appropriate role model for young Scouts in light of my opposition to the policy. In fact, I was asked earlier this year by an executive of the Stanford Area Council if I would take on an additional leadership role as Order of the Arrow lodge advisor, despite my public stand against the exclusion of homosexuals.

/s/ Robert L. Smith Jr.
Robert L. Smith, Jr.

Sworn to before me this
3rd day of January, 1993.

/s/ Carol Ann Brewer
Notary Public

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

AFFIDAVIT OF DR. BRYANT L. WELCH IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF MARYLAND)
: ss.:
COUNTY OF MONTGOMERY)

DR. BRYANT L. WELCH, being duly sworn, deposes and says:

1. I reside in Potomac, Maryland. I am Senior Policy Advisor to the American Psychological Association (the "APA"). I submit this affidavit in support of plaintiff James Dale's motion for summary judgment generally, and, in particular, to respond to the Certification of Dr. Ricky L. Slavings in Support of Defendants' Cross-Motion for Summary Judgment, dated October 26, 1993. The facts stated herein are within my personal knowledge or have been obtained through my review of materials widely disseminated by the APA. I am professionally qualified to testify to all of the matters set forth herein.

Educational, Professional and Personal Background

2. I have extensive professional experience with gay men and lesbians and adolescents with an emphasis on small group dynamics. I received my B.A. from Harvard University in 1968, my J.D. from Harvard Law School in 1972 and my

Ph.D. in Clinical Psychology from the University of North Carolina in 1976.

3. In my professional work over the past twenty years, I have had extensive experience in the psychology of adolescence and homosexuality as well as small group interaction and dynamics. I have rendered extensive clinical psychological services for the treatment of adolescent and gay patients in both private practice -- from 1976-1986 -- and as the Director of Training and staff psychologist at the University of North Carolina's Student Health Service -- from 1976-1982. I also taught for six years as a Clinical Assistant Professor in the University of North Carolina's Department of Psychiatry. Approximately 10-20% of all of the patients I have treated in my ten years of private practice have been adolescents. The types of adolescent problems that I have addressed include, but are not limited to, conflicts with parents and other family discord, poor school grades, depression, anxiety, drugs and sexual problems. I also worked with adolescents from 1973-1975 at Umstead Hospital Adolescent Unit -- an in-patient facility in Butner, North Carolina -- where I provided long-term intensive psychotherapy services, including the treatment of anxiety, depression and sexual identity disturbance. From 1973-1974, I taught classes on small group process. The goal of these classes was to teach my undergraduate students which psychological variables shape behavior patterns in small groups. Throughout the past twenty years, I have kept abreast of scholarship, studies, teachings and critiques in my areas of expertise through extensive reading of professional journals, studies and other literature. My curriculum vitae, which sets

forth in greater detail my professional experience and publications, is attached as Exhibit A.

4. I agree with the professional opinion of Dr. Slavings that values can be transmitted in small group settings.

5. Like Dr. Slavings, my professional opinions regarding small group interaction and dynamics are based on my review of academic research and studies, and my extensive experience as an observer and participant in small group interactions, specifically, my twelve year involvement as an adult in youth baseball leagues. In addition, I have also relied on my broad-based clinical work in a variety of settings.

6. I was a member of Boy Scouts of America ("BSA") from the age of 8 until the age of 13. I received my First Class Badge and was a member in good standing throughout my years in Scouting.

Socialization of Values in Youth Baseball

7. I spent the better part of my youth involved in youth baseball leagues. Youth baseball was an important influence on my development and to this day I credit my experiences in youth baseball with making me the person I am today.

8. As an adult I became involved in youth baseball leagues as a father, as a Coach, and as a trained observer. I have been involved with youth baseball programs for significant periods of time over the last twelve years. For the first four to five years of this period, I participated as a parent actively involved in watching my older son, Lucas, take part in youth baseball. I have coached various teams in little league baseball programs over the last seven to eight years,

including: (i) coaching three years for the Durham County Southwest Athletic Association in Durham, N.C.; and (ii) coaching four to five years for the Montgomery County Baseball Association in Potomac, Maryland. I am currently the Baseball Chairman for the Potomac Valley American Athletic Union and a member of the Baseball Coaches of America.

9. Like Scouting, youth baseball leagues instill norms and values -- ideas about what is right and what is wrong -- in young boys. These norms and values are not set forth in any oath or law, and young boys take no pledge in joining a youth baseball league, but value transmission is strong nevertheless. Where Scouting and other organizations have oaths and laws, youth baseball leagues have a variety of formal and informal rules and regulations to which the boys are subject.

10. The rules in youth baseball are very similar to the rules in Scouting. A member of a youth baseball league must be honest, must be loyal to his team and his teammates, must be helpful and friendly, must respect others, must be courteous and kind to other boys and adults involved in the league, and must obey the Coach and other adult volunteer leaders.

11. Youth baseball is similar to Scouting in another respect. Just as Scouting is about more than learning how to tie a knot and pitch a tent, youth baseball is about more than learning how to swing a bat and pitch a ball. The purpose of youth baseball is to teach young boys about citizenship, teamwork, leadership skills, sportsmanship, diligence and the values that all of us should live by.

12. Within youth baseball leagues, coaches and other youth members influence the development of a youth member's norms, values, identity and sense of self, which, in turn, influence his conduct. The members of youth baseball leagues, like youth members in Scouting, are at an age where their norms, values and identities are susceptible to change and influence.

13. Like the Scoutmaster in Scouting, the Coach in youth baseball occupies a prominent role in reinforcing norms and values. Youth baseball players and their parents often look to the Coach for guidance and support and value training. More often than not, the Coach becomes a friend and leader to the boys, and provides an adult role model outside of the home and school.

14. Boys who participate in youth baseball understand that if they do not abide by the rules -- not just the formal rules of baseball so much as of the rules of citizenship and team play -- they will face some formal or informal sanction, including, in the extreme, being deprived of the privilege of playing in the league.

15. The groups in which youth league baseball take place are small, intimate, primary groups as these terms are defined in Dr. Slavings' certification at paragraph 8. These groups (a) have relatively few members -- teams are generally made up of twelve to fifteen boys between the ages of seven and thirteen and one or two adult leaders, (b) have a relative degree of permanence -- boys often remain with the same league team throughout their participation in youth league baseball, (c) are characterized by face-to-face interaction among its members, and (d) have a sense of group purpose.

Youth can find no greater sense of group purpose than they find in a team sport.

16. Youth baseball leagues are powerful agents of socialization. Like in Scouting, reinforcement and socialization occurs in youth baseball through the processes of role modeling, normative advocacy, rhetorical reflection, and labeling and identification, as these terms are defined in Dr. Slavings' certification at paragraphs 11-14.

17. A Coach is a role model and an educator. He advocates the specific norms and values to youth league members that he wants them to adopt. Over time, these values and norms are reinforced in the boys through this process. These values and norms are further reinforced by engaging in the sport of baseball, with its requirements of teamwork and cooperation. Young boys who participate in youth baseball leagues proudly wear the label of a team player and internalize and identify with the values inherent in the sport.

18. Parents enroll their children in youth baseball leagues not simply so that their children will learn how to play better baseball, but for the purpose of building character and instilling moral values. Membership in a youth league is not merely a ticket onto a baseball field, it is a ticket to teamwork, camaraderie, friendship, education and personal challenge.

Effect of Gay Adult Leaders on Scouts

19. I agree with Dr. Slavings that the ability of a small group to transmit a given set of norms and values would be interfered with if the group's leaders did not transmit those norms and values. I also believe that when the size of a group

increases, there is a decrease in the ability of the group to transmit norms and values. Where my professional opinion differs from that of Dr. Slavings, is on the issues of whether a person's sexual orientation is a value or norm, whether it is therefore transmittable, whether gay men are more likely to be "immoral" and "unclean" under the Scout Oath and Law and whether gay men are therefore less able to instill the values and norms embodied in the Scout Oath and Law than are heterosexuals.

20. In my ten years of private practice and in my experience as the Director of Training and staff psychologist at the University of North Carolina, I frequently provided psychotherapy services to gay men and lesbians. They comprised approximately 20% of all my patients over this time period. Homosexual patients sought treatment on problems afflicting the population at large -- including anxiety, depression and concerns with studying -- and problems uniquely affecting gay men and lesbians -- including whether to reveal their homosexuality to peers and how to cope with being targets of frequent discriminatory attacks.

21. I have been asked to give the expert opinions rendered herein -- that homosexuality is not a matter of moral depravity or mental illness, nor a matter of choice -- in many public fora. I have also appeared before the American Bar Association to discuss discrimination against gay men and lesbians.

22. It is my professional opinion that: (1) homosexuality is not a form of sexual deviation or a mental disorder; (2) sexual orientation is not a value, a norm or determined in

any way by a person's morality and cannot be transmitted from adult to child; (3) sexual orientation is highly resistant to change; (4) there is no correlation between sexual orientation and morality; and (5) the existence of openly gay adult leaders in Scouting will not affect the sexual orientation of youth members in Scouting or affect the program's ability to transmit its norms and values to Scouts.

23. Homosexuality is not a form of sexual deviation or a mental disorder. Homosexuality has not been considered a form of sexual deviation or mental disorder by the mental health profession for approximately twenty years. The American Psychiatric Association removed homosexuality from its list of mental disorders in 1973; two years later, the APA passed a resolution supporting this action. Empirical research and professional norms do not support any correlation between a person's sexual orientation and his psychological adjustment or maladjustment. Homosexual orientation implies no impairment in judgment, stability, reliability or general social and vocational capabilities.

24. Largely from my experience treating homosexual patients, I have realized that sexual orientation is not a value or a norm, is not determined in any way by a person's morality and cannot be transmitted from adult to child. It has been my experience that homosexuality is not a function of maladaptive parenting or role modeling. I have reviewed summaries of studies which indicate that the incidence of homosexuality are the same across different historical eras, countries, cultures, societal standards, religious beliefs and childhood upbringings. Research indicates that gay men and lesbians do not differ in significant ways from heterosexuals except in terms of their sexual orientation.

25. There have been many studies on the effects of a role model on a child. Several studies have concluded that no evidence exists that having a gay role model is harmful to the child, nor does it influence the child's sexual orientation or create personal sexual conflicts or confusion for the child.

26. Sexual orientation is highly resistant to change. Sexual orientation is set in place very early on in the life cycle -- even before birth according to many. I have had experiences with many patients who, because of prevailing prejudicial attitudes and stereotypes, desperately wished to change their sexual orientation but were unable to do so. Research findings suggest that efforts to "repair" homosexuals are nothing more than social prejudice garbed in psychological accouterments. Even those rare therapists who believe that sexual orientation can be altered believe that the process required involves extensive therapy and conditioning and cannot be attained by merely changing role models.

27. According to the APA, there is no correlation between sexual orientation and morality. Homosexuality is a status. Homosexuality is not a function of morality; it does not increase or decrease with any particular moral code or set of social or moral attitudes. Studies have demonstrated that gay men and lesbians have as high a moral code as heterosexuals. As BSA has acknowledged, studies have also shown that a gay man is less likely to molest young children than a heterosexual man. This is not surprising because molestation is not a crime caused by one's sexual orientation; rather, it is a crime of dominance which arises when a person has difficulty with appropriate human intimacy.

28. Many private corporations and other entities have adopted nondiscriminatory policies based on sexual orientation with no apparent disruption to the organization. In fact, allowing gay men into BSA would have beneficial effects on Scouts. Being exposed to diversity promotes psychological growth and will assist the adolescent's development. Studies have indicated that exposing heterosexuals to truthful information about gay men and lesbians often reduces homophobia and discrimination.

29. As a psychologist, it is my opinion that the existence of openly gay adult leaders in Scouting will not affect the sexual orientation of boys participating in Scouting or affect the program's ability to transmit its norms and values to Scouts.

/s/ Bryant L. Welch
Dr. Bryant L. Welch

Sworn to before me this 4th
day of January, 1994

/s/ Mina Vrajesh Patel
Notary Public

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF CHARLES ALBERT WOLFE

STATE OF FLORIDA)
) ss.
COUNTY OF PALM BEACH)

1. I, Charles Albert Wolfe, reside in Palm Beach County in the State of Florida. I make this certification in support of the summary judgment motion of plaintiff James Dale.

2. I first became a registered member of Boy Scouts of America ("BSA") as a Cub Scout in 1970. I became a Boy Scout in 1974 and an Explorer in 1978. I continue to be a registered member of BSA at the present time.

3. As a Boy Scout, I achieved the rank of Eagle Scout and became a Brotherhood member of the Order of the Arrow. I held many different leadership positions in the Boy Scout troops of which I was a member, including Patrol Leader, Assistant Senior Patrol Leader, Quartermaster, Leadership Corps member, Junior Assistant Scoutmaster and Assistant Scoutmaster.

4. In 1978, while still a Boy Scout, I also joined an Explorer post, in which I attained the positions of Post President and Chairman of the Explorer Presidents Association for the Suwannee River Area council.

5. In January 1980, I became the Explorer Chairman for Area 6 of the Southeast Region, Boy Scouts of America, and was responsible for overseeing the Exploring programs throughout that geographical territory. During my time as Explorer Chairman, I organized two statewide Exploring conferences, one for training Explorer Post leaders and the other for the purpose of electing leaders and nominees to the National Explorer Presidents Congress.

6. In 1981, the National Explorer Presidents Congress elected me National Explorer President, the highest elected youth position in Scouting. I served in this position for a term of one year.

7. During my tenure as National Explorer President, I acted as the principal youth representative of Scouting, speaking at numerous meetings of chartering organizations and other groups across the United States, and appearing frequently in newspaper articles and on television. I often spoke about the meaning and significance of Scouting and described what Scouting had taught me and what Scouting has to teach others: values, independence, and practical skills. I also spoke about the Exploring program, and the early career experience it had afforded me.

8. While National Explorer President and until 1983, I served as a voting member of the National Executive Board of BSA, representing the perspective of BSA youth members. As a Board member, I helped adopt BSA policies and procedures, and served on several committees of the National Executive Board, including the Exploring Committee and the Relationships Committee.

9. As part of the celebration of the Diamond Jubilee Year of BSA, I travelled the country from May 1985 to August 1985 with the "Heritage Campfire Caravan." The Caravan travelled to approximately 40 state capitals, ending up at the National Boy Scout Jamboree in Fort A.P. Hill, Virginia, an event geared towards promoting the value of Scouting, and the largest camping event for youth in the world. I was one of just four youth members of BSA selected to accompany the Caravan and was `chosen to be the principal youth spokesman to the media. Throughout the tour, I spoke to reporters about the history, purposes and values of Scouting, and I appeared in newspaper articles and on television in virtually every city visited by the Caravan.

10. From approximately 1985 to 1991, I served as an Assistant Scoutmaster of a troop chartered by Trinity United Methodist Church in Palm Beach Gardens, Florida. I am a member of this Church, and during 1991 and 1992, I served as Scouting Coordinator of the Church, overseeing the Church's sponsoring of a Cub Scout pack, a Boy Scout troop, an Explorer post, a Varsity Scout team and a Girl Scout troop. In connection with my role as Scouting Coordinator, I served as a voting member of Gulf Stream Council, Boy Scouts of America.

11. While occupying the aforementioned leadership positions, I gained a detailed familiarity with the policies and procedures of BSA. Despite this familiarity, however, until approximately 1985 I was completely unaware that BSA had any policy prohibiting membership in BSA on the basis of sexual orientation. No one involved in Scouting ever told me that such a policy existed, nor did I ever read about such a policy in materials provided to me by BSA. Nothing that I

have learned while involved in the Scouting program suggests to me that one's sexual orientation is relevant in any way to determining whether someone is eligible for BSA membership.

12. I have never understood it to be one of the central purposes of BSA or the Scouting program to exclude anyone from membership on the basis of sexual orientation. Rather, throughout my Scouting career I have understood the central purposes of Scouting to be teaching young people outdoor and camping skills, developing their leadership abilities and sense of community responsibility, and providing them with the tools to make ethical choices over the course of their lives. My understanding has always been that BSA advocated a policy of inclusion, and strove to make its programs available to everyone.

13. In approximately 1985, several years after my term as National Explorer President and my service on the National Executive Board, I learned that the national office of BSA claimed to have a policy of excluding homosexuals from membership. I did not learn of this policy from fellow BSA members, but instead read about it in a newspaper article about a lawsuit involving BSA. My initial reaction upon learning of the policy was surprise, because nothing I had learned about the meaning of being a good Scout suggested that homosexuals could not be good Scouts, or, for that matter, that sexual orientation was in any way relevant to Scouting.

14. The moral values I learned as a Boy Scout and tried to impart to others as a BSA leader and public spokesman were essentially based on the points of the Scout law. In my

Scouting experience I both learned and emphasized to others the importance of trustworthiness, honesty, integrity, independence, compassion, and commitment. I was never taught that issues of sex and sexuality had any place in Scouting's definition of morality, and in my leadership roles I have never suggested that they do. The morality that I learned during my time with BSA and imparted to others as a Scout and a leader -- particularly, the requirement that a Scout be trustworthy -- is entirely neutral with respect to sexuality. The values that BSA taught me can guide the lives of homosexuals and heterosexuals equally.

15. During the period that I occupied the leadership positions in Boys Scouts and Exploring described above, I was never told that the phrase "morally straight" in the Scout Oath referred to sexual orientation or that homosexuals were not "morally straight." I never understood and never knew other Scouts to understand "morally straight" to refer to any moral values other than those which the Scouts actively teach, such as trustworthiness, honesty, integrity, independence, compassion, and commitment.

16. During the period that I occupied the above-described leadership positions, I was never told that the term "clean" in the Scout Oath referred to sexual orientation or activity of any kind, or that homosexuals could not be "clean" within the meaning of the Scout Law. I always understood and thought that other Scouts understood the term "clean" in the Scout Law to refer primarily to cleanliness of mind and body. My understanding was that "cleanliness of mind" meant that a Scout should not use foul language or idly think ill thoughts about others. I never interpreted the term "clean" in the Scout Law to refer in any way to sex or sexuality, and I

was never aware of any other Scout who interpreted "clean" in the Scout Law to refer in any way to sex or sexuality.

17. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

/s/ Charles Albert Wolfe
Charles Albert Wolfe

Dated: August 30, 1993

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MONMOUTH COUNTY

Civil Action No. Mon L 5373-92

JAMES DALE,

Plaintiff,

v.

THE BOY SCOUTS OF AMERICA
and THE MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,

Defendants.

DEPOSITION OF CHARLES D. BALL
MARCH 18, 1993

(excerpts)

* * * *

particularly the "to be morally straight" of the Scout Oath and the "clean" point of the Scout Law.

Q. Is the policy contained in explicit language in any document that is disseminated to Scouts?

A. No.

Q. Is the policy contained in any document that is disseminated to parents of Scouts?

MS. KERR: I object to the form.

A. I don't know of any.

Q. Is the policy contained in any document that is disseminated to chartered organizations?

MS. KERR: I object to the form.

A. Again, all parents, chartered organizations, volunteers and youth members would all recognize this as being a true situation based on our Scout Oath and Scout Law and those principles that we have in the Boy Scouts of America.

That has always been true since I belonged. It never was in print or in writing, but we just knew.

Q. Has the policy ever been made known to the public in any writing?

MS. KERR: I object to the form.

By whom?

MS. COSTA: By the Boy Scouts of America.

A. None that I know of.

Q. How would a prospective Boy Scout learn of the policy?

A. When he fills out the application to become a member of the organization it specifies that he would abide by the Scout Oath and Scout Law.

Q. And what is it in the Scout Oath and Scout Law that communicates this policy to the Boy Scout?

A. The issue of "morally straight" in the Scout Oath and the "clean" point of the Scout Law.

Q. Why isn't the policy explicitly set forth in any writing?

MS. KERR: I object to the form.

A. I don't know.

Q. In what way --

MS. KERR: And it mischaracterizes his testimony.

Q. What are the reasons for the policy?

A. Homosexuals do not provide the role model that the parents of our young people want in leadership roles for their children.

Q. What ideals espoused by the Boy Scouts would a gay person not have?

A. The ideals that would be covered in "morally straight."

* * * *

Q. Have you or has anyone else in the Regional Office taken any steps to try to determine what parents' views are concerning this policy?

A. No.

Q. To your knowledge has anyone in the Boy Scouts of America taken any steps to determine what parents' views are in this policy?

A. I'm not aware of any.

Q. Have you had any conversations with Scouts about their views on this policy?

A. No.

Q. Have you had any conversations with Adult Leaders on their views of this policy?

A. I've discussed this policy with Adult Volunteer Leaders.

Q. In what context?

A. Well, one example would be with the Regional Review Committee volunteers.

Q. Was that in the case of James Dale?

MS. KERR: Objection to form.

THE WITNESS: I don't understand that.

Q. Was that in the context of reviewing James Dale's revocation or in some other context?

THE WITNESS: That I would have discussed policy with them?

MS. COSTA: Yes.

A. I don't remember that I did. They're aware of the that individual could be denied membership in the Boy Scouts of America.

An alcoholic or a person that would take alcohol on an outing with young people on any property owned by the Local Council or by the Boy Scouts of America, that individual would be denied membership in the Boy Scouts of America.

Q. This is all --

A. And any offense against the law other than sexual that an individual would do would be just cause for denial of membership.

Q. Okay.

Other than the offenses which would violate the law, the others you referred to, the use of alcohol and the use of foul language would be a cause for expulsion because they violate the requirement that a Scout be "clean"?

A. And "morally straight" in the Scout Oath, yes.

Q. In what way is being a homosexual inconsistent with being "morally straight"?

A. The interpretation of "morally straight", as I see it, would be practicing your religious beliefs, it would be living a life that would follow purity, follow honesty and would believe in justice.

I believe that the homosexual does not -- would not be a good role model for young people based on those things I just mentioned.

Q. Which of those things you just mentioned is inconsistent with homosexuality?

MS. KERR: I object to the form.

A. Well, I would say all of it.

Q. So you're saying that homosexuality is inconsistent with your religious belief?

A. That is correct.

Q. And what is the religious belief of the Boy Scouts of America?

MS. KERR: I object to the form.

A. The religious belief of the Boy Scouts of America. A person that belongs to the Boy Scouts of America attests to the fact that they believe in a God, but no particular religion. That's up to the individual.

Q. Does the Boy Scouts of America recognize that different religions have different ideas about morality?

A. Yes.

Q. Does the Boy Scouts of America recognize that some religious beliefs do not consider homosexuality to be inconsistent with morality?

MS. KERR: I object to the form.

If you know.

Q. Have there been any?

A. Yes.

Q. Can you give me the approximate number?

A. No, I don't remember.

Q. Is it an explicit teaching of the Boy Scouts of America that homosexuality is not morally straight?

MS. KERR: I object to the form.

Asked and answered.

A. When we teach morally straight or when you read "morally straight" it doesn't have the word "homosexuality in

it, as such, but it says those things that I've said before that it says in "morally straight."

Q. Is it an explicit aim of the Boy Scouts to discourage homosexuality?

A. No.

Q. Is it an explicit aim of the Boy Scouts to encourage heterosexuality?

A. The Boy Scouts of America espouses family values.

Q. And what do you mean when you say "family values"?

A. I mean that the young person would gain from being in a family situation.

* * * *

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Selected Exhibits to the Certification of
Steven M. Knecht, Attorney for Respondent

1991 Annual Report
Boy Scouts of America
(excerpts)

**To the Speaker of the United States
House of Representatives**

[PHOTO OMITTED]

The mission and values *of the Boy Scouts of America have remained constant through periods of dramatic challenge for our country. The Scout Oath and Scout Law are unchanged. At the same time, Scouting has responded to societal change by seeking out new ways to meet the needs and interests of young people. The beneficial programs we've launched in recent years continue to prove their worth, such as those that are helping eliminate drug abuse, child abuse, illiteracy, youth unemployment, and hunger. The national Good Turn, Scouting for Food, was the largest food collection effort in the United States in 1991.*

During the past year, BSA expanded the range of its outdoor programs, which have traditionally provided a setting for learning, growth, and discovery. The new outdoor skills instruction seminars, for instance, help Boy Scout leaders master basic and specialized skills they can pass along confidently to Scouts. Our newly published Conservation Handbook *will be an essential reference, not only for Scout leaders but for anyone who works on conservation projects.*

The future of our world is in the hands of children, and, historically, one of our primary goals has been to make contact with all young people who would benefit from Scouting. For children who have little chance of joining traditional youth organizations, our new Learning for Life program takes a values-based curriculum into the classroom. Our recently introduced Hispanic Emphasis program places professional staff in local councils to build support for Scouting in Hispanic communities.

In this changing world, the Boy Scouts of America believes the spirit of Scouting has no borders. Nineteen ninety-one saw the remarkable determination of several eastern European countries to provide Scouting for their young people. The Boy Scouts of America is proud to assist such efforts, to create new friendships, and to increase world understanding through Scouting.

The year 1991 is memorable for new strides taken. Please discover Scouting's many accomplishments in the pages of this report, and celebrate with us the triumphs we are sharing with young people.

/s/ [ILLEGIBLE]	/s/ [ILLEGIBLE]
President	Chief Scout Executive
[PHOTO OMITTED]	[PHOTO OMITTED]

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The New York Times

December 17, 1993, Friday, Late Edition - Final

HEADLINE: United Way Threatens to Cut Aid to Boy Scouts

BYLINE: By JACQUES STEINBERG

BODY

A Connecticut United Way group yesterday threatened to cut off financial support for a local Boy Scout council unless the organization signed a pledge that it would no longer discriminate against gay people.

The new policy by the United Way of Greater New Haven was believed to be among the first of its kind in the Northeast. The United Way in San Francisco cut off support to the Boy Scouts in its area two years ago because of the organization's national policy barring membership to homosexuals.

While the New Haven United Way emphasized that its nondiscrimination policy applied to all recipients of its donations, it had been under intense political pressure to cut off support to the Scouts after it was disclosed this week that the Quinnipiac Council of Boy Scouts had dismissed a veteran scout leader solely because he is homosexual. The Quinnipiac Council, based in Hamden, Conn., receives $70,000, less than 10 percent of its budget, from the United Way.

The 67-year-old volunteer scout leader, a former Eagle Scout who spoke on condition of anonymity because he fears harassment, said in a telephone interview that he had been dismissed by the council last month after someone -- he does

not know who -- brought his homosexuality to the Scouts' attention. He said his private life might have been made public because he attends a New Haven church that is primarily attended by gay people.

No Chance of Altering Policy

"They secretly investigated me for four weeks," he said of the Scouts. "Then they convicted me."

In 23 years as a Scout and then a Scout leader, he said, there had never been any complaints about him.

The Quinnipiac Council, which serves about 43,000 youths in south-central Connecticut, referred questions to the Scouts' northeast regional office in Dayton, N.J., which in turn deferred to the Boy Scouts of America in Dallas.

Richard Walker, the national spokesman for the Scouts, said there was "not a chance" that the organization, known for teaching outdoor skills and homespun virtues to four generations of American boys, would alter its stance on homosexuals. He added that local councils were not permitted to sign agreements that were at odds with the national policy.

"Our national policy is based on what parents expect from us," Mr. Walker said. "Parents tell us that an avowed homosexual is just not a desirable role model."

'Assurance of Compliance'

At a news conference yesterday, Bob Fiscus, president of the New Haven United way, refused to single out the scout leader's dismissal as the impetus for the new policy.

While he said he was "aware of the feeling of some in our community" that the United Way should stop financing the Scouts in response to the incident, he said the new policy was "not directly related to this matter" and had been under discussion since early this year.

Under the directive, which will take effect in 1995 because the 1994 campaign is already under way, all agencies that receive money from the New Haven United Way will be required to sign "an assurance of compliance" with all policies, as well as applicable Federal and state laws, Mr. Fiscus said.

The new policy, which must be signed by the spring of next year, directs the United Way and its affiliates to conduct themselves "on a nondiscriminatory basis without regard to race, creed, color, sex, sexual orientation, mental disability, marital status," among others.

While those organizations that do not sign on to the policy would lose funds authorized by the board of the New Haven United Way, the organization said it would still pass along individual donations that contributors specifically earmarked for a particular recipient like the Boy Scouts.

Compensation From Others

Officials at the United Way of America said that its affiliate in Portland, Me., was believed to be the only other one in the Northeast, among a handful nationwide, that had adopted similar policies, some of them aimed directly at the Scouts. United Way groups, which govern themselves on a local level but have long supported the 86-year-old Scout program, give a total of about $86 million to Scout troops each year.

Mr. Walker, the Scouts' spokesman, said that in all cases, those councils that had lost United Way funding had been able to compensate with money from other sources.

In contrast to the New Haven United Way, United Way groups in the Newark area and in Westchester and Putnam Counties in New York said that there had been no one in their communities clamoring for anti-discrimination policies against the Scouts. The New Haven group had come under fire from New Haven city officials and a student group at Yale, among others, to rein in the Scouts after the dismissal of the leader.

The former scout leader, a resident of an undisclosed "shore line" community who joined the Scouts at age 12, said he had worked on and off with the organization ever since. And he said he hoped it would eventually take him back.

"I passionately believe in the program," he said. "I know the attitudes and feelings of some staff members and volunteers in scouting. And that attitude is very homophobic. I feel very sad and heartbroken about it."

Chicago Tribune
December 18, 1993

HEADLINE: SCOUTS' OUSTER OF GAY ENDS UNITED WAY AID

BYLINE: From Tribune Wires.

BODY

Protests over the ouster of a Boy Scout leader because he is gay have prompted the United Way of Greater New Haven to end its annual $70,000 contribution to the Scouts, the charity said Friday. "We are opposed to discrimination in whatever form it takes," said Robert Fiscus, president of the United Way chapter, who acted after intense pressure from state legislators and homosexual activists. The incident began earlier this week when it became known that the Quinnipiac Council of the Boy Scouts of America had ordered a volunteer leader to stay away from all Scout functions because an investigation revealed he was gay. Robert Walker, the Boy Scouts' national spokesman, said he was saddened by the United Way decision but said the organization has no intention of changing its policy, telling the Hartford Courant newspaper: "We don't discriminate. We differentiate in terms of what our constituency tells us they want."

GO FOR THE EAGLE
(excerpts)

A Guide to Achieving Scouting's Highest Rank

[GRAPHICS OMITTED]

NANCY & DEAN HOCH

Foreword

[GRAPHIC OMITTED]

Almost without exception, every one of the thousands of boys who enter the Boy Scouts of America each year yearns for Scouting's highest award, the coveted Eagle rank. Each boy sets his sights on this honor, as do his parents and leaders. But only a small percentage of young men ever achieve it--less than two out of every hundred boys who enter the program become Eagles.

Part of the reason for this high dropout rate is that information on achieving the Eagle rank is lacking. Yet the need is certainly there. The benefits of the Eagle program both to the Scout and society cannot be calculated.

The rank speaks for itself. When a hundred boys apply for a job, the candidate who can write "EAGLE SCOUT" on his application has a much better chance of being hired. He's a young man recognized to have significant training and skills. He's an acknowledged leader.

Why do so many Scouts attain the first few ranks but never reach the highest? Nancy and Dean Hoch, the parents of five Eagle Scouts who served as Scouting leaders for over 15 years, can tell you why. They do just that in this timely book and also

* * * *

GO FOR THE EAGLE

The very first recipient of the Eagle badge was Arthur R. Eldred of Troop 1, Rockville Center, New York. Everyone wanted to be sure this first Eagle Scout was qualified to receive his award. So he was reviewed not only by his own troop's board of review but also by the nation's three major Scouting figures. Today it would be like having the three highest Scout executives from the National Scout Office as a review board.

Eldred's presentation was a grand affair, with many of Scouting's original founders in attendance. It set the stage for all the Eagle presentations to follow. There were to be over a million such Eagle awards given in the next 75 years.

Any Scout who joins this illustrious group of Eagles can be proud. He has accomplished something remarkable in his young life.

The Eagle...That's my goal!

[GRAPHIC OMITTED]

What Are The Rewards?

A Scout not only learns important skills and develops excellent character traits on the trail to Eagle. He can also expect some very tangible rewards as well.

When he submits an application for a scholarship or for a job, he should include information on earning the Eagle award. This will almost always give him a significant advantage over the other applicants.

* * * *

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

Civil Action No. Mon C 330-92

JAMES DALE,

Plaintiff,

v.

THE BOY SCOUTS OF AMERICA
and THE MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,

Defendants.

CERTIFICATION OF REVEREND JOHN GIFFIN

STATE OF CALIFORNIA)
) ss.:
COUNTY OF RIVERSIDE)

John Giffin certifies:

1. I am an ordained minister of the United Methodist Church and I presently serve as Pastor of the Palm Springs United Methodist Church in Palm Springs, California.

2. I have participated in Scouting for approximately 5 years. As an adult volunteer, I serve as the head of the Chartered Organization for Pack 205, the United Methodist Church of Palm Springs. I also served as a Chaplain at the 1993 Boy Scout Jamboree.

3. United Methodist churches lead all other denominations in terms of youth served in church-sponsored Packs, Troops and Posts. United Methodist churches sponsor approximately 11,000 Cub Scout Packs and Boy Scout Troops nationwide, and total youth membership in these groups is approximately 340,000. There are trained Scouting coordinators in approximately 545 United Methodist districts across the country. Four percent of Americans are members of United Methodist Churches. The United Methodist Church is the second largest Protestant Body in America.

4. The United Methodist Church participates in Scouting and supports Scouting because of the values Scouting seeks to instill in young people. Belief in God, reverence toward God and recognition of one's duty to God are the most fundamental of those values, and the emphasis which Scouting places on those values accords with the beliefs and teaching of the Church.

5. The affiliation between the Church and Scouting immeasurably enhances Methodist youth ministry by enabling Methodist youth to participate in a wide variety of programs and activities designed to enhance spiritual and moral development consistent with the teachings and aims of the Church.

6. The United Methodist Church views homosexual conduct as incompatible with Christian teaching, in accord with Scouting's view of homosexual conduct. Regarding human sexuality, the Book of Discipline states:

> Although we do not condone the practice of homosexuality and consider this practice incompatible with Christian teaching, we affirm that God's grace is available to all.

Book of Discipline at 92 (1992 ed.). "Sexual relations are only clearly affirmed in marriage bond," in accord with the Church's commitment to family life as "the basic human community through which persons are nurtured and sustained in mutual love, responsibility, respect and fidelity." Id. at 90-91.

7. The United Methodist Church believes that a person who practices a homosexual lifestyle is not maintaining "the highest standards represented by the practice of fidelity in marriage and celibacy in singlehood." Book of Discipline at 202. Consequently, the Church does not ordain ministers who practice such a lifestyle:

> Since the practice of homosexuality is incompatible with Christian teaching, self-avowed practicing homosexuals are not to be accepted as candidates, ordained as ministers, or appointed to serve in The United Methodist Church.

Book of Discipline at 202.

8. In my opinion the United Methodist Church's opposition to civil rights discrimination against homosexuals does not affect the membership policies of private organizations such as Boy Scouts of America.

9. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: January 27, 1994

/s/ John Giffin
John Giffin

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF RABBI ARTHUR VERNON

STATE OF NEW JERSEY)
) ss.:
COUNTY OF ESSEX)

Rabbi Arthur Vernon certifies:

1. I am a Jewish rabbi and the Director of Educational Development Services, Jewish Education Service of North America, the national agency for Jewish education.

2. I first joined Scouting in 1959 as a youth member of Boy Scout Troop 280, sponsored by Temple Judea in the Bronx, New York. I attained the rank of Life Scout. In 1962, I joined Explorer Post 280, also sponsored by Temple Judea. From 1964 to 1968, I attended Hunter College in the Bronx. During that time I was a member of the College Scouter Reserve and an active member of Alpha Phi Omega, a service fraternity. I am a Vigil Honor member of Order of the Arrow.

3. In 1983, when my older son joined cub scouts, I registered as an adult leader and served as den leader of his pack. My younger son joined cub scouts in 1985. I served as Den Leader Coach that year, and Cubmaster from 1986-89. In 1988 and 1989, I served as assistant Scoutmaster of my older son's Boy Scout troop and helped him attain the rank of First Class.

4. I am currently a National Vice-Chair of the Jewish Committee on Scouting. The Jewish Committee on Scouting is a liaison committee between the Jewish community and Jewish organizations and the National Council. The Committee sits in an advisory capacity.

5. I served as Headquarters Staff Jewish Chaplain at the National Jamboree this past summer.

6. Because the values of the Scout Oath and Law accord with Jewish beliefs and teachings, the Jewish community has endorsed and supported Scouting programs for decades. The Jewish community participates in Scouting and supports Scouting because of the values Scouting seeks to instill in young people. Fundamental among those values are belief in God, reverence toward God and recognition of one's duty to God.

7. Through this association with Scouting, Jewish youth are provided with a unique opportunity to participate in a structured program of activities designed to enhance spiritual and moral development consistent with Jewish teachings.

8. Scouting views homosexual conduct as immoral and as inconsistent with the Scout Oath's requirement that a Scout be morally straight and the Scout Law's requirement that a Scout be clean in thought, word and deed. This view is in accord with the teachings of Orthodox and Conservative Judaism.

9. There are three principal movements within Judaism -- Orthodox, Conservative and Reform. Orthodox Judaism is the classical wing of Judaism, Conservative Judaism is the historical wing of Judaism, and Reform Judaism is the

progressive wing of Judaism. According to a 1990 National Jewish Population Study there are approximately two million Jews affiliated with synagogues, 355,000 are Orthodox, 890,000 are Conservative, and 760,000 are Reform. I am a Conservative rabbi.

10. Because Jewish morality is based on a strong sense of family tradition and values, classical Jewish tradition condemns homosexual conduct. The Torah, the primary source of Jewish law, unambiguously describes homosexual conduct as an "abomination." Rabbinical interpretations of Jewish law have consistently affirmed this prohibition against homosexual conduct.

11. I was ordained as a Reform rabbi at Hebrew Union College - Jewish Institute of Religion in New York. I left the Reform movement because, among other things, I disagree with the liberal views of the Reform rabbinate in permitting known or avowed homosexuals to serve in clerical leadership roles in synagogues. Among Reform rabbis, there is a significant minority who disagree with the view that known or avowed homosexuals should be permitted to serve in clerical leadership roles.

12. I support Boy Scouts' policy excluding known or avowed homosexuals from adult leadership positions. An adult Scout leader serves as a role model for emerging adolescents who are developing values and making lifestyle decisions. Both Scouting and Jewish tradition strive to instill traditional, heterosexual family values in youth.

13. I use Scouting as an educational program for Jewish youth. If I lost the right to exclude known or avowed

homosexuals from leadership positions in Jewish Scouting units, I would withdraw my support of Scouting.

14. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: January 26, 1994

/s/ Arthur Vernon
Arthur Vernon

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF REVEREND JERALD C. JOERSZ

STATE OF MISSOURI)
) ss.:
ST. LOUIS COUNTY)

JERALD C. JOERSZ certifies:

1. I am an ordained minister of the Lutheran Church Missouri Synod (the "Missouri Synod") and I serve as the Missouri Synod's Assistant Executive Director of the Commission on Theology and Church Relations. The Missouri Synod is one of the two principal branches of the Lutheran Church in America; the other being the Evangelical Lutheran Church in America (the "ELCA"). Eight percent of all Americans are Lutheran, and about 95 percent of Lutherans are members of either the Missouri Synod or the ELCA.

2. Lutheran congregations of the Missouri Synod and ELCA are strong supporters of Scouting. The National Lutheran Association of Scouters represents Lutheran congregations on Scouting's Religious Relationships Committee. Over 120,000 Lutheran youth are members of Scouting nationwide.

3. Lutheran congregations participate in and support Scouting because the values Scouting seeks to instill in young

people are consistent with the values the Church encourages. Belief in God, reverence toward God and recognition of one's duty to God are the most fundamental of those values, and the emphasis which Scouting places on those values accords with the beliefs and teaching of the Church.

4. The Lutheran Church's relationship with Scouting is a vital component of its youth ministry program because it enables Lutheran youth to participate in a wide variety of programs and activities designed to enhance spiritual and moral development consistent with the teachings and aims of the Church.

5. The Missouri Synod agrees with Scouting's view that homosexual conduct is immoral. The Missouri Synod has stated officially with respect to Scouting that the "declarations and practices of the Boy Scouts are not contrary to the Scriptures as they are officially defined" by the Missouri Synod. In its 1973 Convention, the Missouri Synod passed the following resolution:

> To Declare Homophile Behavior Sinful
>
> WHEREAS, God's word clearly identifies homophile behavior as immoral, and condemns it (Lev. 18:22; 20:13 and Rom. 1:24-27); and
>
> WHEREAS, The Law and the Gospel of Jesus Christ are to be proclaimed and applied to all conditions of mankind; therefore be it
>
> RESOLVED, that. the Synod recognize homophile behavior as intrinsically sinful; and be it further
>
> RESOLVED, that the Synod urge that the Law and Gospel of the Scriptures be applied to homophiles as

> appropriate with a view toward ministering the forgiveness of our Lord Jesus Christ to any and all sinners who are penitent . . . .

6. I participated in editing the 1981 Report of the Commission on Theology and Church Relations entitled Human Sexuality: A Theological Perspective (the "Report"), a true and correct copy of portions of which are attached hereto as Exhibit A. The purpose of the Report was to emphasize that "marriage is a divine institution . . . in which God intends to provide for (1) the relation of man and woman in mutual love (Gen. 2:18); (2) the procreation of children (Gen. 1:28); and (3) the partial remedy for sinful lust (1 Cor. 7:2)." Report at 10. The Report describes the position of the Missouri Synod as to homosexual orientation and conduct:

> Whatever the cause of such a condition may be, . . . homosexual orientation is profoundly 'unnatural' without implying that such a person's sexual orientation is a matter of conscious, deliberate choice. However, this fact cannot be used by the homosexual as an excuse to justify homosexual behavior. As a sinful human being the homosexual is accountable to God for homosexual thoughts, words, and deeds.

Report at 35. The 1992 Convention of the Missouri Synod reaffirmed the 1973 resolution, citing the above language from the Report. A true and correct copy of Resolution 3-12A, To Develop Plan for Ministry to Homosexuals and Their Families, is attached hereto as Exhibit B.

7. The Report continues:

> We should stress that the judgment made here is moral and theological, not legal. The question whether homosexual acts between consenting adults should be legally prohibited is one about which Christian citizens may disagree. Not all matters of morality are fit subjects for legislation. Although law does play an educative role and must, therefore, shape moral convictions, questions of morality are especially fit subjects for legal codification when they impinge on the common good. Whether homosexual acts privately engaged in damage the common good in such a way that public concern and control are needed is difficult to judge. Even if one felt that such relationships were not a fit subject for legislation, however, the law would still have a legitimate interest in protecting children from homosexual influence in the years when their sexual identity is formed. At any rate, the judgment of informed Christians may well differ as to precisely where the legal lines ought more property be drawn.

Report at 35-36 (emphasis added).

8. In October 1993 a Task Force on Human Sexuality of the ELCA proposed the First Draft of a Social Statement entitled The Church and Human Sexuality: A Lutheran Perspective. This Statement has not been adopted as ELCA policy and has drawn opposition from ELCA membership and leadership, as well as from the Missouri Synod. In response to the issuance of the Draft, Dr. Alvin L. Barry, President of the Missouri Synod, stated in an official press release that:

> The Holy Scriptures teach, and therefore The Lutheran Church -- Missouri Synod affirms, that homosexual behavior is intrinsically sinful . . . .

> The Holy Scriptures teach clearly that God's gift of human sexuality is to be expressed within the union of one man and one woman in holy matrimony. Furthermore, Holy Scripture specifically warns against the sin of homosexuality and other sexual sins. Because of what Holy Scripture teaches us, The Lutheran Church--Missouri Synod welcomes the opportunity to affirm this Biblical vision of marriage and human sexual behavior.

A true and correct copy of the press release is attached as Exhibit C.

9. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: January 25, 1994

/s/ Jerald C. Joersz
Jerald C. Joersz

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF ELDER JACK H. GOASLIND
IN SUPPORT OF DEFENDANTS'
CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF UTAH)
) ss.:
SALT LAKE COUNTY)

Jack H. Goaslind certifies:

1. I am a member of the First Quorum of the Seventy of the Church of Jesus Christ of Latter-day Saints ("LDS Church"), and have been General President of the Young Men's Organization in the Church since 1990.

2. As General President of the Young Men's Organization, I am responsible for giving direction to all of the young men in the Church ages 12 to 18. As part of this responsibility, I coordinate the Scouting program in the Church.

3. I started my association with Scouting when I joined Cub Scouts at the age of eight, and stayed until I was 14. I later became active in Scouting as a father with three sons all of whom were in the Cub Scout and Boy Scout programs, and became further involved as part of my ecclesiastical duties. I am currently a member of the National Executive Board of Boy Scouts of America.

4. The LDS Church has been involved in Scouting from the very beginning of the movement. The LDS Church sponsors approximately 26,000 Scouting units -- more than any other sponsor -- and has approximately 380,000 boys and 150,000 adult leaders registered in Scouting. Scouting is a large part of the Young Men's program of the LDS Church. The Young Men's program includes Sunday religious instruction and weekly weekday activities that are intended to reinforce the principles taught in the Sunday classes. Scouting is the program that the LDS Church uses for the weekday activities.

5. The LDS Church shares such a strong relationship with Scouting because of the values Scouting seeks to transmit to young people. Belief in God, reverence toward God and recognition of one's duty to God are fundamental values of both Scouting and the LDS Church.

6. Boy Scouts' belief that homosexual conduct is immoral and is inconsistent with the Scout Oath's requirement that a Scout be morally straight and the Scout Law's requirement that a Scout be clean in thought, word and deed, is in accord with the LDS Church's belief on homosexual conduct.

7. The LDS Church considers homosexual conduct to be immoral and opposes same-sex marriages. The LDS Church also teaches that a person must refrain from homosexual or lesbian relations to be morally clean. Homosexual conduct is a ground for excommunication or other Church discipline.

8. The LDS Church's position on homosexual conduct is drawn from Scriptures that pertain to family life. The LDS

Church believes in the sanctity of families and condemns behavior, such as homosexual conduct, that is contrary to God's plan for family living.

9. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: January 26, 1994

/s/ Jack H. Goaslind
Jack H. Goaslind

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

SUPPLEMENTAL CERTIFICATION OF
REVEREND DONALD K. HUMMEL

STATE OF NEW JERSEY)
) ss.:
BERGEN COUNTY)

Donald K. Hummel certifies:

1. I submit this certification to supplement my certification dated November 3, 1993.

2. Twenty-eight percent of Americans are members of the Roman Catholic Church. Approximately 285,000 Catholic youth are members of Boy Scouts of America nationwide.

3. I have read the certification of Bishop Gumbleton. He states that homosexual conduct is regarded by the Catholic Church as immoral and sinful. Homosexual conduct and the practice of a homosexual lifestyle are not to be condoned in any way and is inconsistent with the teachings of the Church.

4. The Church's opposition to civil rights discrimination against homosexuals has no relevance to its view of the membership policies of private organizations such as Boy Scouts of America. The Church agrees with Boy Scouts' emphasis on traditional moral values and believes that avowed homosexuals do not provide the type of adult moral leadership that is consistent with Church teaching. While the

Church believes that no person should be denied equal rights under the law, it does not believe that an organization teaching moral values consistent with those of the Catholic Church should be compelled to use avowed homosexuals as role models for moral behavior.

5. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: January 26, 1994

/s/ Donald K. Hummel
Donald K. Hummel

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF REVEREND SAM HOUSTON IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF TEXAS)
) ss.:
COUNTY OF HILL)

SAM HOUSTON certifies:

1. I am an ordained Southern Baptist minister and I currently serve as Pastor at the Woodrow Baptist Church in Covington, Texas.

2. I have participated in Scouting for almost 40 years. As a youth member I attained the Boy Scout rank of Eagle. As an adult volunteer I have served as a Cubmaster and Scoutmaster and I have served as Chaplain at Scout camps and Scouting Jamborees. I also assisted my son in achieving the rank of Life. I am a recipient of the Good Shepherd award.

3. I currently serve on the board of directors of the Association of Baptists for Scouting. The Association is a nationally active committee whose mission is to assist the Boy Scouts of America in chartering Packs, Troops and Posts to work with local Baptist churches in instilling values in youth.

4. Southern Baptists participate in Scouting and support Scouting because of the values that Scouting seeks to instill in young people. Belief in God, reverence toward God and recognition of one's duty to God are the most fundamental of these values, and Scouting's emphasis on these values accords with Southern Baptist beliefs and teachings.

5. Southern Baptist churches in the United States sponsor approximately 4918 Scout Troops, Packs and Posts. Approximately 146,682 youth and adults are members of these units. Ten percent of all Americans are Southern Baptists.

6. The partnership between Scouting and Southern Baptist churches provides Southern Baptist youth with opportunities to participate in programs and activities which augment the churches' mission of instilling values and developing moral character.

7. Southern Baptist belief accords with Scouting's view that homosexual conduct is immoral and unclean. Southern Baptists continued to express their belief as to the sinfulness of homosexual conduct in its resolution at the June, 1993 Convention:

> Therefore be it RESOLVED, That we, the messengers to the Southern Baptist Convention, meeting at Houston, Texas, June 15-17, 1993, affirm the biblical truth that homosexuality is sin, as well as the biblical promise that all persons, including homosexuals, can receive abundant, new and eternal life by repenting of their sin and trusting Jesus Christ as Savior and Lord (1 Cor. 6:11). . . .

Resolution No. 3 - On Homosexuality, Military Service and Civil Rights, adopted, June 15-17, 1993 (attached as Exhibit A).

8. Because of its belief as to the immorality of homosexual conduct, the Southern Baptist Church does not allow individuals who practice a homosexual lifestyle to be ordained members of the Church.

9. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: January 24, 1994

/s/ Sam Houston
Sam Houston

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF
REVEREND DR. BARRY M. WALKER

STATE OF OHIO)
) ss.:
COUNTY OF COLUMBIANA)

Barry M. Walker certifies:

1. I am an ordained Presbyterian minister and have a doctorate degree in ministry, and I presently serve as the stated supply pastor of Vienna Presbyterian Church in Vienna, Ohio.

2. I am also past president of the central region of the National Association of Presbyterian Scouters and a member of the Executive Committee. The National Association of Presbyterian Scouters was formed in 1986 for the purposes of interpreting Scouting to the governing bodies of the Church, assisting and encouraging congregations in becoming chartered to operate Scouting units, and promoting Scouting's religious programs, such as the religious emblem and Scout Chaplain and Chaplain's Aide programs.

3. As a youth I participated in the Scouting program, attaining the Boy Scout rank of Eagle Scout. As an adult I have served Scouting in numerous volunteer positions, including Assistant Scoutmaster, Scoutmaster, Roundtable Commissioner, Explorer Post Advisor and Explorer

Committee member. I have served as chaplain at two Jamborees and at Scout camp for the past 10 years. I also have assisted my son in attaining the rank of Eagle. I received the Silver Beaver Award for service to youth.

4. The Presbyterian Church participates in Scouting and supports Scouting because of the values Scouting seeks to instill in young people. Belief in God, reverence toward God and recognition of one's duty to God are fundamental values of both Scouting and the Church.

5. The Church's affiliation with Scouting is longstanding; Boy Scouts of America was founded in 1910, and by 1920 Presbyterian congregations were already sponsoring scouting units.

6. Presbyterian churches in the United States sponsor over 4,000 Scout Troops, Packs and Posts. More than 125,000 youth are members of Scouting. Seven percent of all Americans are Presbyterian.

7. The Church's affiliation with Scouting augments the Church's youth ministry by making activities available to youth which promote spiritual and moral growth and development.

8. Boy Scouts' belief that homosexual conduct is immoral and is inconsistent with the Scout Oath's requirement that a Scout be morally straight and the Scout Law's requirement that a Scout be clean in thought, word and deed, is in accord with the Church's beliefs and teachings on homosexuality. The Presbyterian Church considers homosexual conduct and the practice of a homosexual lifestyle a sin. See The Church and Homosexuality at 60 (1978) (excerpts attached at Exhibit A).

9. This belief in the immorality of homosexual conduct is the basis for the Church's refusal to allow for the ordination of practicing homosexuals:

> Officers are not free from repeated expressions of sin. Neither are members or officers free to adopt a lifestyle of conscious, continuing, and unresisted sin in any area of their lives. For the church to ordain a self-affirming, practicing homosexual person to ministry would be to act in contradiction to its charter and calling in Scripture, setting in motion both within the church and society serious contradictions to the will of Christ. . . . Therefore our present understanding of God's will precludes the ordination of persons who do not repent of homosexual practice.

Id. The practicing homosexual does not set the proper example of moral integrity for the community that is required of ordained officers.

10. Those individuals of homosexual orientation who reject the homosexual lifestyle may be ordained officers of the Church:

> The repentant homosexual who finds the power of Christ redirecting his or her sexual desires toward a married heterosexual commitment, or finds God's power to control his or her desires and adopt a celibate lifestyle, can certainly be ordained, all other qualifications being met.

Id.

11. The Presbyterian Church's opposition to civil rights discrimination against homosexuals has no relevance to its

view of the membership policies of private organizations such as Boy Scouts of America. The Church agrees with Boy Scouts' emphasis on traditional moral values and believes that avowed homosexuals do not provide the type of adult moral leadership that is consistent with Church teaching. While the Church believes that no person should be denied equal rights under the law, it does not believe that an organization teaching moral values consistent with those of the Presbyterian Church should be compelled to use avowed homosexuals as role models for moral behavior.

12. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: January 25, 1994

/s/ Barry M. Walker
Barry M. Walker

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF DR. PARK DIETZ IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA)
: ss.:
COUNTY OF ORANGE)

DR. PARK DIETZ, having been duly sworn, deposes and says:

1. I am a physician specializing in forensic psychiatry and a sociologist. Most of my career has been devoted to the study of socially proscribed behavior. I am Clinical Professor of Psychiatry and Biobehavioral Sciences at the UCLA School of Medicine. Since 1981, I have been the psychiatric consultant and a guest lecturer for the Behavioral Sciences Unit and National Center for the Analysis of Violent Crime of the F.B.I. Academy in Quantico., Virginia. Since 1987 I have been the Forensic Psychiatry Consultant for the Forensic Sciences Unit of the New York State Police, Albany, New York.

2. I received my Bachelor's Degree in Psychology and Biology from the Cornell University College of Arts and Sciences in 1970. In 1975, I received an M.D. degree from the Johns Hopkins University School of Medicine and a Master of Public Health degree from the Johns Hopkins

School of Hygiene and Public Health. In 1984, I received a Ph.D. in sociology from the Johns Hopkins University.

3. I have been board certified in psychiatry by the American Board of Psychiatry and Neurology since 1979.

4. From 1986 to 1989, I was a Professor of Behavioral Medicine and Psychiatry and a Professor of Law at the University of Virginia. From 1983 through 1986 I was Associate Professor of Law and of Behavioral Medicine and Psychiatry at the University of Virginia Schools of Law and Medicine. From 1978 through 1982 I was an Assistant Professor of Psychiatry at the Harvard Medical School at the McLean Hospital in Belmont, Massachusetts. From 1977 through 1978 I was Chief Fellow in Forensic Psychiatry at the Center for Studies in Social-Legal Psychiatry at the University of Pennsylvania School of Medicine. From 1975 through 1977 I was a Fellow in the Department of Psychiatry and Behavioral Sciences of the Johns Hopkins University School of Medicine.

5. I have authored approximately one hundred professional publications, mostly on various aspects of socially proscribed behavior. I have served on the editorial boards of the Bulletin of the American Academy of Psychiatry and the Law, the Journal of Forensic Sciences, Behavioral Sciences and the Law, and other professional publications.

6. I am President-Elect of the American Academy of Psychiatry and the Law and a Fellow of the American Psychiatric Association. I am a member of the American Academy of Forensic Sciences, and have been a Fellow of the Academy since 1979. I was chairman of the psychiatry section of the Academy from 1979 through 1982 and served

on the executive committee from 1982 through 1985. I was a founding member of the Association of Directors of Forensic Psychiatry Fellowships, and served as vice president from 1986 through 1988.

7. Much of my work has dealt with sexual behavior, especially those forms of sexual behavior that are controversial or unlawful. I have been consulted as an expert on sexual behavior by the F.B.I., the New York State Police, and scores of state and federal law enforcement and prosecutive agencies.

8. I have testified, lectured, or provided consultation in 46 states, the District of Columbia, Canada, Mexico, England, Australia, and West Germany. To provide a few examples, I was an expert witness for the prosecution in the trials of John Hinckley, Jr., for the attempted assassination of President Ronald Reagan; Walter Leroy Moody, Jr., for obstruction of justice charges in connection with the serial bombings that killed U.S. District Court Judge Robert Vance in Birmingham, Alabama; Jeffrey Dahmer for serial murders in Milwaukee, Wisconsin; and Arthur Shawcross for serial murders in Rochester, New York. I am currently retained by the Nassau County, New York, District Attorney's office in connection with the prosecution of Joel Rifkin for a series of prostitute murders.

9. A copy of my full curriculum vitae is attached hereto as Exhibit A.

10. I agree with several of the opinions of Dr. Bryant L. Welch concerning the development of norms, values, and identity. In particular, I agree that youth members in Scouting "are at an age where their norms, values and identities are

susceptible to change and influence" [Dr. Welch's Affidavit, paragraph 12], that reinforcement and socialization occur in Scouting "through the processes of role modeling, normative advocacy, rhetorical reflection, and labeling and identification" [Dr. Welch's Affidavit, paragraph 16], and that the role model and educator in a youth organization "advocates the specific norms and values to youth ... that he wants them to adopt. Over time, these values and norms are reinforced in the boys through this process" [Dr. Welch's Affidavit, paragraph 17].

11. I disagree with Dr. Welch's assertion that "molestation is not a crime caused by one's sexual orientation; rather, it is a crime of dominance which arises when a person has difficulty with appropriate human intimacy" [Welch affidavit, paragraph 27]. The sexual abuse of boys by adults occurs for multiple motives, including sexual attraction. Openly homosexual men are significantly more likely to be sexually attracted to adolescent boys than heterosexual men.

12. I disagree with Dr. Welch's opinion that "the existence of openly gay adult leaders in Scouting will not affect ... the program's ability to transmit its norms and values to Scouts" [Welch affidavit, paragraph 22]. An openly gay adult leader represents and models norms and values regarding sexual behavior that are diametrically opposed to the norms and values of the Scouting movement with respect to the acceptability of homosexual behavior.

13. Dr. Welch has asserted that a homosexual role model would not influence Scouts, reasoning that sexual orientation is not subject to influence by role models. Whatever the merits of Dr. Welch's opinion that a homosexual role model would not affect sexual orientation-- a matter on which responsible experts

disagree-- there is no doubt that role models influence sexual behavior. Homosexual orientation is not a necessary condition for an adolescent to engage in sexual behavior with another male adolescent or adult. Exploratory sexual play is common among adolescent boys, and male-male sexual behavior can take place for a variety of reasons other than sexual orientation, including curiosity, boredom, a need to please, seduction, rebellion against parental or societal standards, transitory sexual interest, inhibition with females, or unavailability of females.

14. Societal and cultural demands in the form of norms and values are among the major inhibitors of male-male sexual behavior among adolescents. An avowedly homosexual Scout leader models the view that sexual contact between males is acceptable behavior. By decreasing boys' inhibitions against sexual activity between males, such a model increases the vulnerability of Scouts to seduction by both adult males and other boys.

15. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

/s/ Park E. Dietz
PARK E. DIETZ, M.D.,
M.P.H., PH.D.

Sworn to before me this 24th day
of January 1994

/s/ Susan W. Byhower
Notary Public

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

SUPPLEMENTAL CERTIFICATION OF
DR. RICKY L. SLAVINGS

1. I submit this certification to supplement my October 26, 1993 certification. I have read the affidavit of Dr. Bryant Welch in support of plaintiff's motion for summary judgment.

2. I have had extensive experience in youth baseball as well as other youth sports. From 1977-79, I served as an assistant director and coach for the Army Dependent Youth Athletic Program (ADYAP) at the military installation where I served. In this role, I supervised the baseball league for boys aged 11 to 18, and coached both baseball and basketball teams for boys aged 11 to 13. From 1979-81, I assisted with several baseball teams, including Little League teams in Arkansas and Boys Club teams in Tennessee. From 1982-88, I coached youth baseball (Little League and Pony League) in Missouri, and since 1988 have coached Dixie League youth baseball teams each summer in Radford, Virginia (ages 11 to 13 and 15 to 16). In addition, I have coached in the local Junior Basketball League for boys aged 11 to 13 for each of the past six years and in the AAU youth basketball program. I am currently coaching a Junior boys team for boys aged 11 to 13 and will coach a 14 and under AAU team beginning next month.

3. As noted by Dr. Welch, youth baseball and other youth sports programs share some structural similarities in

terms of group size and adult volunteer participation. However, these superficial similarities contrast with the marked differences in the values, purposes and methods of these groups.

4. In sociological terms, small groups fall along a continuum from primary groups at one extreme to task groups on the other extreme. While both primary groups and task groups are small in size, engage in face-to-face interaction, and have a sense of purpose, there are marked differences between them. Primary groups have broad socialization purposes, and provide emotional support and a sense of togetherness and belonging in the process. Primary groups have a greater degree of permanence. A loving family is the prototypical primary group. Task groups have a narrow, instrumental purpose, such as accomplishing a project, making a decision or participating in a single, focused activity. A jury is a task group.

5. Boy Scout Troops fall closer to the primary group end of the continuum, whereas youth baseball teams fall closer to the task group end.

6. Youth baseball teams lack the permanence and intimacy of face-to-face interactions that characterize Scouting, and have a highly specific, instrumental purpose of teaching and competing in baseball during a six to eight week season each year. The limited value transmission that may take place in a youth league centers on fair play, sportsmanship, and team cooperation; but it is clearly secondary and insubstantial as compared to the purpose of playing recreational sports.

7. Even with the best role models as coaches, schedules and timing do not allow coaches to develop close, counselling relationships with the players. To illustrate, as a youth baseball coach, I practice with a te of 18 or so players who travel to and play 10 to 12 games during a six-week season. Rarely, if ever, do I assemble that group to participate in other, non-baseball related activities (save for an end-of-year awards party). After the season, the team disbands and I have no interaction with the players unless they play for me again the next year. Given that boys are usually arranged into two-year age brackets in youth programs, a team will have an average 50% turnover rate from year to year. In many leagues, this is worsened by the fact that boys are shifted from team to team each year, and many coaches leave after only one season. Even if the same coach kept the same players for both years, he would have only two relatively short periods of interaction with his players.

8. The lesser degree to which a youth baseball coach can influence moral development also derives from the limited objective of a coach. A youth baseball coach's primary responsibility is to teach his players how to play baseball effectively. While this goal necessarily requires the instruction in teamwork and cooperation, because of the limited time a coach has to maximize the baseball skills of his players, the coach usually has no time or inclination to transmit values not necessary to playing baseball effectively. At practices and games, the coach spends virtually all of his time organizing drills, developing skills and teaching baseball. With limited practice facilities in most leagues,

coaches focus on skill development during available field time and emphasize strategies for winning the next game.

9. The limitations on the ability to transmit positive values is also related to the public nature of youth baseball as a spectator sport. As studies have shown, the competitive sport experience takes place in a highly public and evaluative environment that produces in children both pre-competition pressure to win and post-competition stress if their team loses. Numerous studies have indicated that spectator parents are much more likely to emphasize winning rather than other values with the children.

10. In addition, the values which are transmitted in youth baseball teams are not always positive. Studies indicate that youth baseball emphasizes competitiveness over comraderie and sportsmanship. Adult participants receive little, if any, training, and studies have indicated that they often value the "product" of winning over the "process" of competing, learning and having fun. Some systematic studies have reported that boys and young men who participated in organized sports were less concerned about sportsmanship and placed greater emphasis on skill and victory than those who did not participate. It has even been reported that young athletes often report a decreased interest in fairness.

11. Boy Scouting is a very different youth organization. The fundamental purpose of Scouting is to reinforce the positive values of the Scout Oath and Scout Law through Troop activities designed for that purpose, whether a Troop meeting, completing requirements for Troop advancement or religious awards, doing a daily good turn, or participating in a Troop outing.

12. Boy Scouts primarily identify themselves and other Scouts as members of Troops and, within Troops, as members of Patrols. Uniforms identify a boy as a Boy Scout; a Troop number and a Patrol patch on the uniform identify a Boy Scout as a member of small primary groups within Boy Scouting. Scouts in a Troop usually become good friends and participate in many activities together both inside and outside of Scouting. Troops are same-sex, relatively permanent peer groups in which the socialization of norms and values occurs very effectively.

13. A Boy Scout participates in the vast majority of Scouting activities with his own Troop. Throughout the school year, Troops meet on a weekly basis; many troops meet in the summer as well. A Scout's Troop typically camps overnight one weekend per month. Once or twice per year, the Troop may participate as a Troop with other Troops in a Scout Show, Klondike Derby or Camporee. A typical Troop spends one to two weeks per year at summer camp with other Troops, but each Troop camps separately. Once every four years a small percentage of Scouts have the opportunity to attend a national Jamboree, at which Scouts from different Troops are assigned to temporary Jamboree Troops. Thus, a Scout typically participates in at least 35 meetings and six to eight weekends with his Troop alone.

14. Unlike baseball, Scouting is not a "spectator sport" performed in public. The vast majority of activities take place privately, within the Troop, and the value transmission methods can successfully operate without outside societal pressures.

15. Scouting provides an extensive training program for adult leaders that emphasizes the socialization of norms and values, and teaches methods for instilling those norms and values.

16. Scouts affords for greater opportunity to an adult leader to influence the moral development of youth in Scouting than does youth baseball. Scouting activities allow the Scout leaders to interact with Scouts in ways that reinforce the broad array of traditional values, such as honesty, reverence and kindness, of the Scout Oath and Law. A Scout leader maintains a continuous relationship with Scouts and usually develops a close relationship with a Scout through the weekly Troop meetings, Scoutmaster conferences, monthly trips and outings, as well as week-long summer camp-outs and trips. In Scouting, I meet weekly with the Scouts in my Troop, spend an entire weekend with them at least once a month, participate in community service projects with them on a regular basis, attend school plays and other events in which they participate, and each summer take at least two trips or encampments of a week or longer, in which I and the other Scout leaders spend 100% of our time interacting with the Scouts. Thus, the Scoutmaster in many cases spends more time actually interacting directly with a Scout than do his parents. Often the Scout leader is the first adult outside of the Scout's family with whom the Scout develops a close relationship.

17. The differing ability to be a role model in youth baseball and in Scouting is apparent from my own experiences. Over the past several years, I have worked with hundreds of Scouts. Many of my former Scouts have written to me or called for my advice on a variety of important life

decisions. I have been invited to numerous graduations including high schools, colleges, Air Force Academy, medical schools and law schools from which my former Scouts have graduated. I have received letters from several young adults, and numerous parents bearing testimony to the role modelling and positive value transmission they experienced as a result of the Scouting program, and the importance of the relationship they developed with me as a Scout leader.

18. Although I have been coaching for about the same length of time, I have never had the same long-lasting relationships with former players or parents, unless they also knew me as a Scout leader. From my experience in Scouting, parents share the desire to teach the norms and values upon which the program is built. My experiences in Scouting and youth sports confirm the theories and research in role modelling and value transmission which indicate that those adults who have close, primary relationships with young people are in the best position to transmit values.

19. The presence of avowed homosexuals in Scouting would interfere with transmitting the value that homosexual conduct is not morally straight or clean. An avowed homosexual is a role model for the morality of his lifestyle; his presence would send to youth the signal that engaging in homosexual conduct is morally straight and clean, in conflict with the traditional sexual morality Scouting seeks to convey.

20. Dr. Welch focuses his arguments on the relationship between sexual orientation and morality in causal terms, that is that lack of morality does not cause homosexual orientation. This statement mischaracterizes my original point that advocating a particular norm (e.g., homosexual

conduct is moral) would lead boys to accept that belief. While "homosexual orientation" is not a norm, a belief about whether homosexual conduct is moral or clean is a norm. And as Dr. Welch agrees, "the ability of a small group to transmit a given set of norms and values would be interfered with if the group's leaders did not transmit those norms or values." That effect is even more pronounced when that leader attempts to transmit a norm that is directly opposite from the one the organization seeks to instill.

21. Dr. Welch takes no account of the influence an avowed homosexual role model may have on a male youth's behavior. Experimentation with homosexual identity or homosexual behavior is not uncommon, and may be influenced by a homosexual role model even if orientation is not affected.

22. While a number of medical and psychological models of the etiology of homosexual orientation suggest that it is present very early in life and is difficult to change, these are by no means the only models that are supported by empirical evidence. The subjectivist model within sociology and some psychological models suggest that, even if some predisposition does exist, sexual orientation is also influenced by social environment. Even if biological theories can establish a behavioral tendency, they have to this point been unsuccessful at explaining the entire etiological story. For instance, most studies of identical twins indicate that when one twin is gay, the other is not always gay; this suggests that homosexual orientation (or predisposition) can only be partly accounted for by biology. It is unclear why some people adopt a homosexual identity and others do not and why some persons who claim both homosexual and heterosexual

identities engage in homosexual behavior and others do not. In short, insufficient evidence exists to accept the idea that homosexual orientation or identity is present at birth or shortly after.

23. I have taken numerous Boy Scout leader training courses including Boy Scout Leader Wood Badge training. Boy Scout leader training is overwhelmingly devoted to teaching about the values and methods of Boy Scouting. Scouting seeks to give leaders the techniques which will permit boys to run the Scouting program themselves and the techniques to work with other volunteers whose participation is motivated by factors other than a paycheck. For example, in Wood Badge training, adult leaders are divided into Patrols just as youth would be in a Troop. These approaches are far removed from the models of business leadership appropriate to a corporate hierarchy. Thus, participation in Wood Badge or other Scout leader training is not a means of acquiring business management skills.

24. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: January 26, 1994

/s/ Ricky L. Slavings
Ricky L. Slavings

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

CERTIFICATION OF PARVIN L. BISHOP

STATE OF ARIZONA)
) ss.:
COUNTY OF MARICOPA)

Parvin L. Bishop certifies:

1. I am National Director of Program of Boy Scouts of America ("Boy Scouts").

2. Scouting is a volunteer movement that seeks to educate boys and young adults in the responsibilities of citizenship, provide growth in moral character and enhance the development of physical, mental and emotional fitness. The values that Scouting aims to instill are those expressed in the Scout Oath and the Scout Law. The Scout Oath states:

> On my honor I will do my best
>
> To do my duty to God and my country and to obey the Scout Law;
>
> To help other people at all times;
>
> To keep myself physically strong, mentally awake, and morally straight.

The Scout Law provides:

A Scout is: . . . Trustworthy.
. . . Loyal.
. . . Helpful.
. . . Friendly.
. . . Courteous.
. . . Kind.
. . . Obedient.
. . . Cheerful.
. . . Thrifty.
. . . Brave.
. . . Clean.
. . . Reverent.

3. Boy Scouts believes that homosexual conduct is not "morally straight" under the Scout Oath, and not "clean" under the Scout Law. Consequently, known or avowed homosexual persons or any persons who advocate to Scouting youth that homosexual conduct is "morally straight" under the Scout Oath, or "clean" under the Scout Law will not be registered as adult leaders.

4. I have reviewed the certifications of Michael Cahn and Robert L. Smith, Jr., in which Cahn and Smith suggest that they teach Troop members that homosexual conduct is "morally straight" and "clean" under the Scout Oath and Law.

5. Boy Scouts is currently investigating the veracity of these claims. If true, Boy Scouts will revoke the registration of Cahn and Smith.

6. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: January 26, 1994

/s/ Parvin L. Bishop
Parvin L. Bishop

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MONMOUTH COUNTY

[CAPTION OMITTED]

SUPPLEMENTAL CERTIFICATION OF DAVID K. PARK

STATE OF TEXAS)
) ss..
COUNTY OF DALLAS)

DAVID K. PARK certifies:

1. I am National Legal Counsel for Boy Scouts of America ("Boy Scouts").

2. Boy Scouts became aware of the view of Joseph Velasquez with respect to its membership policy as to known or avowed homosexuals when he addressed the Relationships Committee of Boy Scouts on February 9, 1993.

3. After Mr. Velasquez discussed his view with the press, Boy Scouts asked Mr. Velasquez to resign from his position on the Executive Board.

4. Mr. Velasquez submitted his resignation on July 26, 1993.

5. The Executive Board is composed of no more than 64 regular members who shall be elected at the annual meeting of Boy Scouts for one year terms.

6. Youth members may be appointed by the President with the approval of the Executive Board to serve for a specified term of up to one year. A youth member may be

elected for a second one-year term. The aggregate number of youth members on the Executive Board shall not exceed five.

7. Boy Scouts records indicate that Dr. Satcher and William Kirkner were never members of the Executive Board of Boy Scouts of America.

8. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: January 26, 1994

/s/ David K. Park
David K. Park

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, MONMOUTH COUNTY

Civil Action No. Mon L 5373-92

JAMES DALE,

Plaintiff,

v.

THE BOY SCOUTS OF AMERICA
and THE MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,

Defendants.

DEPOSITION OF JAMES WILLIAM KAY
JANUARY 19, 1993

(excerpts)

* * * *

Q. If the Council learned that the Scoutmaster was running a unit -- his Troop -- in a way that was inconsistent with the Rules and Regulations of the Boy Scouts of America, would the Council intervene or take action in any form?

A. Yes, it would.

Q. How would it intervene or take action?

A. There could be a number of different ways. It would probably depend a lot on the particular situation.

Each one is an independent situation and the circumstances would dictate how we would intervene.

Q. Could one form of intervention include instructing the Scoutmaster that he should be conducting himself differently?

MR. DAVIDSON: I object to the form of the question.

A. It's conceivable that the circumstance would call for coaching in that instance and coaching only.

Q. Could one form of intervention include revoking the membership of the Scoutmaster?

A. Yes.

* * * *

Q. Do you recall any instances of the National Office rejecting an Adult Application to a unit in the Council that you worked for the eight and one-half years prior? And I believe you said that was with Rip van Winkle in New York, is that correct?

A. Yes.

I recall no such rejection.

* * * *

Q. In your tenure as Council Executive for Monmouth Council have you had the opportunity to follow these procedures in revoking the membership of an adult member of a unit within Monmouth Council?

A. I have.

Q. In how many instances?

A. Three.

Q. One of those instances being James Dale?

A. That's correct.

Q. What were the grounds for revocation in the other two instances?

A. In one instance it was conviction on child abuse and in another instance it was conviction on substance abuse.

Q. In each of those instances who made the initial determination that revocation of membership was appropriate?

A. I did.

* * * *

Q. Mr. Kay. James Dale's membership in the Boy Scouts was revoked, is that correct?

A. That's correct.

Q. And that revocation decision was made by you, is that correct?

A. Yes.

* * * *

Q. When did you first learn that Mr. Dale is homosexual?

A. In 1990, in the summer of 1990.

Q. And how did you learn that Mr. Dale is homosexual?

A. I became aware of it through a newspaper article that appeared in which he affirmed his homosexuality.

Q. Was there any basis for Mr. Dale's membership revocation, other than his homosexuality?

A. None that I would be -- that I was aware of.

Q. And you're the person who made the revocation decision, is that correct?

A. Yes.

Q. Who was involved in the revocation decision, other than you?

A. This was a uni -- This was my decision.

Q. Did you involve anyone at the National Council?

A. I spoke with the Director of Registration concerning this situation.

* * * *

Q. Of the documents that you were aware of which contain explicit reference to the Boy Scouts' policy concerning homosexuals, have any of those documents been provided to Scouts?

A. I don't know. I would be unaware of that.

Q. Are you aware of any of those documents being provided to adult members of Scouting?

A. Again, I would not be aware of that.

Q. Are you aware of any of these documents being provided to parents of Scouts?

A. I am not aware of it.

Q. Are you aware of any -- (Discussion off the record between the witness and Mr. Davidson.)

Q. Are you aware of any of those documents being provided to any chartered organizations?

A. I don't know.

Q. Is there any document disseminated by Monmouth Council which makes reference to the policy concerning homosexuals?

MR. DAVIDSON: I object to the form.

A. I'm not aware of one.

* * * *

Q. Do you believe that every prospective member who fills out the application understands the concept of "morally straight" to exclude homosexuality?

MR. DAVIDSON: I'm going to direct him not to answer that question.

MS. COSTA: On what basis?

MR. DAVIDSON: It's not a question that anybody can competently answer.

MS. COSTA: Can you answer that question?

THE WITNESS: I don't see how I could. No, I can't.

Q. Have you ever spoken to the members of units in Monmouth Council about their understanding of "morally straight"?

A. (No response.)

MS. COSTA: That's a simple yes or no.

A. No.

Q. Have you ever spoken to the parents of youth members of units in Monmouth Council about their understanding of the concept of "morally straight"?

A. No.

(Discussion off the record between the witness and Mr. Davidson.)

Q. Have you ever spoken to any adult member in Monmouth Council about their understanding of the concept of "morally straight"?

A. I've spoken to them in the context of the Scout Oath and Law.

Q. Have you ever spoken to them about whether or not the term "morally straight" includes the Boy Scouts' understanding of "morally straight" to exclude homosexuality?

MR. DAVIDSON: I object to the form.

A. I've not spoken to them in that regard.

* * * *

Q. When did the Boy Scouts determine that a homosexual doesn't meet or satisfy the

requirements of moral straightness?

A. I can't answer. I don't know.

(Discussion off the record between the witness and Mr. Davidson.)

Q. Can you please give me your understanding of the Boy Scouts' definition of "morally straight."

MS. KERR: I believe that was asked and answered.

Q. Can you please give a your understanding of the Boy Scouts' definition of "morally straight."

A. In accordance with the -- According to the Boy Scouts of America, it would be a life of -- a character, a strong character exemplified by the virtues of justice of cleanliness.

Q. In what way does a homosexual fail to satisfy that standard?

A. Well, I --

(Discussion off the record between the witness and Ms. Kerr.)

MS. COSTA: There's a question pending.

MR. DAVIDSON: I think that's the question that's tautological.

A moral view is a moral view. I don't understand what meaning there is to a question that asks for what aspects of it.

I mean I don't -- I don't understand the question. How can anybody answer that question?

Do you want to clarity what you're driving at?

MS. COSTA: I'd like the witness to answer the question.

MR. DAVIDSON: I don't know how he could.

(Discussion off the record involving the witness, Mr. Davidson and Ms. Kerr.)

THE WITNESS: I'm sorry. We're still on the question of --

MS. KERR: Read the question back.

(The requested question is read by the Reporter.)

A. I think in the context of meeting the sexual morays of that community.

* * * *

Q. To your knowledge does every member of Scouting share the Boy Scouts' views concerning homosexuality?

A. Every member of Scouting signs an Application when they join. They swear to the same Scout Oath and Law and when they do that they accept the standards of the Boy Scouts of America.

Q. Do you do anything to satisfy yourself that their interpretation of "morally straight" and "clean" is the same as the Boy Scouts' interpretation of "morally straight" and "clean"?

A. No.

When they sign their Application they accept -- they agree to abide by the Scout Oath and Law.

Q. I understand that. I --

A. They are accepting that.

* * * *

Q. Do adult volunteers engage in sexual instruction or counselling?

A. Yes.

Q. In what capacity?

A. In the context of youth protection.

Q. What do you mean by "youth protection"?

A. A program of instruction or program training young people -- training members -- in an awareness program, if you will, to protect them against child abuse.

Q. Is there any other context in which adult volunteers engage in sexual instruction or counselling?

A. Not that I'm aware of.

* * * *

Q. Mr. Kay, you mentioned earlier in your testimony a woman who had applied to be a Scoutmaster.

A. Yes, I did.

Q. Did that woman actually serve as a Scoutmaster in Monmouth Council?

A. She did.

Q. You mentioned you had become aware of Mr. Dale's homosexuality by reason of his statement to that effect in a newspaper article.

How did you become aware of that newspaper article?

A. The article came to me by a number of volunteers throughout Monmouth Council who sent it to me.

Q. Do Scouting volunteers who are registered at the District or Council levels get involved in activities in which they come into contact with Scouting activities in which they come into contact with Scouting youth?

A. Yes.

Q. And can you give me a couple of examples of that kind of activity?

A. A camporee, a Boy Scout Klondike Derby.

Q. You mentioned that someone's membership had been revoked by reason of child abuse, where you had been personally involved in the revocation.

A. Yes.

Q. Was that an instance of homosexual or heterosexual abuse?

A. That was homosexual abuse.

Q. And is it your understanding that that person also had their membership revoked because of their homosexuality?

A. Yes.

Q. Do you have any reason to believe that the Boy Scouts' understanding of the term "morally straight" in regard to homosexual conduct is not widely known within the membership of Monmouth County Council?

A. I have no reason to believe that it would not be.

Q. When you were a youth in Scouting, did you have an understanding of whether homosexual conduct was morally straight?

A. Oh, I most certainly did.

Q. And what was that understanding?

A. The understanding was that it was not morally straight.

Q. Do you have any reason to believe that the Scouting policy with respect to homosexual membership started at any point after Boy Scouts of America began in 1910?

A. I have no reason to believe that it hasn't been in existence since the inception of the program.

Q. Are there kinds of heterosexual immorality which would lead to revocation of membership in Scouting?

A. Yes, there could be.

Q. If an adult volunteer Scouter advocated the morality of homosexual conduct to youth in Scouting, would that be grounds for revocation of membership?

A. Yes.

MR. DAVIDSON: I have no further questions.

MS. COSTA: Just a moment.

(Discussion off the record between Ms. Costa and Ms. Ostrow.)

REDIRECT EXAMINATION BY MS. COSTA:

Q. Mr. Kay, as a youth in Scouting, from where did you get your understanding that homosexual conduct is not morally straight?

A. It was a widely-accepted premise in Boy Scouts of America among youth members. It was just a widely-accepted premise.

* * * *

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a large unselective membership organization can invoke the First Amendment to defeat application of an anti-discrimination law and expel a long-standing exemplary member, when none of the expressive purposes that bring its members together are significantly altered or burdened by application of that law.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

The Boy Scouts Of America 1

James Dale 6

The Superior Court Of New Jersey, Chancery Division 7

The Superior Court Of New Jersey, Appellate Division 8

The Supreme Court Of New Jersey 8

SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. BSA'S CHOSEN ENTWINEMENT WITH GOVERNMENT SHOWS THAT IT IS FAR FROM WHOLLY PRIVATE, AND HEIGHTENS NEW JERSEY'S INTERESTS IN FORBIDDING DISCRIMINATION HERE 11

PAGE

II. THE FREEDOM OF EXPRESSIVE ASSOCIATION DOES NOT PREVENT NEW JERSEY FROM APPLYING ITS ANTI-DISCRIMINATION LAW TO BSA'S EXCLUSION OF YOUTH AND ADULTS KNOWN TO BE GAY 16

A. The Court Should Decide This Case By Examining Whether Ending BSA's Exclusionary Policy Will Significantly Burden Its Members' Ability To Carry Out Their Expressive Purposes, And If So, Whether The State's Interests Outweigh Any Such Burden 19

1. Past Expressive Association Decisions Establish Sound First Amendment Standards That Should Govern Here 19

2. This Case Does Not Present The Kind Of "Peculiar" Application Of A Public Accommodations Law To Speech Itself That Took *Hurley* Out Of Expressive Association Jurisprudence 23

B. Scouting's Members Are Not Brought Together By Any View Or Expressive Purpose That Implicates Sexual Orientation 24

PAGE

1. No Message About Gay People Or Their Incompatibility With The BSA "Moral Code" Exists In Any BSA Communications To Adult Or Youth Members..... 25

2. The Pluralism And Diversity Of Views That Characterize Scouting Refute BSA's Claim That Condemnation Of Homosexuality Constitutes An Expressive Goal 28

C. Even Taking The Views And Programs Set Forth In Its Brief At Face Value, Reinstating Dale Would Have No Significant Effect On BSA's Ability To Carry Out Its Expressive Purposes . 29

1. BSA Has Not Charged Its Adult Members With Conveying Its Proffered View Against Homosexuality To Young People 30

2. Dale's Identity Is Not A Message And Does Not Undermine Any Of BSA's Expressive Purposes ... 31

D. New Jersey's Interests In Ending Discriminatory Conduct By Public Accommodations Are Compelling And Outweigh Any Alleged Burden On BSA's Right To Expressive Association 34

PAGE

III. THIS CASE INVOLVES IDENTITY-BASED EXCLUSION, NOT COMPELLED SPEECH 39

A. The Facts Of This Case Are Many Steps Removed From The Forced Speech-Within-Speech of *Hurley*..... 40

B. The Inclusion Of Gay Members Does Not Give Rise To A "Forced Speech" Or "Symbolic Speech" Claim 42

C. Even Were There Some Cognizable Infringement On Speech, Application Of The LAD Easily Satisfies The *O'Brien* Standard 45

IV. THE FREEDOM OF INTIMATE ASSOCIATION DOES NOT SHIELD AN ORGANIZATION LIKE BSA 46

CONCLUSION 50

TABLE OF AUTHORITIES

Cases	PAGE
Arcara v. Cloud Books, 478 U.S. 697 (1986)	17
Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991)	17
Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987)	*passim*
Bob Jones Univ. v. United States, 461 U.S. 574 (1983)	15
Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996)	22
Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987)	22
Chas. Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522 (1923)	16
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)	46
Cohen v. Cowles Media Co., 501 U.S. 663 (1991)	17
Combs v. Central Texas Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999)	23
Dallas v. Stanglin, 490 U.S. 19 (1989)	19
Elrod v. Burns, 427 U.S. 347 (1976)	32
Employment Div. Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)	23
Equal Employment Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996)	23

	PAGE
Eu v. San Francisco County Democratic Ctr. Comm'n, 489 U.S. 214 (1989)	21, 22
Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299 (11th Cir. 2000)	23
Gosche v. Calvert High School, 997 F. Supp. 867 (N.D. Ohio 1998)	22
Harvey v. YWCA, 533 F. Supp. 949 (W.D.N.C. 1982)	22
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)	37
Hishon v. King & Spalding, 467 U.S. 69 (1984)	11, 19
Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995)	*passim*
Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, No. 94-749, 1995 WL 301703 (U.S. Apr. 25, 1995) (Oral Arg. Tr.)	41
Kimel v. Florida Bd. of Regents, __ U.S. __, 120 S.Ct. 631 (2000)	36
Lee v. Weisman, 505 U.S. 577 (1992)	38
Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991)	22
Maguire v. Marquette Univ., 814 F.2d 1213 (7th Cir. 1987)	22
Marsh v. Alabama, 326 U.S. 501 (1946)	15-16
Meyer v. Nebraska, 262 U.S. 390 (1923)	49
Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974)	42

PAGE

Munn v. Illinois, 94 U.S. 113 (1876)..... 12

Nebbia v. New York, 291 U.S. 502 (1934)..... 12

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) .....*passim*

Norwood v. Harrison, 413 U.S. 455 (1973)..... 19

Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986) 42

People v. Garcia, 92 Cal. Rptr. 2d 339 (Ct. App. 4th Dist. 2000) 32

Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55 (1978) 36

Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476 (2d Cir. 1985), *aff'd*, 479 U.S. 60 (1986)..... 24-25

Pierce v. Society of the Sisters, 268 U.S. 510 (1925)..... 49

PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)..... 12

Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945)... 19

Roberts v. United States Jaycees, 468 U.S. 609 (1984).....*passim*

Rode v. Dellaciprate, 845 F.2d 1195 (3d Cir. 1988).. 46

Romer v. Evans, 517 U.S. 620 (1996)..... 35, 36

Runyon v. McCrary, 427 U.S. 160 (1976).....*passim*

Salvation Army v. Department of Community Affairs, 919 F.2d 183 (3d Cir. 1990) 46

PAGE

San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 526 (1987) .. 14

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 23

Texas v. Johnson, 491 U.S. 397 (1989) 42, 45

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 20, 21

United States v. O'Brien, 391 U.S. 367 (1968)...42-43, 45

United States v. Seeger, 380 U.S. 163 (1965)..... 24

Wallace v. Texas Technical Univ., 80 F.3d 1042 (5th Cir. 1996) 46

Watson v. Fraternal Order of Eagles, 915 F.2d 235 (6th Cir. 1990) 46

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 42

Wisconsin v. Mitchell, 508 U.S. 476 (1993)..... 35

Wisconsin v. Yoder, 406 U.S. 205 (1972) 49

Wooley v. Maynard, 430 U.S. 705 (1977) 42

Statutes and Rules

10 U.S.C. § 2544..... 15

10 U.S.C. § 2606..... 15

10 U.S.C. § 7541..... 15

14 U.S.C. § 641 15

16 U.S.C. § 539f 15

PAGE

32 U.S.C. § 508 15

Ala. Code § 40-9-12 14

Fla. Stat. Ann. § 320.08058 14-15

Ind. Code Ann. § 9-18-37-5 14-15

Internal Revenue Publication 78 15

I.R.C. § 170(c) 15

Kan. Stat. Ann. § 19-2696 15

N.J. Stat. Ann. § 10:5-3 36

N.J. Stat. Ann. § 23:2-3 15

N.J. Stat. Ann. § 39:3-27 14-15

N.J. Stat. Ann. § 54:4-3.24 14

N.J. Stat. Ann. § 54:39-66 15

Tex. Parks & Wild. Code Ann. § 62-082 15

Wis. Stat. Ann. § 70.11 14

Other Authorities

Brief *Amici Curiae* of the Diocesan Council of the Episcopal Diocese of Newark, *et al.* in Opposition to the Petition for Writ of Certiorari 29

Brief *Amicus Curiae* of the Boy Scouts of America in Support of Appellants Rotary International, *et al.* (December 18, 1986) 47

PAGE

National Capital Area Council, *1997 School Night to Join Scouting: Join Scouting Night Guidebook*, Lodging of Documents by *Amici Curiae* Roland Pool and Michael Geller 2

Taylor, Larry A., "How Your Tax Dollars Support the Boy Scouts of America," *The Humanist* (Sept.-Oct. 1995) 1-2

STATEMENT OF THE CASE

This case concerns the Boy Scouts of America's decision to expel James Dale from membership because he is gay.

The Boy Scouts Of America

Petitioner Boy Scouts of America ("BSA") is a national recreational organization with a unique position in American society. Scouting is part of growing up for many boys, a central presence in their schools and communities, and an enriching life experience for adult participants as well. "Fifty percent of all boys today between the ages of seven and ten are Cub Scouts, and 20 percent between 11 and 18 are Boy Scouts." JA 523.[1] BSA maintains and manages the nationwide Scouting organization, which when this case began had a membership of more than four million youth and one million adults. R.1020. BSA has sought this inclusiveness, declaring, "Neither [our federal] charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy." JA 66. With over 90 million members since its inception in 1910, R.1323, BSA's promotional materials boast that Scouting is "the largest youth movement the free world has ever seen." R.1157.

BSA's corporate structure is highly centralized at the national level, but then divides into regions, districts, councils, and local units. JA 348-58. Those units are formed through the granting of charters to local organizations upon application—in essence, "franchising."[2] JA 375. Each char-

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[1] Consistent with the Petitioners' references to the record, numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition for Writ of Certiorari. Numbers preceded by "JA" refer to pages in the bound Joint Appendix. Numbers preceded by "R" refer to pages in the joint appendix below. Numbers preceded by "L" refer to pages in the bound Joint Lodging Materials.

[2] "Informally, the term 'franchise' helps to explain what is meant by 'chartering' an organization. 'Franchise' implies local ownership while still using the corporation name and resources." BSA Membership/

tered organization "owns" the troop, and "receives a national charter yearly to use the Scouting program as a part of its youth work." R.967.

Through its franchising of local units, BSA forms an extraordinary partnership with government, as well as diverse community groups and religious entities. In New Jersey alone, as of 1993, troops were sponsored and owned by over 600 government agencies or organizations operating under state aegis, including 15 city governments, 92 law enforcement agencies, 191 public schools, 281 school parent-teacher associations and groups, 21 boards of education, 6 Army National Guard units, 4 Navy units, 1 Coast Guard unit, 2 Disabled Veterans units, 3 Air Force units, 10 Army units, and 132 fire departments. R.1278-80.

In New Jersey, public schools and school-affiliated groups constitute approximately one-fifth of the chartering organizations in the state. 4a. Nationwide, "[m]ore than 26 percent of Scouting's chartered organizations are PTA and other academic and education organizations." JA 69. In addition, public schools regularly allow BSA special access to recruit in classrooms and on school grounds. JA 86; JA 102-05; JA 124; JA 442. BSA declares that "[t]he education field holds our greatest potential[.]" JA 70. For example, a guidebook recently issued by one BSA council urges "school coordinators" to give a "[p]ersonal invitation to every boy in school to join scouting," and exhorts the "classroom presentation coordinator" to "band every boy, tag every boy, stick every boy" to reach the goal: "Every classroom, every boy." National Capital Area Council, *1997 School Night to Join Scouting: Join Scouting Night Guidebook*, Lodging of Documents by *Amici Curiae* Roland Pool and Michael Geller, at 609.

Relationship Committee Guide *quoted in* Taylor, Larry A., "How Your Tax Dollars Support the Boy Scouts of America," The Humanist, at 6-13 (Sept.–Oct. 1995) <<*http://www.humanist.net/religion/bsa.html*>> (viewed on February 13, 2000).

BSA also receives a wide range of special privileges and benefits from federal and state government, such as a federal charter, favorable tax treatment, access to facilities and services, and a close association with Congress, the President, the military, the astronaut corps, and other departments and agencies. 4a; 27a-30a; *see infra* at 14-15.

All one-million-plus BSA adult members are automatically "leaders." 11a. In practice, BSA is as non-selective in welcoming adult members as youth members. James Kay, "the highest ranking employee in Monmouth Council and the official who first made the decision to terminate Dale," 78a, acknowledged that he was not aware of any rejection of an adult application for membership. JA 751.

Scouting's rules and message are explicitly pluralistic. BSA bylaws declare Scouting to be "absolutely non-sectarian," JA 362, a requirement repeated on every adult membership application. No troop may require its members to hold any particular religious belief or participate in any particular religious ceremony. R.1176. "BSA categorically states: '[r]eligious instruction is the responsibility of the home and church.' " 9a; *see also* R.4412.

Sexual behavior of any kind is deemed inappropriate within the context of the Scouting experience, JA 655, as is any substantive discussion of sexuality. Guidelines for Scoutmasters declare that boys should "learn about sex and family life from their parents, consistent with their spiritual beliefs." JA 668; JA 758.

Likewise, BSA executives advise that homosexuality is "not a Scouting issue," JA 673, and that BSA has no requirement that any interpretation of "morally straight" bearing on homosexuality be shared by participants, or taught or communicated by Scouting sponsors, leaders, or members. JA 460-61; JA 666; JA 696-97; JA 757-58. Although charter applications "obligate the [sponsors to] . . . provide youth

members with the opportunity for a quality program experience *as set forth in the official literature,*" JA 375 (emphasis added), a position on homosexuality is not found in BSA's literature,[3] none is disseminated to BSA members, parents, or sponsors, and no restriction is mentioned at any point in BSA's broad solicitation of a representative membership. BSA has never communicated any instruction to its members, including Scoutmasters or sponsors, that they must believe or convey to youth that "morally straight" includes an implicit view that gay people or homosexuality are immoral and incompatible with Scouting. JA 753-55.[4]

Notwithstanding this unbroken organizational silence on sexual orientation, BSA national officials initiated a practice of excluding "known or avowed" gay youth and adult members. Cert. Pet. at 3.[5] BSA has never announced this policy

[3] No view whatsoever regarding sexual orientation is articulated in the tens of thousands of pages of Scouting literature, JA 691-92, including the application for adult membership, L.9; the application for youth membership, L.3-8; *The Boy Scout Handbook*, R.399-752; *The Scoutmaster Handbook*, R.753-901; *Advancement Guidelines*, R.582-1587; the many histories of Scouting, R.4341-42; the voluminous training materials or extensive training courses offered by Scouting, R.3970; R.4018; R.4342; R.4416; or in Scouting "Fact Sheets"—documents intended to "tell . . . the story of scouting, talk about the programs, standards and values of the organization, to bring it to young people and others." JA 4434-60.

[4] Only a handful of internal documents, dated from 1978 to the early 1990s, refer to the exclusion of gay youth and adult members and staff. JA 453; JA 460-61; JA 669. None have been circulated among youth or adult members, JA 753-54, or even made available upon request. JA 662; JA 669.

[5] BSA's undistributed "position statements" (there is no written policy as such) state a blanket rule that "Boy Scouts of America does not accept homosexuals." JA 457-59; *see also* JA 137 (letter stating "grounds for [Dale's] membership revocation" that BSA "specifically forbid[s] membership to homosexuals"). Because BSA "does not ask prospective members about their sexual preference," JA 460, however, the excluded group only consists of those known to be gay, either through their own

outside of litigation, or communicated it to members or sponsors. *See supra* notes 3-4. However, if troops inquire, they are told they have no choice but to follow the discriminatory policy. *See* JA 701.

BSA allows its members and sponsors to voice their disagreement with the membership policy, so long as they are not known to be gay themselves.[6] Likewise, members and sponsors can have widely divergent views on what it means to be "morally straight"—and whether that tenet relates to sexual orientation in any way—again, so long as they are not known to be gay themselves.[7]

statements or otherwise. JA 746 ("known or avowed homosexual persons" will not be registered). Contrary to BSA's claim in its brief that "Scouting makes no effort to discover the sexual orientation of any person," Pet.'s Br. at 6, the record reflects that if "an individual involved in Scouting is alleged to be a homosexual . . . [t]he matter should be investigated in a discreet and responsible fashion." JA 455.

[6] *See, e.g.*, JA 623 (Aff. of a Scoutmaster, whose troop voted in favor of a resolution opposing the exclusionary policy, but whose charter was subsequently renewed); JA 655 (Aff. of adult leader of BSA, author of BSA materials and trainer of other Scout leaders, who has "been involved in an ongoing dialogue with professional and volunteer Scouters about [his] opposition to [the] exclusionary policy," and been told that "voicing [his] opposition . . . is not grounds for revocation of [his] Scouting membership"); JA 665 (Aff. of Assistant Scoutmaster: "Despite my open opposition to the Scouting policy of excluding homosexuals from membership, I have been asked to continue in my role as an adult leader in Scouting."); JA 637 (Letter from Monterey Bay Area Council stating that its applications for youth and adult membership "do not discriminate on the basis of . . . sexual orientation").

[7] *See, e.g.*, JA 557; JA 560 (Aff. of Lutheran pastor, ¶¶4, 9); JA 563; JA 565 (Aff. of Executive Presbyter of the Presbytery of Elizabeth, ¶¶3, 9); JA 571 (Aff. of Roman Catholic bishop, ¶11); JA 597 (Aff. of President of the Union of American Hebrew Congregations, ¶4); JA 608-09 (Aff. of Bishop of the Episcopal Diocese of Newark, ¶¶3-5); JA 615 (Aff. of Roman Catholic priest, ¶4); JA 618-19 (Cert. of Methodist bishop, ¶¶3-4); R.3805-06; R.3815-21; R.3863-69 (Statements of the Unitarian Universalist Association, the United Church of Christ, and the Religious Society of Friends).

James Dale

At the time of his expulsion shortly after his twentieth birthday, James Dale had spent more than half of his life in Scouting. His record was "exemplary." 157a. In addition to teaching him outdoor and other practical skills, Scouting provided Dale with a sense of civic and ethical responsibility, fostered his self-confidence, and gave him the opportunity to have fun and form friendships with other boys in his community. JA 113-14. BSA recognized Dale's outstanding commitment and abilities, JA 116-19, admitting him to the Order of the Arrow (established by BSA to "recognize those Scout campers who best exemplify the Scout Oath and Law in their daily lives," JA 43), and awarding him its highest rank, Eagle Scout (attained by only two percent of all Scouts, JA 705). Dale held various youth leadership positions in Scouting, including Junior Assistant Scoutmaster from 1985 through 1988. JA 116. In August 1988, when he turned 18, Dale became an adult member and was asked to become an Assistant Scoutmaster in his troop. JA 119; L.9. Throughout his entire time in Scouting, he exemplified, "accept[ed] and endors[ed] Boy Scouts' moral principles." 57a.

While an undergraduate at Rutgers University, Dale first acknowledged, both to himself and to his friends and family, that he is gay. JA 126. In July 1990, the 19-year-old attended a seminar at Rutgers on the psychological and health needs of lesbian and gay teenagers, including the harms caused by discrimination and isolation. A local newspaper, the *Newark Star-Ledger,* ran an article entitled "Seminar addresses needs of homosexual teens," included Dale's picture, and identified him as co-president of the campus lesbian and gay student group. JA 127; L.10. The article did not mention BSA or identify Dale as a BSA member.

Days later, Monmouth Council sent Dale a letter "revok[ing]" his membership and instructing him to "sever

any relations [he] may have with the Boy Scouts of America." JA 135. Stunned, Dale wrote back asking the reason. JA 136. BSA responded by mail that it "specifically forbid[s] membership to homosexuals." JA 137. No BSA representatives spoke with Dale during the course of his expulsion, asked his views on sexuality or any topic, or questioned his approach to Scoutmaster duties. Indeed, a subsequent letter from BSA Legal Counsel David K. Park to Dale's counsel flatly stated:

> As your client is apparently an avowed homosexual and the Boy Scouts of America does not admit avowed homosexuals to membership in the organization, no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting.

JA 138.

On July 29, 1992, Dale brought this suit against BSA and its Monmouth Council, charging that revocation of his membership based on his sexual orientation violated the New Jersey Law Against Discrimination ("LAD"). JA 10-28. He sought reinstatement to continue participating in the organization, affirming his continuing belief in Scouting and the Scout Oath and Law. *See* JA 27; JA 492; JA 510-12.

The Superior Court Of New Jersey, Chancery Division

On cross-motions, the Superior Court of New Jersey, Chancery Division, granted summary judgment for BSA and dismissed Dale's complaint on statutory grounds, holding that BSA is not a "place of public accommodation" under the LAD because (i) it is not a physical "place," but "an entity," 205a; and (ii) its membership "is limited to those who subscribe to the Scout Oath and Law" and is therefore selective. 208a. In dicta, the court endorsed BSA's alleged expressive association defense, citing the King James Bible,

"Judeo-Christian tradition," and a history of "sodomy" statutes to construe BSA's moral views. 193a-194a.

The Superior Court Of New Jersey, Appellate Division

On March 2, 1998, the Superior Court of New Jersey, Appellate Division, reversed. The court found that BSA was a place of public accommodation, and held the lower court's "narrow interpretation" of the LAD inconsistent with New Jersey precedent. 115a. It cited factors such as BSA's open invitation to membership, large size, and substantial government entanglement, and rejected BSA's attempt to fit into the LAD's exemptions. 119a-125a. The court found no infringement of intimate or expressive association rights, noting in particular that it is an "undisputed fact that the BSA's collective 'expressive purpose' is not to condemn homosexuality." 135a. The court also concluded that, unlike the application of Massachusetts public accommodation law to a parade in *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), freedom of speech is not implicated or infringed in this case. 148a.

The Supreme Court Of New Jersey

The Supreme Court of New Jersey unanimously affirmed. The court found that BSA is a public accommodation, and that it does not fit within the LAD's exemptions for "distinctly private" groups or religious schools. The court based these conclusions on a detailed examination of the record, emphasizing BSA's "substantial public solicitation," 24a-27a; its lack of selectivity, 32a-39a; its "close relationships" with government, particularly its "connection to public schools and school-affiliated groups," 27a-30a; and its nonsectarian, pluralistic nature. 39a-40a. BSA also failed to qualify for the LAD's *in loco parentis* exemption. 40a-41a.

The court rejected BSA's claim of intimate association protection at the troop and full organizational level, finding

that the typical troop size of between 15 and 30 members, the character of the relationship between Scoutmasters and youth members, and BSA's open membership policy demonstrate that BSA troops are not intimate associations. 45a-50a. It considered BSA's alleged expressive association defense and found that:

> The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality.

52a. It noted that both the record and amicus briefs indicated that even BSA's religious sponsors differed significantly in their views on homosexuality. 55a-56a.

The court rejected BSA's speech claim as well. Comparing this case to the facts of *Hurley*, the court found that "Dale's status as a scout leader is not equivalent to a group marching in a parade," 65a, that "Boy Scout leadership [is not] a form of 'pure speech' akin to a parade," and that BSA remains free to "shape its expression." 66a.

Finally, the court held that "[i]t is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society," 62a, and thus "even if the application of the LAD . . . had resulted in some slight infringement," that infringement "is justified." 63a-64a.

SUMMARY OF ARGUMENT

BSA, "an American institution," 64a, and a singularly inclusive civic organization uniquely entwined with the government, expelled a gay 20-year-old long-time member because of his identity. BSA's status-based discrimination

targets all levels of Scouting, youth as well as adult, to exclude gay boys and men because of their sexual orientation. To defeat the mandate of New Jersey's Law Against Discrimination, BSA asks this Court to hold that the First Amendment leaves states powerless to prevent such discrimination by public accommodations. Instead, the Court should hold that the LAD's prohibition on discriminatory conduct, a rule that neither aims at nor effects the suppression of First Amendment freedoms, prevails here to require Dale's reinstatement. That result will not interfere with BSA's ability to craft and control its own message, but will serve New Jersey's vital interest in guaranteeing equality of opportunity in important institutions that open their doors to the public.

BSA's government entanglement and the large, open nature of the organization defeat BSA's efforts to cloak itself in the mantle of highly private associations. The especially public nature of this group diminishes its claim that it must be wholly walled off from government in the name of the First Amendment, and conversely increases the government's interests in curbing its identity-based discrimination.

The freedom of expressive association does not shield BSA's anti-gay membership practice from the LAD's mandate. Ending that practice will not affect in any significant way the members' ability to convey their expressive purposes. BSA's diverse members and sponsors do not come together for any anti-gay or gay-incompatible expressive goals. In fact, BSA welcomes in its ranks those who assert that gay people are "morally straight" and should be able to participate equally—so long as those asserting such views are not themselves known to be gay. But even assuming, *arguendo*, that BSA's expressive purposes were as claimed in its brief, it is undisputed that in its programs and materials BSA does not communicate to Scouting youth or the public any view condemning homosexuality or gay people, or require its sponsors or Scoutmasters to do so. Dale and

other openly gay members can fully accomplish the important work of Scoutmasters, with no effect on BSA's message. Moreover, any burden allegedly imposed by halting sexual orientation discrimination is more than justified by New Jersey's compelling interests.

Nor does freedom of speech provide a valid defense here, as no BSA speech is compelled by ending its discriminatory membership practice. Inclusion of human beings under a civil rights law cannot be translated into speech; if it could, all discriminators could raise a First Amendment shield to any equal opportunity statute. BSA remains free to say whatever it pleases, and to require any member, sponsor, or leader, including Dale, to express only BSA's views within Scouting.

Finally, an organization as vast, non-selective, and entwined with government as BSA cannot claim the freedom of intimate association to shield itself from the LAD. This is especially true given that individual troops are forced to apply BSA's anti-gay membership exclusion.

ARGUMENT

I. BSA'S CHOSEN ENTWINEMENT WITH GOVERNMENT SHOWS THAT IT IS FAR FROM WHOLLY PRIVATE, AND HEIGHTENS NEW JERSEY'S INTERESTS IN FORBIDDING DISCRIMINATION HERE

"An association must choose its market." *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring). When an organization enters the commercial sphere, it decreases its claim to privacy and triggers government interests in regulating discriminatory practices. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69 (1984). However, government's interests in combating discrimination are

not limited to the commercial context.[8] *See Roberts*, 468 U.S. at 625-26. BSA has made the decision to seek and trade on its unique relationship with government at all levels, and to open up to all boys in the nation as its constituency. This choice, too, diminishes privacy and triggers especially strong government interests. BSA cannot fairly inflate its freedom of association claim simply by repeatedly invoking the word "private." *Cf.* Pet.'s Br. at 2, 18, 20, 22, 27, 29, 34, 38, 45, and 47. In fact, the exceptionally unselective nature of BSA and its association with government decrease its entitlement to wall itself off from government and "affect it with a public interest." *Munn v. Illinois*, 94 U.S. 113, 129 (1876); *see also Nebbia v. New York*, 291 U.S. 502, 534 (1934); *Prune-Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 84-85, 87 (1980).

BSA is a massive organization whose unique nature and self-positioning are not fairly captured by "private." Its prominence in American life is a product of (1) its symbiotic involvement with government, including government entities' direct ownership and operation of troops and programs; (2) its aggressive and all-embracing outreach;[9] (3) its

[8] BSA and its amici rely heavily on Justice O'Connor's dictum about Scouting in her concurrence in *Roberts*, 468 U.S. at 636, but of course this Court in *Roberts* did not have before it any of the evidence regarding either BSA's unique government entwinement or its commercial enterprises. While its members undoubtedly engage in valuable recreational and expressive activities, BSA is in many respects also a commercial entity. In 1992, BSA councils operated more than 700 residential camps around the country. *See* R.1395. BSA councils provide camping and outdoor facilities, program material and literature, planning tools, and other program aids. R.1184. BSA advertises aggressively; referring to BSA's "broad public solicitation through various media," a BSA spokesman stated, "scouting [is] a product and we've got to get the product into the hands of as many consumers as we can." 25a-26a.

[9] Far more than the value-inculcating entity denied an associational defense in *Runyon*, BSA conducts "aggressive recruitment through national television, radio and magazine campaigns." 3a; *cf. Runyon v. McCrary*, 427 U.S. 160, 172-73 n.10 (1976) ("[T]he petitioning schools are private only in the sense that they are managed by private persons and

proclaimed pluralism; and (4) its resulting diverse, "representative" membership.[10] BSA cannot have it both ways—benefited and sponsored by government entities when it holds itself out to the public, then intensely private when it asks this Court to deny the government's ability to hold it to the public accommodations law's requirement of nondiscrimination.

Unlike virtually all private organizations in this country, BSA has a relationship with public entities whereby those entities, along with others, implement BSA's program at the local level. The *Troop Handbook* declares that chartered (or "franchised") sponsors, including public entities, actually own and operate the troops.[11] As the *Scoutmaster Handbook* puts it, "The chartering process becomes in practice a working partnership, in which the organization agrees to accept certain responsibilities and the BSA agrees to provide certain services." R.776. While "[t]he program is flexible, . . . major departures from BSA methods and policies are not permitted." L3. Thus the sponsors' representatives—firefighters, police officers, teachers, etc.—are implicated in

they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private. They appeal to the parents of all children in the area who can meet their academic and other admission requirements. This is clearly demonstrated in this case by the public advertisements.") (citations omitted); *see also id.* at 188 (Powell, J., concurring).

[10] BSA's official materials emphatically proclaim its desire to have a "representative membership," reflecting not just race or ethnicity, but "proportionately the characteristics of the boy population." JA 64-65. BSA tells the public that its "high hopes for the nation's future . . . cannot flower if any part of our citizenry feels deprived of the opportunity to help shape the future." JA 66-68.

[11] *See* R.967 ("Your troop is 'owned' by a chartered organization. It receives a national charter yearly to use the Scouting program as part of its youth work."); *see also* JA 57; R.776. James Kay, head of petitioner Monmouth Council, testified that it is these sponsoring groups, including schools and police, "that actually conduct the Scouting program." JA 308.

executing the practices mandated by BSA's national bureaucracy.[12]

From its inception, BSA has contemplated operating through the nation's public schools, establishing in-school scouting programs in its by-laws "which take place during school hours and/or as part of school curriculum" in order to "further [BSA's] purpose and relationship concept." JA 442. In New Jersey, public schools and school-affiliated groups sponsor nearly 500 scouting units. R.1278. BSA's 1991 Report to Congress stated, "[a]cross the nation as young people returned to school . . . BSA's Learning for Life program entered the classroom with them." R.4506 ("Learning for Life is a weekly youth program presented during the school day by the classroom teacher or a council presenter."). Nationwide, school representatives thus run school troops, implement BSA activities and policies, and reach out to the community in the name of the schools' chartered BSA units. *See* JA 69-70. Public schools also offer BSA privileged access for recruitment. *See supra* at 2.

Beyond schools, state governments have granted BSA a wide range of special privileges and benefits not accorded other "private" organizations. For example, in New Jersey, real and personal property used for the purposes of and in the work of the Boy Scouts is exempt from state taxation. N.J. Stat. Ann. § 54:4-3.24.[13] New Jersey does not charge

[12] *Cf. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 526, 544 (1987) (O'Connor, J., dissenting) (finding state action based on degree to which private entity and the government act as "joint participants"). Dale does not claim state action here, but rather that BSA's choice to operate very much in the public sphere and to embrace government diminishes its claim to a First Amendment shield and augments New Jersey's interests.

[13] Tax advantages like those granted by New Jersey are common features of state tax codes across the country. *See, e.g.*, Ala. Code § 40-9-12; Wis. Stat. Ann. § 70.11. Several states have implemented specialty

registration fees for motor vehicles owned by local BSA councils, *id.* § 39:3-27; grants reimbursement for certain BSA training expenses, *id.* § 54:39-66; and stocks with fish any body of water "that is under the control of and for the use of . . . the Boy Scouts." *Id.* § 23:2-3 (a benefit granted only to BSA and "other similar public organizations").

Finally, BSA received a federal charter in 1916, one of few organizations to have such a distinction. JA 314-321. BSA also receives numerous benefits from the federal government, ranging from tax exemption, I.R.C. § 170(c); Internal Revenue Publication 78; *cf. Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), to special services, access, and supplies.[14] It touts its government connection in its public presentation. JA 46-55; JA 66; JA 106.

BSA's size, symbiosis with government at all levels, and broad invitation to volunteer leaders and "all boys," JA 66-68, demonstrate that it is far less "private" than most associations that operate in this country.[15] In fact, BSA has

license plate programs that generate funds for BSA. *See, e.g.*, Fla. Stat. Ann. § 320.08058; Ind. Code Ann. § 9-18-37-5. The favorable treatment of BSA under state laws also includes advantages relating to state lands and public facilities. *See, e.g.*, Tex. Parks & Wild. Code Ann. § 62-082; Kan. Stat. Ann. § 19-2696.

[14] These include services, medical supplies, and equipment from the Secretary of Defense, Navy, Marines, and Coast Guard, 10 U.S.C. §§ 2544, 7541; 14 U.S.C. § 641; and assistance from the National Guard, including transportation and the use of facilities. 32 U.S.C. § 508. The Secretary of Agriculture may waive fees for the use of national forest land as BSA camps. 16 U.S.C. § 539f. The Secretary of Defense may cooperate with BSA to establish scouting facilities and services for military personnel overseas, by which the Scouts may receive free transportation, office space, warehousing, utilities, and means of communication, as well as reimbursement for the pay of BSA personnel performing these services overseas. 10 U.S.C. § 2606.

[15] *Cf. Marsh v. Alabama*, 326 U.S. 501, 506 (1946) ("The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statu-

gloried in its government imprimatur, which furthers that broad invitation. At the same time, BSA's very operations, structure, and public presentation implicate government in its membership practices. To the extent that "[a]n organization cannot speak except through its agents," Pet.'s Br. at 19, BSA has elected to speak to young people and the public through public entities and employees. Thus, gay youth may learn from their local police and fire departments, or in their classrooms, that while BSA has a "[p]ersonal invitation to every boy in school to join scouting," *supra* at 2, their identity as gay means that they are blackballed. The injury of discrimination is compounded when inflicted by an organization so intensely associated with the government, and government's interests in preventing such an injury are heightened.

II. THE FREEDOM OF EXPRESSIVE ASSOCIATION DOES NOT PREVENT NEW JERSEY FROM APPLYING ITS ANTI-DISCRIMINATION LAW TO BSA'S EXCLUSION OF YOUTH AND ADULTS KNOWN TO BE GAY

This Court has time and again rejected efforts by would-be discriminators to claim a First Amendment freedom to disassociate as a defense against civil rights laws targeting discriminatory conduct. Where the law at issue regulates a large membership organization's ability to exclude human beings based on their personal characteristics or identity, rather than its ability to express its ideas, this Court has

tory and constitutional rights of those who use it."). Among "private" organizations, BSA may well be the one that has most "clothed [itself] with a public interest justifying some public regulation," especially neutral regulation against discriminatory practices. *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 536 (1923) (government has a special interest in regulating organizations with "a peculiarly close relation between the public and those engaged in it[, raising] implications of an affirmative obligation on their part to be reasonable in dealing with the public").

upheld the states' power to act. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). This case involves identity-based discrimination, not any policy about or examination of views, as memorialized by both BSA's own internal documents and those sent to Dale. *See supra* note 5.

In the *Roberts* trilogy, the Court developed the analytic approach that should govern here. To test BSA's assertion of a First Amendment defense, the Court should ask (1) whether ending the policy of excluding all youth and adults known to be gay will affect in any significant way the members' ability to carry out their expressive purposes, and (2) if so, whether New Jersey's interest in the LAD outweighs any such burden.[16]

The lack of any significant burden on BSA's First Amendment interests is apparent from two distinct perspectives. First, the "views that brought [BSA's] members together," *Roberts*, 468 U.S. at 623, are not about homosexuality or sexual orientation. A reviewing court appropriately examines what message the members of an association collectively seek to express, much as courts examine the existence of religious beliefs and whether they are sincerely held—not

[16] Because the LAD is a neutral law of general applicability that regulates conduct, not expression, it could also be argued that those characteristics suffice to protect First Amendment interests and that the Boy Scouts' specific claim of expressive burden need not even be weighed under the *Roberts* trilogy approach. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 670-72 (1991) (burden on press is "incidental, and constitutionally insignificant, consequence" of generally applicable law prohibiting bad practices); *Arcara v. Cloud Books*, 478 U.S. 697 (1986) (even where remedy to law's prohibition on non-expressive conduct may burden expression, no First Amendment analysis required); *see also Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 572 (1991) (Scalia, J., concurring) ("as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all").

to decide the correctness of views or impose a philosophy on the group, but to verify the nature of the group's own expression. That limited inquiry here reveals that the expressive purposes of BSA's membership are not related in any way to homosexuality, and thus that ending discrimination on the basis of sexual orientation will have no impact on First Amendment interests.

Second, even if the nature of Scouting's programs and claimed expressive purposes are assumed to be exactly as set forth in BSA's brief, BSA has failed to show that abolishing its exclusion of gay members will cause any significant injury to those programs and purposes. While the upper echelons of the organization may interpret the BSA moral code to condemn homosexuality—and many adult members may share that view—BSA concededly does not at any point (1) express any anti-gay view to Scouting youth, or (2) require or instruct Scoutmasters to convey such a view in the recreational and educational programs that are the group's *raison d'etre*. Dale or another openly gay Scoutmaster can fully teach the positive message of family values and sexual responsibility that BSA emphasizes in its brief, just as closeted gay Scoutmasters, or non-gay Scoutmasters who happen to dissent from BSA's proffered interpretation of its moral code, now do.

Moreover, New Jersey's interests in enforcing its public accommodations law to end discrimination by a large civic organization that has woven its way into the fabric of American life and teamed up with government entities to sponsor its programs are compelling. Any small burden on First Amendment interests that might be found here is outweighed by the countervailing government interests in keeping the important opportunities Scouting provides free from sexual orientation-based discrimination.

A. The Court Should Decide This Case By Examining Whether Ending BSA's Exclusionary Policy Will Significantly Burden Its Members' Ability To Carry Out Their Expressive Purposes, And If So, Whether The State's Interests Outweigh Any Such Burden

1. Past Expressive Association Decisions Establish Sound First Amendment Standards That Should Govern Here

Though labor unions, schools, partnerships, membership organizations, and other entities have over the years attempted to assert a "right to discriminate" as a component of freedom of association, this Court has never accorded affirmative constitutional protection to the bare practice of group-based exclusion.[17] Nor has the Court recognized "a generalized right of 'social association'" or disassociation under the Constitution. *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Rather, freedom of expressive association is an implicit, "instrumental" right, necessary for full enjoyment of the explicit First Amendment freedoms but also limited by their scope: "a right to associate *for the purpose of* engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618 (emphasis added); *see also New York State Club Ass'n*, 487 U.S. at 13.

Thus, the Court's touchstone in assessing whether a litigant presents a cognizable expressive association claim is a

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[17] *See, e.g., Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945) (rejecting a "right of selection to membership" based on race); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (" 'the Constitution . . . places no value on discrimination' ") (*quoting Norwood v. Harrison*, 413 U.S. 455, 469 (1973)); *Hishon*, 467 U.S. at 78 ("there is no constitutional right . . . to discriminate"); *Roberts*, 468 U.S. at 628 ("invidious discrimination in the distribution of publicly available goods, services, and other advantages [is] entitled to no constitutional protection").

showing of some significant burden on the litigant's ability to pursue its speech or other constitutionally protected group activities. In rejecting Rotary International's asserted expressive association defense to application of California's anti-discrimination statute, for example, the Court emphasized that "the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various [First Amendment] purposes." *Rotary*, 481 U.S. at 548.[18]

Moreover, even if a cognizable burden exists, the state's interests may still outweigh those of the litigant. As *Roberts* recognized, "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which . . . the constitutionally protected liberty is at stake in a given case." *Roberts*, 468 U.S. at 618; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary."). The Court rejected the Jaycees' expressive association defense by concluding, "even if enforcement of the Act causes some incidental abridgment of . . . protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." *Roberts*, 468 U.S. at 628. Thus, a balancing of the competing interests must take

[18] *See also Rotary*, 481 U.S. at 548 ("the Unruh Act does not require the clubs to abandon or alter" any of their "activities that are protected by the First Amendment"); *New York State Club Ass'n*, 487 U.S. at 13 ("Local Law 63 does not affect 'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints."); *Runyon*, 427 U.S. at 176 ("there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma").

place, and a compelling state interest can justify even "severe burdens" on the freedom of expressive association. *Timmons*, 520 U.S. at 358.

Whether the challenged state action regulates an organization's criteria for choosing members as well as "leaders" (as in this case and the *Roberts* trilogy), or only the selection of leaders or "standard bearers" (as in eligibility requirements for office that limit political parties' potential candidates), does not change the expressive association analysis. A group asserting that right must, in all cases, first show that the challenged state law significantly hampers its ability to pursue its constitutionally protected expressive goals. *See, e.g., Timmons*, 520 U.S. at 357-64; *Eu v. San Francisco County Democratic Ctr. Comm'n.*, 489 U.S. 214, 222-25, 229-31 (1989). If an actual burden is proven, then it is weighed against the government interests being served. *See, e.g., Timmons*, 520 U.S. at 363-70; *Eu*, 489 U.S. at 225-29, 231-33.

Yet BSA urges this Court to grant all "private, non-commercial, expressive associations" the *"unqualified* right to select their own leadership," Pet.'s Br. at 34 (emphasis added), even as it defines "leaders" fuzzily as at least all of the million-plus adult members of BSA (or, since "leadership" is a term with many meanings used throughout Scouting, many youth members as well).[19] This absolutist position would exclude the government from its well-established and necessary role in regulating political parties and primaries. It would severely undercut government efforts to end discrimination in civic life by excluding many of the advantages and privileges of membership (including powerful and important roles within an association that is a public accom-

[19] BSA mounts its defense in this Court with near constant emphasis on "leadership," as if it were prepared to renounce its current blanket membership policy and concede that at least some of its discrimination against gay youth who are or apply to be members is untenable.

modation) from the reach of civil rights laws. BSA's unqualified approach unmoors the right of expressive association from its proper focus on whether First Amendment activity, not simply a decision within or action by a group, is at stake, and on whether any burden on that activity is outweighed by government concerns.

This untethered approach finds no support in precedent or the Constitution. Indeed, the sole expressive association decision that BSA's proposal references, *Eu*, closely examined the First Amendment interests at stake in that particular case, and tested the weight of the government's asserted justifications. Ruling in favor of the political parties, the Court nevertheless noted that government intervention in other cases may be "necessary to prevent the derogation of the civil rights of party adherents." *Eu*, 489 U.S. at 232.[20] Expressive associations have no unqualified right to select their leaders in defiance of civil rights prohibitions (least of all under a policy that discriminates against members, too).

[20] Similarly, none of the Title VII cases BSA cites, Pet.'s Br. at 9, carve out a categorical exception for charitable organizations' leadership decisions. All of those cases were decided under the same statutory standards and proof requirements that apply to any Title VII case. The same should be true for BSA's expressive association claim here—it cannot be absolute. *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 (7th Cir. 1987), held that the plaintiff had failed to show that her sex was a "motivating or substantial factor" in her being rejected for employment. In *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996), *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987), and *Harvey v. YWCA*, 533 F. Supp. 949 (W.D.N.C. 1982), the courts found that the employers had proven a legitimate, non-discriminatory reason or a bona fide occupational qualification to justify their actions. And in *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991), and *Gosche v. Calvert High School*, 997 F. Supp. 867, 871 (N.D. Ohio 1998), the courts found that the defendants fit within Title VII's statutory provision that allows religious institutions to limit employment to those with the same religious beliefs. (Under that provision, however, religious institutions must still refrain from other forms of prohibited identity-based discrimination, such as sex-based decisions).

To create such a right today would handcuff government, and defer absolutely to private choice, in myriad ways destructive to the traditional Constitutional balance.[21]

2. This Case Does Not Present The Kind Of "Peculiar" Application Of A Public Accommodations Law To Speech Itself That Took *Hurley* Out Of Expressive Association Jurisprudence

This case fits squarely in the line of the *Roberts* trilogy. Because it cannot prevail under that expressive association framework, as shown below, BSA heavily relies on one case, *Hurley*, to try to evade the LAD and this Court's expressive association precedents. However, in contrast to this case, *Hurley's* unique facts made it apparent that Massachusetts' "peculiar" application of its public accommodations law directly interfered with the parade sponsors' freedom of *speech*. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572-74, 578 (1995). Thus, the Court had no need to conduct the normal threshold inquiry it must undertake in expressive association cases to determine whether expressive purposes are burdened enough even to implicate the First Amendment. The facts of this

[21] The "ministerial exception" that allows churches and synagogues complete discretion in choosing their ministers and rabbis is based on unique concerns about government involvement in *religious* affairs and on the dual commands of the Free Exercise and Establishment Clauses. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000); *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 351 (5th Cir. 1999). Moreover, that exception has never been "explained as arising from freedom of expressive association," Pet.'s Br. at 32 n.8, but has always been rooted directly in the Religion Clauses. The exception survives *Employment Division Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *See Gellington*, 203 F.3d at 1303; *Combs*, 173 F.3d at 349-50; *Equal Employment Opportunity Comm'n v. Catholic Univ. of Am.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996).

case—where BSA seeks to exclude openly gay members, as such, and where a member invokes the public accommodations law simply to maintain his membership and pursue BSA's expressive goals (not to inject his own, separate views into the work of the organization)—do not support BSA's attempt to make *Hurley* override the *Runyon-Roberts* line of cases. *See infra* Point III.

B. Scouting's Members Are Not Brought Together By Any View Or Expressive Purpose That Implicates Sexual Orientation

As the *Roberts* trilogy establishes, an entity invoking an expressive association defense must—as a threshold matter—show "that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example," or some other personal characteristic covered by the antidiscrimination law. *New York State Club Ass'n*, 487 U.S. at 13; *see also id.* at 19 (O'Connor, J., concurring).

BSA italicizes its opposition to the idea that courts have a role in examining the nature of an organization's "moral message," Pet.'s Br. at 25-26, but the alternative is that any organization could claim a discriminatory expressive purpose without any factual basis and use that manufactured purpose to evade the civil rights laws. A discriminator's claimed message must at least be examined for its foundation in the organization's prior activities and speech. In fact, courts often are charged with piercing the pretextual claims put forth by those who seek to discriminate or who otherwise seek a freedom from neutral laws of general applicability. *See, e.g., United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth of a belief is not open to question,' there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case.") (citation omitted); *Philbrook v.*

Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985) ("it is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity—as opposed, of course, to the verity—of someone's religious beliefs in both the free exercise context . . . and the Title VII context"), *aff'd*, 479 U.S. 60 (1986).

Because it is the *members'* First Amendment right to pursue the expressive purposes for which they associate that may be at stake, courts appropriately examine what the members formally declare, what they have seen or shared by way of organizational literature or communication, what they have not seen or shared, what they are charged with saying or doing either internally or externally, whom they associate with and how, and any other evidence relevant to the organization's true expressive goals. On these indicia, even with a deferential examination, it is clear that BSA's claim to have some expressive purpose that concerns homosexuality is a false premise for its purported expressive association defense. BSA members and sponsors in reality do not come together for any shared expression—any "specific expressive purposes" or actual "views that the club's members wish to promote," *New York State Club Ass'n*, 487 U.S. at 13—that relate to sexual orientation. That reality is what the New Jersey Supreme Court found, not "*impose[d]*," Pet.'s Br. at 25, and this Court should do the same.

1. No Message About Gay People Or Their Incompatibility With The BSA "Moral Code" Exists In Any BSA Communications To Adult Or Youth Members

BSA publishes a plethora of recruiting and informational materials, yet is unable to produce even a single document disseminated or generally made available to members or prospective members containing the "moral code" interpretation that it now argues as the basis of its gay exclusion. The Scout Oath, Law, Motto, and Slogan do not mention gay

people, homosexuality, or sexuality at all. JA 187-89. Nowhere in the Scout Handbook's extensive explanations of Scouting principles is there reference to people as gay or non-gay, or to the alleged moral superiority or inferiority of anyone based on sexual orientation. R.399-752. When asked under oath: "Is it an explicit aim of the Boy Scouts to discourage homosexuality?," both BSA and Monmouth Council replied: "No." JA 697; R.4405. There is no evidence that members or leaders are in any way instructed on the morality of heterosexuality or homosexuality, JA 694; JA 696-97; JA 753-54; JA 757-58, or that "sex is . . . part of the Scouting curriculum." JA 668; *see also* JA 655; JA 673.[22]

BSA has centered its defense on the claim that condemnation of gay people or homosexuality should be *inferred* from the requirements that Scouts be "clean" and "morally straight." But these terms are not defined anywhere in Scouting materials, in appeals or instructions to members, or in BSA's activities, in any way connected to sexuality. 55a. If a member or Scout leader wished to express to the public or other Scouts the meaning of "morally straight," and looked to the organization for guidance, he would see that "morally straight" is defined in the Scout Handbook as follows:

> To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values that you follow as a Scout will help you to become virtuous and self-reliant.

[22] BSA strives to explain away this remarkable total public and membership-wide silence on something so supposedly central as to require group-based exclusion, arguing that its Oath and Law "are a list of 'do's' rather than 'don'ts'." Pet.'s Br. 3. However, BSA materials do discuss aspects of life that BSA views as negative. *See, e.g.*, R.1473 (BSA President attacks "the five 'unacceptables' in society . . . child abuse, drug addiction, hunger, youth unemployment, and illiteracy").

JA 218. He would see nothing in the Handbook, or anywhere in Scouting materials or on its website, that communicates anything about gayness or homosexuality.[23]

It truly matters that nowhere in its program, applications, instructions, or activities has BSA ever communicated to members, sponsors, government, or donors that it interprets its Oath and Law as having a gay-incompatible meaning, because it allows BSA to have it both ways in a manner that the LAD does not permit and the First Amendment does not require.[24] There is a difference between a "policy" or practice stealthily implemented by officers, and the actual purposes that bring the members together. "Truth in advertising" is a fair minimal requirement for an organization seeking to trump a civil rights statute in the name of expression. At least so long as the members do not come together for any "specific expressive purposes" regarding gay people,

[23] The fact that certain or even large segments of society disfavor homosexuality does not evidence any expressive purpose on the members' part any more than past or present racism in society would support an analogous conclusion about the members' moral assumptions regarding racial minorities. *Cf.* Pet.'s Br. at 5. Numerous long-time participants in Scouting, including James Dale's father, JA 146-47; a Roman Catholic bishop, JA 571; and a Scouting National Explorer President, JA 688-90, have sworn that such an anti-gay view was never part of BSA, or anything they were required to believe, implement, or teach.

[24] If members one day read in the newspaper that BSA officials have excluded African-Americans, they would not necessarily think that remaining involved in the organization and its activities meant that *they* were embracing or expressing the "view" that African-Americans were not "morally straight" or "clean," or that race discrimination is really one of their organization's "expressive purposes." Knowing that theirs is the Boy Scouts *of America* (government participation and all), some might protest, while most would likely continue in pursuit of the true activities and purposes, ascribing the action to wrong-headed leaders, not to the organization. They would expect the courts to reject any specious assertion of "their" First Amendment rights to defend an expressive purpose that they never heard of, were never told to communicate, and had no need to protect.

BSA's identity-based exclusion is indefensible. *New York State Club Ass'n*, 487 U.S. at 13.

2. The Pluralism And Diversity Of Views That Characterize Scouting Refute BSA's Claim That Condemnation Of Homosexuality Constitutes An Expressive Goal

In part because Scouting "is identified with no particular faith, encourages no particular affiliation, nor assumes functions of religious bodies," R.880, its members do not all have the same concept of morality or the term "morally straight," or the same views on gay people or "homosexual conduct." *See, e.g.*, JA 153; JA 656; JA 663; JA 670-71. This is no mere "internal disagreement," Pet.'s Br. at 27, but rather reflects the organization's commitment to religious and philosophical pluralism in general,[25] and in particular a vast spectrum of views on sexuality as well as homosexuality that disproves any purported organizational perspective. The members of this association do not come together for any such shared message, or to express or inculcate something upon which they emphatically differ. *See supra* notes 6-7. Far from fulfilling these diverse members' expressive purpose in associating, the exclusionary policy directly contradicts the pluralism and "tolerance of all persons," Pet.'s Br. at 5, constantly presented to the public and the members as hallmarks of the organization and its expression.

Many within Scouting at every level have loudly voiced their condemnation of the exclusionary practice,[26] noting

[25] *See* R.2542-49. Scouting helps and urges youth to develop their own moral compass, reflecting the religious and political diversity of its membership, rather than one detailed, absolute philosophy. *See, e.g.*, JA 670 (*The Scoutmaster Handbook* emphasizes that: "Older Scouts may begin to develop a personal philosophy of life, reevaluating values and standards. . . . [They] combine advanced thinking ability with feelings, and are able to see good and bad as relative, not absolute.").

[26] *See generally* JA 146-47; JA 153-54; JA 597; JA 605-06; JA 609-10; JA 625-26; JA 626-29; JA 630; JA 635-37; JA 638-45;

their belief that sexual orientation discrimination is antithetical to the *true* tenets of Scouting, such as community service, honesty, inclusion, and respect for others. JA 154; JA 566; JA 571; JA 612-13; JA 625. Many in Scouting also believe that individuals are neither inherently moral or immoral because of their gay or non-gay status, or that discrimination itself is immoral and thus does not comport with the Scout Oath that Scouts keep themselves "morally straight." *See* JA 558; JA 565; JA 571; JA 575; JA 608-09; JA 626; JA 565; JA 663; JA 670; JA 689.

Indeed, perhaps the clearest indication that identity-based discrimination, rather than a burden on any actual Scouting message, is at issue here is that non-gay members are not expelled or even asked to refrain openly from sharing their views that the policy is wrong or that gay people are appropriate moral role models. By contrast, Dale was expelled not for expressing any particular view, but because outside of Scouting he revealed that he is gay.

C. Even Taking The Views And Programs Set Forth In Its Brief At Face Value, Reinstating Dale Would Have No Significant Effect On BSA's Ability To Carry Out Its Expressive Purposes

Even accepting, *arguendo*, the description of beliefs, "moral code," and educational programs in BSA's brief, ending status-based discrimination against gay members will not significantly affect the group's expressive goals.

JA 650-51; JA 651-53; JA 663-64; JA 687-89; R.1625-1905; R.3781; R.3805-06; R.3895; R.3958-59; R.4027-4328; R.4461-90; R.4478-85. *See also* Brief *Amici Curiae* of the Diocesan Council of the Episcopal Diocese of Newark, et al. in Opposition to the Petition for Writ of Certiorari.

1. BSA Has Not Charged Its Adult Members With Conveying Its Proffered View Against Homosexuality To Young People

While BSA officials may "believe that homosexual conduct is inconsistent with" the Scout Oath and Scout Law, Pet.'s Br. at 6, BSA fails to show that any adult member has ever conveyed or been instructed to convey that view to even a single young person. As its brief professes, "Boy Scouting does not have an 'anti-gay' policy, it has a morally straight policy." Pet.'s Br. at 6. BSA endeavors to teach "affirmative character traits," not a list of "don'ts." *Id.* at 3. Scouting materials touch on "sexual responsibility," "responsibility to women" and "to children," *id.* at 4-5; JA at 209-11, but "[o]fficial Scouting materials addressed to the boys do not refer to homosexuality or inveigh against homosexual conduct; rather, they teach family-oriented values and tolerance of all persons." Pet.'s Br. at 5. It follows that individual Scoutmasters' discussions with or responses to questions from youth would be of the same, affirmative quality. Certainly, a negative belief concededly left unexpressed in all of the voluminous written materials given to boys and leaders cannot be a critical component of the organization's effort to instill values.

Just as admitting women to the Jaycees did not impede that group's expressive efforts to "promot[e] the interests of young men," *Roberts*, 468 U.S. at 627, allowing openly gay members will not impede the Boy Scouts' teaching of "family values." Pet.'s Br. at 4. BSA can require that all Scoutmasters "disseminate its preferred views," *Roberts*, 468 U.S. at 627, and its "positive moral code for living." Pet.'s Br. at 3.[27]

[27] BSA falsely contends that "[t]o say that public accommodations laws apply to selection of Scoutmasters is to say that these positions must be open to all members of the general public." Pet.'s Br. at 43. But such laws require only that specified personal characteristics, such as sexual orientation, not be used in determining membership or other access. Entities like BSA remain free to use non-group-based criteria for participation, such as education or training requirements, or a commitment to teaching a prescribed curriculum.

Dale, like other openly gay youth and adults, can effectively do everything that BSA expects of its members. Dale can continue to teach the affirmative character traits central to Scouting, as well as the outdoor skills and more practical aspects of the program. His prior achievements within Scouting show his mastery of this material. Moreover, he can serve as a role model in the same way that other Scoutmasters do. Scoutmasters indeed lead by example, Pet.'s Br. at 3-4, during troop meetings, camping trips, community service projects, and discussions with Scouts, but *no* Scouting context calls upon them to "role model" sexuality, marriage, or intimate adult relationships. Thus, with BSA's acquiescence, Scoutmasters who are single, divorced, or gay and closeted all now serve and fulfill their leadership responsibilities, both through explanation and example. A Scoutmaster known to be gay can do the same, by teaching the organization's messages, and exhibiting the affirmative character traits that Scouting extols. as he undertakes all of his Scouting activities.

2. Dale's Identity Is Not A Message And Does Not Undermine Any Of BSA's Expressive Purposes

BSA expelled Dale not because of any particular view he articulated or believed, but because BSA officials discovered, from his disclosure unrelated to Scouting, that Dale is gay. JA 137-38. Even in the case of a nearly-lifelong, highly accomplished member, BSA officials summarily applied the anti-gay membership policy; in fact, they violated BSA's own procedures and declined to meet with the 20-year-old personally, stating that "no useful purpose would be served." JA 138; 13a. Nor does BSA get mileage from the fact that Dale himself disclosed his identity as a young gay man, because its discrimination targets "known," not merely "avowed," gay members. Cert. Pet. at 3. The

few internal BSA "position statements" reinforce that any youth or adult member known to be gay would be removed, regardless of how his sexual orientation came to be known, his individual views on any subject, or his performance within Scouting. JA 453-61.

Now, however, BSA tries to transform Dale's avowal of his sexual orientation into something more, and to insinuate that declaring oneself to be gay communicates more than one's sexual orientation. When a gay youth or adult says "I am gay" or provides that information to a newspaper reporter, he or she communicates only the fact about that one personal characteristic. Revealing one's gayness does not reveal a belief system, in contrast to revealing one's religion, atheism, political party, or membership in the Ku Klux Klan, *cf.* Pet.'s Br. at 28. The statement "I am gay"—like the statements, "I am Italian," "I am Latina," or "actually, I guess you can't tell, but my mother is African-American"—identifies a human being as a member of a group protected by the LAD. But beyond this mere identification, it does no more, and does not provide a basis for exclusion that is separate from the identity itself.[28] The law's protection against racial, ethnic, or sexual orientation discrimination does not end the moment a person reveals the

[28] Being gay cannot be used as a "shorthand measure" to disqualify an individual by imputing to him or her a "message." *New York State Club Ass'n*, 487 U.S. at 13. Learning someone is gay tells you nothing about his or her political party, religious beliefs, lifestyle, or moral code. *See People v. Garcia*, 92 Cal. Rptr. 2d 339, 344 (Ct. App. 4th Dist. 2000); *see also Elrod v. Burns*, 427 U.S. 347, 365 (1976) (cannot infer behavior or disposition to ill-willed conduct from membership in a political party). From the time of Lord Baden-Powell, gay people—including Dale as a schoolchild, as a teenager, as an Eagle Scout, and as an assistant Scoutmaster—have pledged the Scout Oath myriad times. They have transmitted the organization's messages to their fellow Scouts and the public for years. The Court should "decline to indulge" any contrary "overbroad assumptions," "stereotypical notions," or "sexual stereotyping" about openly gay people's ability to do so. *See Roberts*, 468 U.S. at 628.

information that might make her or him vulnerable to group-based prejudice.

Subsequent to his dismissal, Dale has voiced the opinion that BSA's conduct in excluding openly gay members is "bad and wrong." JA 513. This suit itself embodies that view, as would any suit challenging discrimination. Dale's perspective about the very exclusionary act that is at issue cannot provide a distinct reason—separate from his sexual orientation—for keeping Dale out, *cf.* Pet.'s Br. at 29, not least because if he proves unlawful discrimination and secures reinstatement there will be no ongoing dispute about that between the parties.

Moreover, contrary to BSA's representations, Dale does not wish "to use the bully pulpit of the Scoutmaster's position to communicate" anything other than Scouting's own organizational message. *Cf.* Pet.'s Br. at 22. He is not asking for a "platform upon which to expound" his personal beliefs. *Id.* The comments BSA relies upon (all made subsequent to the expulsion) indicate no unwillingness to continue expressing "the Oath and Law['s] positive moral code for living," Pet.'s Br. at 3, but, rather, disagreement with identity-based exclusion. Dale has sued to return to an organization in which he invested and excelled for twelve years. Once the unlawful discrimination in membership policy has been ended and he is reinstated, Dale is prepared to be bound by the same directives and limitations placed on all Scoutmasters.[29]

[29] BSA calls Dale a "gay rights activist," Pet.'s Br. at i, but such labeling cannot rewrite the basis of his expulsion or other facts of this case. The facts show that Dale is committed to the Boy Scouts' expressive messages and will further those—not any personal political goals—as a Scoutmaster. As Dale testified at his deposition, "I don't think sexual orientation ha[s] anything to do with Scouting." JA 498. BSA policy forbid "involve[ment of] the Scouting movement in any question of a political character," but does not "limit the freedom of thought or action of any official or members as an individual." JA 407-08. Dale's non-Scouting activities, such as the Rutgers University Lesbian/Gay Alliance, can-

Although the discriminatory practice has never been directly communicated even to all the volunteer leaders who run Scouting's programs, BSA concededly permits them to oppose it, should they learn of it. It cannot be, as BSA argues, that it is essential for its members not to associate with Dale, but fine to associate with the many non-gay members and sponsors who oppose anti-gay discrimination or who do not use sexual orientation as shorthand to determine morality. *See supra* notes 6-7.

In sum, BSA does not have the views and expressive agenda it claims, and even if its claims were taken at face value, they would not support the contention that allowing openly gay members will significantly hinder the group's shared goals. Thus, BSA's expressive association claim should be rejected because First Amendment interests are not at stake.

D. New Jersey's Interests In Ending Discriminatory Conduct By Public Accommodations Are Compelling And Outweigh Any Alleged Burden On BSA's Right To Expressive Association

The LAD has not been applied here "for the purpose of hampering the organization's ability to express its views." *Roberts*, 468 U.S. at 624. Rather, the statute has been used to correct status-based exclusion based on sexual orientation. The LAD does not "target speech or discrimination on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Hurley*, 515 U.S. at 572; *see also Roberts*, 468 U.S. at 623.[30] Thus, BSA's assertion that New Jersey is pursuing the illegitimate goal of dictating a speaker's message must be rejected.

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not have significance as to him when such outside activities are permitted to others associated with Scouting.

Far from serving an illegitimate purpose, the LAD advances vital government interests that outweigh any incidental burden (were any to be found) on the expressive interests of the Scouts. This Court has repeatedly held that public accommodations laws like the LAD "plainly serve compelling state interests of the highest order." *Roberts*, 468 U.S. at 624; *Rotary*, 481 U.S. at 549. "[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Roberts*, 468 U.S. at 628. In *Romer v. Evans*, 517 U.S. 620 (1996), this Court recognized that lesbians and gay men share the need for such protection. *Id.* at 628-29 ("Amendment 2 bars homosexuals from securing protection against the injuries that these public accommodations laws address. That in itself is a severe consequence.").

In adding a prohibition of sexual orientation discrimination to the LAD, New Jersey sought to protect individuals, institutions, and the government itself from the "enormous" price of such discriminatory conduct. 61a; *see also* N.J. Stat. Ann. § 10:5-3 ("such discrimination threatens not only the

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[30] In *Wisconsin v. Mitchell*, 508 U.S. 476, 484-85 (1993), the Court unanimously reaffirmed that anti-discrimination laws like the LAD are content-neutral regulations of conduct, and held the same with respect to hate crime sentencing enhancements, reasoning:

> [M]otive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld under constitutional challenge. *See Roberts v. United States Jaycees, supra*, 468 U.S., at 628; *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976). . . . In *Hishon*, we rejected the argument that Title VII infringed employer's First Amendment rights. And more recently, in *R.A.V. v. St. Paul*, 505 U.S., at 389-390, we cited Title VII (as well as 18 U.S.C. § 242 and 42 U.S.C. §§ 1981 and 1982) as an example of a permissible content-neutral regulation of conduct.

Id.

rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State"). As the New Jersey Supreme Court emphasized below, "It is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society." 62a; *see also Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 80 (1978) ("New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society").

States' leeway to determine the "breadth of the" problem, 61a n.15, and to include all extant categories of discrimination in their compelling effort to forbid such harmful conduct, is well supported both by federalism and by past precedent. *Roberts*, 468 U.S. at 623-24 (upholding Minnesota's interests in eradicating sex discrimination in public accommodations, a goal that went beyond federal civil rights protections); *Romer*, 517 U.S. at 627-29; *Hurley*, 515 U.S. at 571-72.[31] In this case the state interests are especially compelling because allowing BSA to discriminate would, in effect, cause government to sponsor the very activity it seeks to prevent.

The LAD "protects the State's citizenry from a number of serious social and personal harms." *Roberts*, 468 U.S. at 625. Discrimination in public accommodations "deprives

[31] The concerns about protecting states against federal incursion cited in *Kimel v. Florida Board of Regents*, __ U.S. __, 120 S. Ct. 631 (2000) (limiting Congress's Fourteenth Amendment, Section 5 power vis-a-vis state sovereignty), cut in precisely the opposite direction when it comes to allowing states to pursue their compelling interests in proscribing discrimination. Nor does this case require a determination of what level of scrutiny sexual orientation discrimination triggers under the Fourteenth Amendment. This Court has never held that the states are confined in their anti-discrimination efforts to those classifications deemed suspect, or that one national limit must fit all. Respect for federalism counsels that this Court not constrict states' power so tightly. This Court should decline BSA's invitation to tie the states' hands.

persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Id.* The "state interest in assuring equal access [is not] limited to the provision of purely tangible goods and services," *id.*, or even more narrowly, to the commercial context. *Cf.* Pet.'s Br. at 35. Access to community leadership opportunities and skills, for example, has been recognized as one of the vital aspects of truly equal access to public accommodations. *Roberts*, 468 U.S. at 626. BSA's insinuation that leadership positions are not of concern to the state flies in the face of these statutes' very purpose. The women who challenged the Jaycees' and the Rotary Club's discriminatory membership policies, for example, already had some access to those organizations; their suit sought fully equal access and the opportunity to rise through the ranks just as men could. *Roberts*, 468 U.S. at 613; *Rotary*, 481 U.S. at 541.

Most fundamentally, public accommodation statutes seek to remedy " 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' " *Roberts*, 468 U.S. at 625 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964)). When BSA expelled Dale because it found out he is gay, the stigmatizing sting of that exclusion was "surely felt as strongly" by him as by those who in the past have been kept out of other public accommodations. *See Roberts*, 468 U.S. at 625. BSA's decision deprived Dale of important opportunities to grow, network, and contribute, JA 652-53, and strengthened the "barriers to . . . social integration" that have historically disadvantaged gay people. *See Roberts*, 468 U.S. at 626. New Jersey advances a compelling goal when it acts to eliminate that second-class status based on sexual orientation.[32]

[32] While it is true that 20-year-olds like Dale do not "have to" remain active in Scouting, many of them, like Dale, want to because they believe in the program. Likewise, although boys do not "have to" join

Because of BSA's size, prominence, and public orientation—indeed, government's own involvement in the organization—New Jersey has an especially powerful interest in not having those who participate in Scouting exposed to discriminatory practices. *See supra* Point I. The entities BSA invokes to urge hands off by the government—Jewish dating services, Asian-American theater companies, Promise Keepers prayer groups, and Women Anglers clubs, Pet.'s Br. at 45, or for that matter, Croatian Cultural Societies, *id.* at 37—do not seek or involve the joint participation of, or multiple benefits from, the government. They do not recruit in the public schools, make annual reports to Congress, or hold themselves out as open to all. They lack BSA's massive size, and are far more truly private; it is unlikely they would even fit within the LAD's definition of covered "public accommodations." These differences highlight why New Jersey has a greater interest in applying its civil rights law to BSA. This Court should reject BSA's overheated claims that barring its identity-based exclusion of Dale will "crush social pluralism" and compel homogeneity, Pet.'s Br. at 46, much as the Court has rejected similar unfounded prophecies (some made by BSA's own amicus briefs) in the *Roberts* trilogy.

Scouting, being a Cub or Boy Scout looms large in the life of many kids; in some schools or communities it may be the most enriching, "coolest," or even only program offered. *See* JA 66. Being—or not being—a Boy Scout can matter a great deal, and the pressures on young people and the harm of exclusion are serious and real. *See Lee v. Weisman*, 505 U.S. 577, 593 (1992) ("Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and the influence is strongest in matters of social convention."). BSA's discriminatory practice denies gay youth the important socialization skills, chance to connect with peers and society through community service, and basic outlets for fun and support that Scouting's programs offer.

III. THIS CASE INVOLVES IDENTITY-BASED EXCLUSION, NOT COMPELLED SPEECH

In addition to its expressive association argument, BSA attempts to repackage its defense of its discriminatory practice as a speech argument, asserting that enforcement of the LAD would "violate the organization's right to control its own message." Pet.'s Br. at 19. But when the content- and viewpoint-neutral LAD, *see Hurley*, 515 U.S. at 572; *Roberts*, 468 U.S. at 623-24, mandates non-discrimination in BSA's membership decisions, it neither targets nor requires speech. Rather, the law requires that non-gay and gay members be treated alike, participating side by side as Scouts or Scoutmasters under the same organizational rules. This case is about discrimination against Dale because of his identity and the viewpoint-neutral enforcement of a public accommodations statute and should not be twisted into a speech case. A human being such as Dale is not speech, much less a particular viewpoint.

In its effort to transform expressive association issues into a speech defense, BSA merges the concepts of compelled speech and symbolic speech in an unprecedented way, arguing in essence that a gay youth or adult member's continued participation within Scouting is inferred symbolic speech that the law compels BSA to make or respond to. But that conception is far too elastic. It would allow any discriminator faced with liability under a civil rights statute prohibiting identity-based discrimination to raise a First Amendment defense merely by stating that the inclusion of a person in the entity's activities is a government-mandated "message" of equality or support (*e.g.*, "women's lib," "black pride," or "gay pride") that the entity does not wish to make.

A. The Facts Of This Case Are Many Steps Removed From The Forced Speech-Within-Speech Of *Hurley*

As this Court emphasized, *Hurley* arose in a factual context that made the First Amendment interest in speaker autonomy virtually insurmountable. The state was forcing the inclusion of quintessential speech ("the marching GLIB contingent" carrying its own banner) within a parade (the "sponsors' speech itself"). *Hurley*, 515 U.S. at 572-73.[33] Massachusetts was putting words in the parade organizers' mouths. By contrast, New Jersey is putting a person (not speech) back into a membership organization (an entity that engages in activities that include expression but that is not "speech itself," as a parade is). Those two distinctions doubly remove this case from the speech-within-speech context of *Hurley*. BSA ignores this Court's care in *Hurley* not to equate inclusion of a person with inclusion of a compelled message, *id.* at 572, and not to equate parades with more traditional public accommodations. *Id.* at 571-73.

In addition, because Dale seeks continued inclusion as a person and does not seek to express any views within Scouting other than the Scouts' own message, BSA must hypothesize the asserted interference with its speaker autonomy from a (1) *implicit* message (2) allegedly conveyed by gay members' mere *presence* and (3) *attributed* to the BSA. Pet.'s Br. at 24 ("the very service of an openly gay person"). Yet a membership organization like BSA is understood

[33] Massachusetts' apparent "object [was] simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But . . . this object is merely to allow exactly what the general rule of speaker's autonomy forbids." *Hurley*, 515 U.S. at 578. Here New Jersey attempts no such modification of expression. Moreover, as opposed to a longtime member contesting his expulsion, the excluded contingent in *Hurley* formed for the very purpose of entering the organizers' parade, and sought "admission. . . as its own parade unit carrying its own banner," *id.* at 572, in order to communicate its ideas within someone else's parade. *Id.* at 570, 574.

through its own speech and activities, which are left undisturbed here, not through the personal characteristics, inferred beliefs, or inferred political positions of its individual members; indeed, BSA policy acknowledges as much. *See, e.g.*, JA 407-08 (BSA rules stating that the organization's limits on its involvement in political questions shall "not limit the freedom of thought or action of any official or member as an individual"). By contrast, the Court found it "clear that *in the context of an expressive parade*, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole." *Hurley*, 515 U.S. at 577 (emphasis added).

Moreover, the alleged inherent message that Dale's presence is asserted to convey is much more "difficult to identify" than GLIB's articulated message in *Hurley*, 515 U.S. at 570, 574-75. In fact, unlike GLIB, Dale has no desire to include a new message in Scouting's teachings, carry his own expressive sign or banner along with him as he performs his Scouting duties, or use Scouting as a "bully pulpit" for some other cause than the Scouting activities in which he excelled all along. For these reasons as well, BSA's analogy to *Hurley* is attenuated, and must fail.

Hurley "[did] not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade." *Id.* at 572. In fact, openly gay marchers who conveyed the organizers' messages were allowed in the parade. *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, No. 94-749, 1995 WL 301703, at **13-14 (U.S. Apr. 25, 1995) (Oral Arg. Tr.) (openly gay city councilor marched in parade as did other gay, lesbian and bisexual people). No one contended that having openly gay people communicating the parade organizers' message would inherently alter that message, nor did the organizers seek to invoke the tautological defense of sexual orientation discrimination that BSA

mounts here. The exclusion upheld in *Hurley* targeted message, not marchers; not in *Hurley* or in any other case has wholesale exclusion based on identity in defiance of a civil rights law ever been approved by this Court.

B. The Inclusion Of Gay Members Does Not Give Rise To A "Forced Speech" Or "Symbolic Speech" Claim

BSA would define known or openly gay members' existence itself as inherent forced speech, but this Court has never before embraced such an equation. As in *Hurley*, this Court's compelled speech cases all involved actual speech—an unwanted message either communicated by, or reasonably attributable to, a private speaker.[34] This Court has never allowed a covered entity to defeat an anti-discrimination law by claiming that the excluded person's identity itself constitutes speech—either compelled, or compelling a response—nor should it. To do so would ignore the Court's careful First Amendment distinctions and open an escape hatch for discriminators in nearly every case.

Non-discrimination is not forced speech, nor is it symbolic speech in the way that concept has been used in the past. This Court's symbolic speech cases involve individuals who prove that their non-speech conduct nonetheless was "intend[ed] to convey" a message and that the "likelihood was great that the message would be understood by those who viewed" their conduct. *Texas v. Johnson*, 491 U.S. 397, 404, 438 (1989) (emphasis added). Here Dale's existence in the Boy Scouts is the only "conduct." Unlike Johnson (who burned a flag) or O'Brien (who burned a draft card), *United*

[34] *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (state may not force person to utter the pledge of allegiance); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state may not force person to bear the state's message on a license plate); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (state may not force newspaper to print item); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (1986) (state may not force utility to insert consumer rights flyer in its envelope).

States v. O'Brien, 391 U.S. 367 (1968), Dale intends to convey no personal message as a member distinct from the Scouting message he conveyed throughout his years in the organization. BSA is asserting that Dale's mere existence in Scouting is a "message" that others would then infer comes from this vast, diverse civic organization as a whole. Neither past cases nor the facts here provide a foundation for such a forced-symbolic-inferred speech defense to civil rights laws.

New Jersey has not decreed that BSA must allow gay members to adorn themselves with gay rights symbols or carry gay rights banners. It has only ordered that gay kids and adults receive the privileges and advantages of Scouting, and be permitted to participate under the same rules as others, without exclusion based on sexual orientation. Even if people within or outside Scouting know that this or that one among the five-million-plus youth and adult members are gay, those members' existence among the many others sends no divergent message, is not understood to convey one, and requires (and precludes) no expression from BSA.

Because a gay person does not inherently convey any viewpoint, BSA repeatedly invokes the uniform and argues that the uniform transforms Dale into a BSA message about the morality of homosexuality. Wearing the uniform may signify a belief in and support for Scouting. But it does not, in reverse, convey Scouting's endorsement of all of the individual's personal characteristics, political positions, or moral beliefs. Thus, Scouting willingly allows heterosexuals who publicly state their position that homosexuality is moral, or that known gay people should not be excluded from the organization, to proudly wear their uniforms. The sight of any individual in the uniform does not readily translate into any discernible statements about morality. Dale in his uniform participates along with heterosexuals, closeted gay people, a racially, religiously and politically diverse membership, and government sponsors—all conveying pride in

Scouting while they differ on much else. The only plausible additional message might be one of inclusion, non-discrimination, or compliance with the law; there is no reasonably attributable endorsement of any particular group, individual behavior, or individual belief. Thus, allowing Dale, like all Scouting's other members, to wear his uniform does not compel any speech from BSA on homosexuality.

In uniform or not, moreover, BSA can hand Dale its chosen script of messages, just as it does for all adult members, and require him faithfully to convey it. BSA is baldly speculating when it worries that Dale will "interject[ ] his own opinion" in troop discussions (or file a "hostile environment" law suit because of BSA's internal, alleged views about homosexuality). Pet.'s Br. at 38. The present case remains about identity-based exclusion, not about any personal views interjected into Scouting or a views-based contortion of the LAD. Dale presents no greater risk of departing from Scouting's message than any other Scoutmaster, including the (non-gay) opponents of the challenged membership policy who remain valued leaders in the organization. As discussed above, Dale can and will teach effectively through role modeling as well as exhortation, because no Scout leader is expected to "role model" adult sexuality or intimate relationships. Scoutmasters serve as role models for the positive character traits and practical skills that can be conveyed through Scouting's outdoor activities, community service, and educational programs. These do not include lessons or activities related to sexual orientation.

The only "genie" that is out of the bottle, *cf.* Pet.'s Br. at 29, is the fact that Dale is gay. Dale's personal pride in his whole self, including his sexual orientation, stated as a matter of individual feeling outside Scouting, is not attributable to the organization. Nor is Dale seeking to trumpet that feeling or inject a "gay pride message" within his Scoutmaster responsibilities; he asks for reinstatement of his member-

ship, not to add any extraneous opinions to the Scouting approach. Likewise, much as BSA tries to distort Dale's statement about his own search for gay role models at Rutgers into some personal speech or lesson he may try to bring into his Scouting activities, there is absolutely no record evidence to support that notion. As Dale has made clear, he wants to continue to serve in the BSA to provide young people with a *Scouting* role model, which is "not about sexuality." JA 549.

C. Even Were There Some Cognizable Infringement On Speech, Application Of The LAD Easily Satisfies The *O'Brien* Standard

For state regulations that are not directed at speech, but that nonetheless place a limit on constitutionally protected expressive conduct, *O'Brien, supra*, sets the governing First Amendment standard. Of course, before *O'Brien* can be invoked, sufficient speech interests must be at stake in the case, *see Texas v. Johnson*, 491 U.S. at 403, a threshold not met here. *See supra* note 16. If the LAD were to be tested against the standard for incidental infringements on expression, however, it would easily pass *O'Brien's* four-part test:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

Public accommodations statutes "are well within the State's usual power to enact[.]" *Hurley*, 515 U.S. at 572. As shown above, the LAD serves compelling, not merely important, state interests. *See supra* at 34-38. This govern-

ment effort to end discrimination in the goods, privileges and advantages of public accommodations "does not aim at the suppression of speech." *Roberts*, 468 U.S. at 623; *see also supra* at 34-35. Moreover, its provisions sweep no greater than necessary to further the goal of ending discriminatory conduct by entities that open their doors to the public. *See supra* at 36-38 (discussing the vital government interests in including groups like BSA within the law and in covering leadership as well as lesser opportunities); *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (*O'Brien* standard largely defers to government judgments about "how much protection" of its interests is necessary and "how an acceptable level" of its goal is to be attained).

IV. THE FREEDOM OF INTIMATE ASSOCIATION DOES NOT SHIELD AN ORGANIZATION LIKE BSA

The freedom of intimate association shelters highly personal relationships of mutual self-definition, exemplified by those "that attend the creation and sustenance of a family.[35] *Roberts*, 468 U.S. at 619. Unlike most relationships, intimate associations "involve the deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id.* at 619-20. They exhibit "such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from

[35] Although intimate associational rights are not limited to family relationships, courts have refused to find the right to intimate association implicated in many contexts. *See, e.g., Wallace v. Texas Technical Univ.*, 80 F.3d 1042, 1051 (5th Cir. 1996) (coach-student relationship); *Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 197 (3d Cir. 1990) (religious adult home); *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 243 (6th. Cir. 1990) (fraternal lodge); *Rode v. Dellaciprate*, 845 F.2d 1195, 1204 (3d Cir. 1988) ("good friends").

others in critical aspects of the relationship." *Id.; see also Rotary*, 481 U.S. at 545-46. Like Rotary Clubs, whose entitlement to constitutional protection BSA told this Court in 1986 was "similar[ ]" to its own, BSA lacks the characteristics of a protected intimate association. *See* Brief *Amicus Curiae* of the Boy Scouts of America in Support of Appellants Rotary International, *et al.* (Dec. 18, 1986), at 9.

BSA is vast and exceptionally unselective. Its "national objective, as well as for regions, areas, councils, and districts, is to see that *all eligible youth* have the opportunity to affiliate with the BSA." JA 64 (emphasis added).[36] BSA's goal of an all-inclusive "representative membership" applies from top to bottom. *See* JA 67 ("[W]e have made a commitment that our membership shall be representative of all the population in every community, district and council.") (emphasis added); *see also* R.1033.

Despite this consistent theme, BSA now attempts an intimate association argument on behalf of its local troops. But even the smallest BSA group is tellingly nonselective in accepting both youth and adult applications. *See, e.g.*, JA 751 (testimony of James Kay that he recalled no rejection of any application). Except for the minimal membership criteria, which are decided at the national level, JA 457-56, troops open their doors to all. The Scoutmasters and Scouts exercise no personal selectivity in choosing their associates,

[36] BSA troops are indeed far less selective than Rotary Clubs. Local Rotary Clubs are "not open to the general public," *Rotary*, 481 U.S. at 547, and membership is limited, under the Rotary "classification system," to persons in a "leadership capacity in his business or profession." *Id.* at 540. Despite such restrictions the Court found Rotary Clubs to be too unselective and inclusive to qualify as intimate associations. *See id.* at 546-47. Furthermore, Rotary Clubs, like BSA troops, carry on many of their activities "in the presence of strangers," *id.* at 547, are approximately the same size as many BSA troops, *see id.* at 546 (noting that the range of sizes of local Rotary Clubs begins at "fewer than 20"), and have similar goals—"humanitarian service, high ethical standards, good will, and peace"—to those of the BSA. *Id.* at 548.

the kind of selectivity that is necessary for a protected intimate association. Their selection preferences and the individual attachments of any troop are irrelevant to BSA's structure. JA 32; JA 701. Indeed, there is absolutely no evidence that any of Dale's fellow troop members (or their parents) wished his expulsion.

In any case, BSA activities and association cannot be confined to the individual troop. Dale took part in leadership programs, JA 117, jamborees and scout camp, JA 120, a national jamboree, JA 125, scout shows, a Klondike Derby, newspaper drives, and council-wide fundraisers, JA 480, all outside the confines of his troop. *See* JA 109; JA 126; R.693; R.880. Many of these events are also open to the public and are promoted by BSA allowing "community residents [to] see Scouting in action." R.838. That certain BSA activities take place in smaller groupings does not erase the generally broader nature of the organization's activities and offerings, any more than members dining at "tables for two" would have exempted the clubs in *New York State Club Ass'n*.

Beyond these characteristics, BSA troops are also not the type of intimate associations that needs protection from "unjustified interference by the State," *Roberts*, 468 U.S. at 610, as many troops are indeed sponsored by and owned by the State and other public entities with whom BSA has associated itself. *See supra* at 1-2, 13-15. This chosen entwinement, along with BSA's vigorous self-promotion in the public realm, further dispels a need for a shield against the law based on a desire for intimacy, personal choice, and seclusion.

Nor is BSA's argument advanced by its attempt to squeeze into its purported First Amendment right of intimate association a defense based on "protection of the rights of parents to control the education and upbringing of their children." Pet's Br. at 42. As a factual matter, parents have

no more control over BSA policies than do their children. BSA has not shown that parents in general are ever consulted for their views, much less that those views affect BSA policy. *See* JA 693 (deposition of BSA officer Charles Ball, stating that neither he nor anyone in BSA overall has taken any steps to determine parents' views on the group-based exclusion). In fact, given BSA's silence on sexual orientation everywhere but in court, and its claimed indifference to closeted gay members and leaders, Pet.'s Br. at 6, parents cannot be presumed to be "select[ing a] 'wise friend"' on that basis. Pet.'s Br. at 43; *see* R.1962-73; R.1974-80 (affidavits of Scouting parents who were unaware of the anti-gay policy, and who do not support it).

As in *Runyon v. McCrary*, 427 U.S. 160, 177 (1976), this case does not involve parents' right to choose what institutions they entrust with their children. Parents can enroll their kids in any given troop, or not, as they please, but have no right to dictate the other members, leaders, or organizational policies. This Court should not accept BSA's sweeping and open-ended argument, which would turn any parent's "different ideas" into a weapon for discriminating third-parties such as day-care centers, schools, and the like.[37] Pet.'s Br. at 42.

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[37] This Court's precedents do not support BSA's novel claim. The LAD does not rob parents of any autonomy; it does not force a parent to subject their children to a certain curriculum, *Meyer v. Nebraska*, 262 U.S. 390 (1923), or to send their children anywhere they do not wish. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925). Application of the LAD does not "affirmatively compel [parents], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. at 218. BSA's attempt to use the First Amendment as a sword to exclude boys and adults from its ranks (in the name of parents never consulted) is not akin to the Amish community's invocation of the First Amendment as a necessary shield to prevent the State from "gravely endanger[ing] if not destroy[ing] the free exercise of [their] religious beliefs" and their "way of life." *Id.* at 218-19.

Finally, this case does not involve "the subject matter which is taught" in such organizations. *See Runyon*, 427 U.S. at 177. It solely involves "the practice of excluding [certain groups] from such institutions," the very type of "[i]nvidious discrimination [that] has never been accorded affirmative constitutional protections." *Id.* at 176 (citation omitted). Neither intimate association nor BSA's proposed new right of "parental direction," Pet.'s Br. at 42, should be permitted to thwart the LAD here.

CONCLUSION

For the foregoing reasons, this Court should affirm the unanimous decision below, upholding application of New Jersey's LAD to BSA's anti-gay membership policy and directing James Dale's reinstatement.

Dated: March 29, 2000

Respectfully submitted,

Thomas J. Moloney
Allyson W. Haynes
Seth A. Stuhl
Kierith A. Jones
CLEARY, GOTTLIEB, STEEN & HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Lewis H. Robertson
231 Maple Avenue
P.O. Box Y
Red Bank, New Jersey 17701
(732) 842-6660

Evan Wolfson
(Counsel of Record)
Ruth E. Harlow
David Buckel
Jon W. Davidson
Beatrice Dohrn
Patricia M. Logue
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585

Attorneys for Respondent

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IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

REPLY BRIEF FOR PETITIONERS

MICHAEL W. McCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

SANFORD D. BROWN
CERRATO, DAWES, COLLINS, SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75015

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. BOY SCOUTING'S MESSAGE AND DALE'S MESSAGE ARE IN CONFLICT	4
A. Boy Scouting's Expressive Purpose	4
B. The Expressiveness of Dale's Proposed Participation	9
II. BOY SCOUTING'S INTERACTIONS WITH GOVERNMENT DO NOT DEPRIVE IT OF ITS CONSTITUTIONAL RIGHTS	12
A. Federal Government Contacts	13
B. New Jersey Contacts	14
C. Local Contacts	15
III. NO COMPELLING GOVERNMENTAL INTEREST JUSTIFIES INFRINGEMENT OF BOY SCOUTING'S FIRST AMENDMENT RIGHTS	18
CONCLUSION	20

TABLE OF AUTHORITIES

Page

Bob Jones University v. United States, 461 U.S. 574 (1983) 18

Cuevas-Macias v. Girl Scouts of the United States, No. 658630 (Cal. Ct. App. Jan. 11, 1994) 2

Cuffley v. Mickes, Nos. 99-2334, 99-2501, 2000 WL 336668 (CA8 Mar. 31, 2000) 19

Curran v. Mount Diablo Council of Boy Scouts of America, No. C 365529 (Cal. Super. Ct. July 25, 1991), *aff'd in rel. part*, 48 Cal. App. 4th 670, 29 Cal. Rptr. 2d 580 (1994), *review granted and opinion superseded by* 17 Cal. 4th 670, 952 P.2d 218 (1998) 6

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 952 P.2d 218 (1998) 20

Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980) 11

Gay Law Students Association v. Pacific Telegraph & Telegraph Co., 24 Cal. 3d 458, 595 P.2d 592 (1979) 12

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) 4, 18

Katcoff v. Marsh, 755 F.2d 223 (CA2 1985) 14

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 385 (1993) 16

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) 17

TABLE OF AUTHORITIES–Continued

Pool & Geller v. Boy Scouts of America, Nos. 93-030-PA, 93-031-PA (D.C. Dep't of Human Rights & Minority Bus. Dev.) (post-hearing briefing concluded May 18, 1998), *sub judice* 8

Quinnipiac Council, Boy Scouts of America, Inc. v. Commission on Human Rights & Opportunities, 204 Conn. 287, 528 A.2d 352 (1987) 20

Randall v. Orange County Council, Boy Scouts of America, 17 Cal. 4th 736, 952 P.2d 261 (1998) 2,20

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 13

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 4,19

Romer v. Evans, 517 U.S. 620 (1996) 19

Runyon v. McCrary, 427 U.S. 160 (1976) 19

San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987) 13,14

Schwenk v. Boy Scouts of America, 275 Or. 327, 551 P.2d 465 (1976) 20

Seabourn v. Coronado Area Council, Boy Scouts of America, 257 Kan. 178, 891 P.2d 385 (1995) 20

Sherman v. Community Consolidated School District 21, 8 F.3d 1160 (CA7 1993), *cert. denied*, 511 U.S. 1110 (1994) 16

Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981) 7

Welsh v. Boy Scouts of America, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993) 20

TABLE OF AUTHORITIES–Continued

Widmar v. Vincent, 454 U.S. 263 (1981) 13

Winkler v. Chicago Public Schools, No. 99-2424 (N.D. Ill. filed Apr. 14, 1999) 15

STATUTES

36 U.S.C.A. §§ 110101-110112 (West Supp. 1999) 14

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36 U.S.C.A. §§ 152901-152913 (West Supp. 1999) 14

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36 U.S.C.A. § 220511 (West Supp. 1999) 14

Boston, Mass. Ord. § 12-9(7) (1999) 1

D.C. Code § 1-2519 (1992) 1

Seattle, Wash. Mun. Code § 14.08.090 (1999) 1

I.R.C. § 170(c) (1999) 15

N.J. Stat. Ann. § 14A:4-5 (West Supp. 1999) 14

N.J. Stat. Ann. § 15A:4-5 (West Supp. 1999) 14

N.J. Stat. Ann. § 23:2-3 (West 1997) 15

N.J. Stat. Ann. § 39:3-27 (West Supp. 1999) 15

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TABLE OF AUTHORITIES–Continued

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Andrew Sullivan, Virtually Normal: An Argument About Homosexuality (1995) 5

Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update On the Fight Against "Sodomy" Laws*, 21 Fordham Urb. L.J. 997 (1994) 10

TABLE OF AUTHORITIES–Continued

MISCELLANEOUS

Brief of *Amici Curiae* Lambda Legal Defense Fund and ACLU in Support of Appellant, *Thomasson v. Perry*, 80 F.3d 915 (CA4 1995) (No. 95-2185)..... 10

Letter from Chief Scout Executive Jere B. Ratcliffe to David A. Rice <http://boyscout.home.texas.net /RICE007.htm> (visited Apr. 14, 2000) 8

REPLY BRIEF FOR PETITIONERS

If unchecked by the strictures of the First Amendment, public accommodations law – newly untethered from its traditional application to businesses serving the general public[1] – would be the death knell of pluralism and diversity in this nation's voluntary private sector.

In their more sweeping arguments, respondent and his *amici* contend that state and local governments have a compelling interest in enforcing all nondiscrimination laws against any organization defined to be a public accommodation. *See* Brief for Respondent ("Resp. Br.") at 34-37; Brief of the Cities of Atlanta, *et al.* as *Amici Curiae* in Support of Respondent ("Cities Brief") at 10-12. That means, for example, that girls may join Boy Scout Troops,[2] that boys may become Girl Scouts, that atheists may join both, and that heterosexuals may demand to lead gay and lesbian organizations. Indeed, this theory would prevent organizations from "discriminating" on the basis of an extraordinary array of criteria, such as prior criminal record, personal appearance, or political affiliation, all of which are covered by some public accommodations laws.[3] This would literally destroy the missions of a host of social, cultural, religious, and charitable organizations – ironically including many of respondent's *amici* – which serve or represent a particular segment of the population. *See generally* Encyclopedia of Associations (Christie Maurer &

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1. *See* Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 218 (1978).

2. Attempting to avoid this conclusion, *amicus* New Jersey (Br. at 12-13 n.2) points to a statutory exemption that allows entities falling within certain categories to discriminate on the basis of sex, but the only such category within which Boy Scouting might seem to fit – educational institutions – has already been held inapplicable to the organization. 39a-40a. In any event, other states may not have any such exemption.

3. *See, e.g.*, Boston, Mass. Ord. § 12-9(7) (1999) (ex-offender); D.C. Code § 1-2519 (1992) (personal appearance); Seattle, Wash. Mun. Code § 14.08.090 (1999) (political ideology); *see also* Cities Brief at 1-3.

Tara E. Sheets eds., 33d ed. 1998). Indeed, without unequivocal First Amendment protection, the rigor of litigation alone may be enough to bring many private associations to their knees.[4]

As respondent's *amicus* American Jewish Congress comments (Br. at 4-5):

> To allow government to insist on its own, monochromatic, non-exclusionary vision is to allow government to control, dictate, and limit the terms of all private association, and to end all discussion about any groups defined by the "status" of its members. *Hurley v. Irish-American Gay Group*, 515 U.S. 557, 579 (1995). That is an Orwellian vision, incompatible with freedom and the existence of real ideological competition with official (and unofficial) orthodoxies.

As petitioners' *amici* Christian Legal Society *et al.*, representing the experience of often-unpopular campus organizations, observe, when groups are unable to enforce membership and leadership criteria, "small, unpopular groups" can "be easily hijacked by persons who oppose their message." (Br. at

4. The Girl Scouts of the U.S.A. ("Girl Scouts") was sued in California in 1992 for "duty to God" discrimination by the same lawyer who had sued Boy Scouting on behalf of his sons in *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998). He sought $250,000 in punitive damages. *See* L.A. Times, Nov. 25, 1992, at B1 ("'I'm after their pocketbooks right now, I'm after everything I can possibly get,' attorney James G. Randall of Orange County said."). While Boy Scouting withstood the eight years of litigation required to win its case, Girl Scouts agreed to change its policy soon after losing a preliminary injunction motion (and the *pro hac vice* motion which would have allowed its chief counsel to argue the matter). It settled by agreeing to allow a girl to substitute any term she chooses in place of God, or no term at all. Joyce Price, *'God' Now Optional in Girl Scout Oath*, Wash. Times, Oct. 24, 1993, at A1; Matt Lait, *Girl Scouts Settle in Pledge Dispute*, L.A. Times, Dec. 7, 1993, at A26. The court of appeal then assessed costs against Girl Scouts. *Cuevas-Macias v. Girl Scouts of the United States*, No. 658630 (Cal. Ct. App. Jan. 11, 1994).

10-11). Indeed, *amicus* Gays and Lesbians for Individual Liberty (Br. at 25-26) points out that affirmance of the decision below would have especially devastating consequences for gay and lesbian organizations, which frequently "seek exclusively gay environments" and would "resist[] . . . leadership by heterosexuals." Its words bear attention:

> Respondent Dale and a number of *amici* gay advocacy groups argue that a loss for the Boy Scouts here would be a victory for gay Americans. But diminution in the scope of freedom of association is not something that gay people should hail. If the BSA loses, private organizations and institutions will have substantially diminished control over the composition of their membership and leadership. For the large number of gay organizations that seek to remain exclusively gay or gay-controlled, this decision could sound a death knell.

Id. at 24.

Perhaps aware that so sweeping a legal regime would plainly violate the First Amendment, respondent and some of his *amici* retreat to a more modest position. Under this view, a private group has a constitutional right to exclude leaders only if it can demonstrate that those leaders would communicate a message inconsistent with the organization's beliefs. But respondent provides no good reason why he should prevail under that standard. No one disputes that Boy Scouting has a moral code, called the Scout Oath and Law, JA 184; no one disputes that authority to interpret it is vested in the National Executive Board, JA 308, JA 329; no one disputes that the National Executive Board takes the view that homosexual conduct is inconsistent with the obligations of the Scout Oath and Law and that open homosexuals are not appropriate role models for youth in the organization, JA 457-461; and no one disputes that James Dale is a self-identified

homosexual who disagrees with those views and asserts the right to be "open" about his sexuality. JA 11. That should be the end of the matter.

I. BOY SCOUTING'S MESSAGE AND DALE'S MESSAGE ARE IN CONFLICT

The crux of respondent's argument is that Boy Scouts of America does not have an expressive purpose related to homosexual conduct, and that even if it did, appointment of an openly gay Scoutmaster would not interfere with it. Neither half of this argument can be sustained.

A. Boy Scouting's Expressive Purpose

This Court has declared it a "fundamental rule" that "a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995). This includes not only the right to speak loudly, but the right to speak through "quiet persuasion" or not at all.[5] *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring). Boy Scouting teaches that:

> A Scout is concerned about other people.
>
> A Scout is a friend to all.
>
> He respects those with ideas and customs that are different from his own.
>
> He treats others as he wants to be treated.
>
> A Scout is polite to everyone.
>
> A Scout is kind.

5. Contrary to the argument of the paradoxically–named *amicus* American Civil Liberties Union there is no reason for the Court to be "wary" of an organization's claim that it "purports to represent a set of values that conflicts with the state's antidiscrimination goals." (BR. at 11). The right to represent values conflicting with those of the state was, at one time, the most cherished of civil liberties.

JA 188. Boy Scouting wants boys to be tolerant. But Boy Scouting also wants boys to be morally straight, to live their lives with purity. JA 218. Believing that homosexual conduct, along with other sex outside of marriage, is immoral, Boy Scouting does not want to promote homosexual conduct as a legitimate form of behavior.

Boy Scouting attempts to walk the line between tolerance toward all people and disapproval of some types of conduct. That may be unusual in this age of acrimonious conflict between gay rights advocates and their opponents (though we think it has considerable support among ordinary Americans).[6] It would be a sad day if First Amendment protection were limited to either strident "anti-gay" messages (Resp. Br. at 18) or their opposites. The claim that Boy Scouting can have no protected position other than one of explicit hostility is an effort to disqualify the middle of the political spectrum so that all remaining opponents can be dismissed as extremists.

Boy Scouts of America finds itself in the bizarre position of litigating the question whether it actually has the views it says it has. *Id.* at 34. The record in this case contains five official policy statements of the National Executive Board and testimony by nine present and former Scout leaders to the existence of the policy. JA 457-461, JA 160-161, JA 183, JA 312, JA 444, JA 451, JA 465, JA 692-693, JA 746, R 3254. The Chancery Court found that "[s]ince its inception, Scouting has sincerely

6. *See* Andrew Sullivan, Virtually Normal: An Argument About Homosexuality 98 (1995) (describing this general position as "one of the most civilized responses to the homosexual question"). *See also* Michael W. McConnell, *What Would It Mean to Have a "First Amendment" for Sexual Orientation?*, *in* Sexual Orientation & Human Rights in American Religious Discourse 235-36 (Saul M. Olyan & Martha C. Nussbaum eds., 1998) (suggesting that government should protect both the right of homosexuals to act in accordance with their orientation and the right of other private persons to act in accordance with their moral convictions on the matter).

and unswervingly held to the view that an 'avowed,' sexually active homosexual is engaging in immoral behavior which violates the Scout Oath and the Scout Law. . . ." 223a. The California courts reached the same conclusion after full trial. *Curran v. Mount Diablo Council of Boy Scouts of America*, No. C 365529, slip op. at 12 (Cal. Super. Ct. July 25, 1991), *aff'd in rel. part*, 48 Cal. App. 4th 670, 29 Cal. Rptr. 2d 580 (1994) (rev'g application of state law), *review granted and opinion superseded by* 17 Cal. 4th 670, 952 P.2d 218 (1998). The primary sponsoring institutions of Scouting corroborate Scouting's position. Brief of National Catholic Committee on Scouting, *et al.* as *Amici Curiae* in Support of Petitioners at 15-16.[7]

The authenticity of this policy, therefore, cannot credibly be doubted. But even if there were no historical consistency in Boy Scouting's position, the First Amendment permits groups to

7. Respondent's notion that Boy Scouting's policy has been "stealthily implemented" without the knowledge of the members is belied by the evidence of his own witnesses: (1) one learned about the policy in October 1991 at "a general meeting open to the committee members of the Watchung Area Council" in New Jersey, JA 152; (2) another read about the policy in December 1992 when *Scouting Magazine* (a magazine sent to all adult leaders, JA 123, R 1583), and his "local Council newspaper" ran articles on the subject, JA 654; (3) another learned about it in 1980 through "media reports" of the *Curran* case, JA 662; (4) another learned about it in September 1991 when he received "the *Scouter's Log* from the Stanford Area Council stating that homosexuals were not eligible to be members or leaders of Scouting because they were not 'morally straight' and were not good role models," JA 668-669; (5) another learned about it in approximately 1985 when he "read about it in a newspaper article about a lawsuit involving BSA," JA 688; (6) another learned about it from his son, a high school teacher, in 1990, JA 625. The Scoutmaster of Dale's former Troop testified: "As an adult leader, I have always understood homosexual conduct to be incompatible with Scouting principles as reflected in the Scout Oath and Scout Law. I believe the other adult volunteer members of Troop 73 also understood that homosexual conduct was inconsistent with Scouting values." JA 465. The Chairman of Dale's Troop Committee from 1987 to 1991 also testified: "As Troop Committee Chairman, I understood homosexual conduct to be incompatible with Scouting principles." R 3254.

change their opinions and adopt new views. Even if Boy Scouting had reached its conclusion for the first time in this particular case, the First Amendment would still provide protection.

Respondent concedes that in determining the nature of an association's beliefs, the reviewing court may conduct only a "limited inquiry" (Resp. Br. at 18) and must be "deferential" (*id.* at 25) to the association's statements. "A reviewing court appropriately examines what message the members of an association collectively seek to express, much as courts examine the existence of religious beliefs and whether they are sincerely held. . . ." *Id.* at 17. Under this exacting standard, there is no conceivable basis for doubt. *Cf. Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"). Respondent presented not a scrap of evidence that Boy Scouting's beliefs about homosexuality are insincere, and the suggestion cannot be taken seriously. If undergoing nearly 20 years of unremitting litigation, unfair and unfavorable publicity, and attacks on funding sources is not evidence of Boy Scouting's sincerity, what could be? If respondent means to suggest that the Court should undertake its own examination of whether the organization's leadership faithfully reflects the views of the members, that suggestion should be rejected. Organizations have the right to determine their own beliefs through their own internal procedures.[8]

8. Respondent claims that "[m]any within Scouting at every level have loudly voiced their condemnation of the exclusionary practice," contrasting it with "the *true* tenets of Scouting." Resp. Br. at 28-29 (emphasis in original) (footnote omitted). However, every organization which sponsors a Scouting unit has a delegate to its local council and every local council has three or more delegates to the National Council, which elects the National Executive Board. JA 308. If any policy did not command the support of the Scouting movement, it would be changed.

The *amici* religious groups supporting Boy Scouting (Roman Catholic, Southern Baptist, Latter-day Saints, Missouri Synod Lutheran, United

Respondent makes much of the claim that Boy Scouting does not exclude *heterosexuals* who espouse the view that homosexuality is "morally straight." No such finding was made below, and it is contradicted by the record. The National Director of Boy Scouting certified that heterosexual Scout leaders who taught Troop members that homosexual conduct is consistent with being "morally straight" and "clean" would be subject to revocation of their registration, JA 746, and the Monmouth Council Scout Executive testified that advocacy of the morality of homosexual conduct by any adult leader would lead to revocation of membership. JA 761. Indeed, as respondent is well aware, the registration of one of his witnesses, David Rice, was revoked for promoting the morality of homosexual conduct with boys in his Troop. *See* Letter from Chief Scout Executive Jere B. Ratcliffe to David A. Rice <http://boyscout.home.texas.net/RICE007.htm> (visited Apr. 14, 2000).[9] But even if this

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Methodist Men, National Council of Young Israel) represent over two thirds of the Scouting units sponsored by churches and synagogues, while the religious *amici* supporting respondent represent sponsors of many fewer units. The Methodist social action group supporting respondent seeks government compulsion to force Boy Scouting to do what it has been unable to persuade the Methodist Church to do. The *Book of Discipline* of the United Methodist Church bars appointment of sexually active homosexual clergy. JA 709, R 4800. In any event, *amicus* United Methodist Men has been vested with authority to control the Methodist Church's relations with Scouting, and it does not accept the social action group's views.

9. Evidence of the revocation of David Rice's membership (Tr. 2470) was conspicuously omitted from the substantial sections of the record in *Pool & Geller v. Boy Scouts of America*, Nos. 93-030-PA, 93-031-PA (D.C. Dep't of Human Rights & Minority Bus. Dev.) (post-hearing briefing concluded May 18, 1998), *sub judice*, which counsel for Pool and Geller chose to lodge in this Court. *Amici's* carefully excerpted selection of their clients' case is an attempt to re-litigate a matter heard, but undecided, by the District of Columbia Department of Human Rights and Minority Business Development. We respectfully request that the Court either ignore this attempt, since the

were true, Boy Scouting would be entitled to judge that a person who avowedly *acts* contrary to the Scout Oath and Law is a more objectionable role model than a person who disagrees with it in the abstract.

B. The Expressiveness of Dale's Proposed Participation

Respondent Dale claims that, if allowed to be a Scoutmaster, he would communicate Boy Scouting's message and would not communicate an unwelcome message of his own. Resp. Br. at 31, 43. For the most part, this is predicated on his opinion that Boy Scouting's moral message is consistent with homosexual conduct. Thus, when Dale says he is willing "to continue expressing 'the Oath and Law['s] positive moral code for living'" (*id.* at 33) (citation omitted), he means that he will impart *his interpretation*. He has never promised that he would impart *Boy Scouting's interpretation*, which he has described as "bad" and "wrong." JA 513.

In his brief, respondent attempts to hide his expressive intentions. He asks the Court to ignore the fact that he is a gay activist (Resp. Br. at 33-34 n.29), and that he has made numerous statements about his pride in being gay and about the importance of gay role models. JA 470, JA 497-498, JA 513, JA 549, JA 126, L 10. He portrays this case as one about "identity-based discrimination" and not speech. Resp. Br. at 17, 39. He claims that his openness regarding his homosexual orientation carries no message beyond a simple identification of his status. *Id.* at 32.

This represents a shift in litigation tactics. In his Complaint, respondent asserted the legal right to be "open" and "honest" about his sexual orientation, and alleged that "the only gay Scouts singled out for exclusion" are those who "become leaders in their community and are open and honest about their sexual orientation." JA 11. Then, he wanted to be expressive – "open."

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evidentiary gaps are apparent from the above omission alone, or take judicial notice of the entire record and post–hearing briefs in that matter.

Indeed, he came to the attention of Monmouth Council because of newspaper reports of a speech he made in his capacity as Co-President of the Rutgers University Gay/Lesbian Alliance, urging the need for gay role models for teens. JA 126, L 10. He gave interviews to the national media to express his pride in being gay, and to associate that pride with his training as a Boy Scout. JA 470, JA 513. Now, by contrast, he says that he has no desire to communicate "anything other than Scouting's own organizational message," and complains that Boy Scouting is "insinuating" that he has a certain view on the morality of homosexuality. Resp. Br. at 32, 33, 43.

In other contexts, gay rights advocates (including respondent's counsel of record and many of the *amici* and their counsel) have consistently argued that "coming out" is an expressive and political act. *See Amici Curiae* Brief of the ACLU and Lambda Legal Defense and Education Fund in Support of Appellant at 21-23, 27, *Thomasson v. Perry*, 80 F.3d 915 (CA4 1995) (No. 95-2185) (Describing the discrimination imposed by the "don't ask, don't tell" policy as "viewpoint-based," Lambda and the ACLU maintained that "the Navy discharged Thomasson based on the fact that he had *revealed* his gay identity, not based on that identity itself" and that a "verbal or written 'state[ment] that [one] is a homosexual . . .' is obviously constitutionally-protected pure speech.") (emphasis in original); Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update On the Fight Against "Sodomy" Laws*, 21 Fordham Urb. L.J. 997, 1025 n.100 (1994) (there are "inherently political dimensions to being openly gay or lesbian"). In their *amicus* brief for the Society of American Law Teachers (Br. at 7, 9) in this case, Nan D. Hunter and David Cole write:

> Unlike the gay contingent in *Hurley*, Dale was expelled for his identity, not his views. He was expelled based on a newspaper article that reported only that he was gay and involved in a gay student group. . . .
>
> The Boy Scouts seek to collapse the line between status and speech by using the terms "avowed homosexuals" or "openly gay" persons. But that conflation does not transform the Boy Scouts' status-based discrimination into speech-based discrimination.

In her professional writing, however, Hunter has written:

> As it has emerged in lesbian and gay rights case law, "identity" is a multilayered concept. The idea of identity is more complicated and unstable than either simply status or conduct. It encompasses explanation and representation of the self. *Self-representation of one's sexual identity necessarily includes a message that one has not merely come out, but that one intends to be out – to act on and live out that identity.*

Nan D. Hunter, *Identity, Speech and Equality*, 79 Va. L. Rev. 1695, 1696 (1993) (emphasis added). Similarly, Cole has taken the position that self-identification as gay is "pure speech," and that exclusion for self-identification is a speech-based exclusion and not a status-based exclusion. David Cole & William N. Eskridge, Jr., *From Hand-holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L. Rev. 319, 337, 321-322, 325 (1993). *See* William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet 176 (1999) ("An admission of sexual identity is expressive in the strictest sense of the word."); *id.* at 306 ("Coming out of the closet as a gay person is an act of self-identification that is also an explicitly political act.").

Courts have reached the same conclusion. *See Fricke v. Lynch*, 491 F. Supp. 381, 384-85 (D.R.I. 1980) (holding that gay student's seeking to attend high school prom with male escort had "expressive content" and constituted a "political" "mes-

sage"); *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 488, 595 P.2d 592, 610 (1979) ("[T]he struggle of the homosexual community for equal rights . . . must be recognized as a political activity. . . . [O]ne important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet. . . .'"); *Dale v. Boy Scouts of America*, 308 N.J. Super. 516, 560, 706 A.2d 270, 293 (1998), 149a (Appellate Division majority describing Dale's statements as an "exercise of his own First Amendment right").

It is disingenuous to suggest that "coming out" is expressive when the individual seeks First Amendment protection, but is nonexpressive when organizations with contrary views prefer not to be associated with the message.

II. BOY SCOUTING'S INTERACTIONS WITH GOVERNMENT DO NOT DEPRIVE IT OF ITS CONSTITUTIONAL RIGHTS

Apparently recognizing the inadequacies in the First Amendment analysis employed by the New Jersey Supreme Court, respondent reaches to develop a new rationale based on Scouting's supposed "entwinement" with the government. Resp. Br. at 11. The court below did not rely on any such theory: while it treated contacts with the government as relevant to whether Boy Scouting is a public accommodation under state law, the New Jersey Supreme Court did not claim that organizations with governmental connections have reduced First Amendment protection. Nor did respondent make this argument below.

The kinds of interactions identified by respondent and his *amici* are so common (almost unavoidable in this age of pervasive government) that their theory would serve to disqualify virtually every group and many citizens from enjoying First Amendment rights. *See* Brief of *Amici Curiae* Eagle Forum Education & Legal Defense Fund, *et al.* in Support of Petitioners ("Eagle Forum Brief") at 19-21. The assertion in the New Jersey Brief

(at 14) that Boy Scouting enjoys a "uniquely high level of governmental support" is ludicrous. While many private social service agencies and many private individuals receive almost all of their funding from government, petitioners are virtually entirely privately funded. *Cf. Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (private school more than 90% funded by state not state actor). For the most part, the cited interactions consist of access to public lands or buildings on the same basis as other community groups, non-financial sponsorship by public entities, and authorizations to various government agencies to provide relatively trivial in-kind benefits that are available to other not-for-profit youth groups as well.

Boy Scouting asserts no right to governmental benefits beyond those that are provided to other private groups, but its enjoyment of equal access to government property and other equally available benefits cannot be the basis for forcing the organization to forfeit its First Amendment rights. *See Widmar v. Vincent*, 454 U.S. 263, 277 (1981). To the extent that New Jersey sponsors Scouting units or provides special benefits, it is entitled to withdraw support if it now disapproves of Scouting.[10] But the state cannot leverage its relatively minor involvement with the organization into control over its constitutionally protected decisions.

A. Federal Government Contacts. It is clear that Boy Scouts of America has not lost its First Amendment rights, or its "essentially private character" because it is incorporated under federal rather than state law. In *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 543-44 (1987), this Court rejected the contention that since the United States

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10. It is absurd to suggest that "allowing BSA to discriminate would, in effect, cause government to sponsor the very activity it seeks to prevent." Resp. Br. at 36. No one is "causing" any government agency to sponsor Scouting. It is the agency's choice.

Olympic Committee was federally chartered, it thereby became a government actor. The Court explained: "All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character."[11] *Id.* Among the dozens of groups that have federal charters are groups based on religion (such as the Jewish War Veterans), 36 U.S.C.A. §§ 110101-110112 (West Supp. 1999), ethnicity (such as the Polish Legion of American Veterans, U.S.A.), 36 U.S.C.A. §§ 170501-170512 (West Supp. 1999), sex (such as the Ladies of the Grand Army of the Republic), 36 U.S.C.A. §§ 130101-130113 (West Supp. 1999), and ancestry (such as the National Society, Daughters of the American Colonists), 36 U.S.C.A. §§ 152901-152913 (West Supp. 1999). Nor do federal tax exemptions (Resp. Br. at 14-15) deprive Boy Scouting of First Amendment rights. Such a notion would eliminate First Amendment freedom for virtually every not-for-profit group in America. That the organization has designated the President of the United States as its honorary president is without legal significance, as is the fact that many members of Congress once were Boy Scouts.

Other federal government contacts discussed by respondent are mostly with the military. In light of the military's unusual posture as providing a mini-civil society for its members, the military supports numerous organizations – including churches – that are outside the usual range of public institutions. *See Katcoff v. Marsh*, 755 F.2d 223, 234-35, 237 (CA2 1985).

B. New Jersey Contacts. The evidence of a "close relationship" with the State of New Jersey is trivial in the extreme. These contacts consist of one statute permitting (but not requiring) the

11. Respondent points to the requirement of filing an annual report with Congress (Resp. Br. at 38), but annual reports are required of other federally chartered corporations, *see, e.g.*, 36 U.S.C.A. § 220511 (West Supp. 1999), as well as by many state corporation laws. *See, e.g.*, N.J. Stat. Ann. §§ 14A:4-5, 15A:4-5 (West Supp. 1999).

Fish and Game Board to stock bodies of water at camps of Boy Scouts and other youth organizations, and another statute exempting vehicles owned by a variety of organizations, including local councils of the Boy Scouts of America, from motor vehicle registration fees. N.J. Stat. Ann. §§ 23:2-3, 39:3-27 (West 1997 & Supp. 1999). There is no evidence in the record that either of the petitioners received any fish, and in any event, both benefits are equally available to other youth organizations.

C. Local Contacts. The principal contact Scouting has with governmental bodies is that a small percentage of Scout Troops – less than 10% – are sponsored by public institutions such as schools or public housing agencies.[12] Sponsorship, however, does not necessarily, or even typically, entail material assistance. Boy Scout Troops do not ordinarily receive any funding at all from their sponsors. R 981. There is no evidence in the record of any Boy Scout Troop receiving public funding in this case.[13]

Whatever legal or political issues sponsorship may raise for the government sponsor,[14] they do not affect Boy Scouting's rights. As the Eagle Forum Brief (at 21) so well observes, the sponsoring entities

12. Respondent exaggerates the number by including Troops that are sponsored by PTAs and "other academic and educational organizations." Resp. Br. at 2. PTAs are voluntary not-for-profit organizations, not government entities. *See* I.R.C. § 170(c) (1999); National PTA Fast Facts 1999-2001 <http://www.pta.org/apta/fastfcts.htm (visited Apr. 14, 2000).

13. While sponsor funding is not usual or expected, there is no prohibition on sponsor funding, and counsel is aware of instances of Troops outside of New Jersey serving impoverished communities which have received financial support from a sponsoring church, housing authority, or school.

14. In *Winkler v. Chicago Public Schools*, No. 99-2424 (N.D. Ill. filed Apr. 14, 1999), plaintiffs have sued the government (but not Boy Scouts of America) to end sponsorship of Troops by the Department of Defense, Department of Housing and Urban Development, and government entities in Illinois. If successful, the result would largely fall on housing projects which now sponsor Scouting for inner-city youth lacking other resources.

> have agreed to be agents for the Boy Scouts, and have agreed to conduct themselves and to instruct their charges according to the rules and values of the Scouts. At no time was the Boy Scouts ever given as a condition of accepting such sponsorship the requirement that it alter its membership practices. Had it been confronted with such a condition it would have been up to the Scouts whether to accept the condition or to reject the erstwhile sponsor. But the Scouts having never accepted such a condition *ex ante*, a court cannot use the current sponsorship to impose the condition *post hoc*.

Whether or not sponsored by public schools, some Boy Scout Troops and Cub Scout Packs, like many other community groups, hold monthly or weekly meetings in school buildings outside of school hours and hold an annual evening recruiting meeting in school buildings. Of course, schools which have elected to make their buildings available for use by community groups outside of instructional time cannot discriminate on the basis of the group's viewpoint, *see, e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 385, 393-95 (1993); *Sherman v. Community Consol. Sch. Dist. 21*, 8 F.3d 1160, 1165 (CA7 1993), *cert. denied*, 511 U.S. 1110 (1994), and Boy Scouting claims no right of access to school buildings greater than that of other community groups.[15]

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15. Confusing a program which terminated many years ago with its substitute, Learning for Life, the New Jersey Supreme Court erroneously implied that Scouting was being conducted in school during the school day. 29a-30a. The Learning for Life program is offered by Learning for Life, a separate 501(c)(3) corporation affiliated with Boy Scouts of America. It is purely a curricular program, and does not involve membership in Boy Scouts of America. JA 307, JA 369. Since Learning for Life was created, there has been no Scouting program offered in school during the school day. R 1363. The *amici* brief of the American Association of School Administrators and various school boards

Other supposed governmental contacts discussed by respondent and his *amici* involve material outside the record. Most of this is trivial, even if true. For example, the State of New Jersey (Br. at 2) cites "free use of public parks." Heretofore, parks have been regarded as venues for the exercise of First Amendment rights, *see, e.g.*, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), and it has never been supposed that by enjoying a public park one forfeits one's First Amendment rights. Another *amici* brief proposes to deprive Boy Scouting of its First Amendment rights because boys *help the government* by picking up trash in the national parks. Brief of *Amici Curiae* American Association of School Administrators, *et al.* in Support of Respondent at 8. In a particularly remarkable passage, the State of New Jersey (Br. at 2) states: "BSA reinforces this close relationship to government among scouts, conferring merit badges for 'citizenship' based on familiarity with the Declaration of Independence, the Constitution and the Bill of Rights. . . ." Apparently, by teaching about First Amendment rights, Boy Scouts of America should be held to have lost them.[16]

(at 13) reaches outside the record to assert that Police Departments sponsor many "Explorer" units. The term "Exploring" was formerly used for Boy Scouting's oath-based membership program for older teenagers. In 1998, that program was restructured. The membership program was renamed Venturing. The term "Exploring" was attached to a new, career-oriented program within Learning for Life. This is the program discussed in the School Administrators' brief. It is not a membership organization, and its participants do not subscribe to the Scout Oath and Law. JA 307.

16. The first example of a constitutional right given in the *Boy Scout Handbook* is that of freedom of association ("*Do you like to get together with your friends*? Do you read all sorts of books and newspapers? Do you live in a home no one can enter unless they are invited? *Those are your rights.*") JA 190 (emphasis added), and the *Handbook* quotes the First Amendment in full. JA 199-200.

If governmental contacts of this sort were sufficient to remove First Amendment protection, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), would have come out the other way. The St. Patrick's Day Parade was founded by the City of Boston, until recently received public funds and used the city's official seal, takes place entirely on government property, receives a special and exclusive permit from the government, involves the participation of city officials, and has all the public visibility and prominence that features so largely in respondent's description of Boy Scouting. *See id.* at 560. Boy Scouting, by contrast, was established through private efforts, rarely receives public funds, conducts most of its activities on private property, and enjoys no special legal status (other than a charter). If the organizers in *Hurley* enjoyed First Amendment rights, Boy Scouting is an *a fortiori* case.

III. NO COMPELLING GOVERNMENTAL INTEREST JUSTIFIES INFRINGEMENT OF BOY SCOUTING'S FIRST AMENDMENT RIGHTS

It cannot be true that states automatically have a compelling interest in applying "all extant categories of discrimination" contained in state law in every possible instance. Resp. Br. at 36. That would be the end of all freedom of association – a consequence respondent purports to disavow. *Id.* at 38.

Respondent's claim of a compelling governmental interest is overbroad in three respects. First, while this Court has identified certain bases for discrimination – such as racial discrimination in education – that are genuinely compelling, see *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983),[17] it has never

17. Racial discrimination may be a unique case. The Thirteenth Amendment, which is the only provision of the Constitution directly applicable to private persons, expresses a constitutional commitment to the principle of racial nondiscrimination throughout society, which does not exist in the case of other forms of discrimination. Even with regard to racial discrimination, however,

suggested that the mere inclusion of a category – for example, personal appearance – in a state public accommodations statute automatically creates a compelling interest. Sexual orientation nondiscrimination has never been elevated to the status of a compelling interest. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631-32, 635 (1996) (subjecting sexual orientation discrimination to rational basis scrutiny).

Second, while this Court has recognized that protection of equality of access to certain benefits and opportunities constitutes a compelling interest, it has never suggested that there is a compelling interest in guaranteeing access to every institution that might be defined as a "public accommodation" under state law. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623, 626, (1984). The state had an especially strong interest in admission of women to the Jaycees and the Rotary Club because those organizations are the locus of business networking and the state has an interest in ensuring that women are not shut out of the economic marketplace. Boy Scout Troops are closer to the sphere of family, church, and morality, where the government should take a hands-off policy, than to the commercial sphere where the government is a guarantor of equality. Indeed, it

First Amendment freedom of association can sometimes prevail. *See Cuffley v. Mickes*, Nos. 99-2334, 99-2501, 2000 WL 336668, at *3-4 (CA8 Mar. 31, 2000) (holding that the Ku Klux Klan has the right to discriminate based on race and religion in membership). In light of respondent's heavy reliance on *Runyon v. McCrary*, 427 U.S. 160 (1976), we point out that *Runyon* involved the federal government's authority under the Thirteenth Amendment to require a for-profit school to admit black students. This case does not involve racial discrimination, does not involve the Thirteenth Amendment, and does not involve for-profit activity. The Court expressly noted that *Runyon* did not present "any question" regarding the "right of a private social organization to limit its membership on racial or any other grounds," the rights of schools to limit membership on the basis of sex, religion, or other nonracial grounds, or the rights of sectarian, as opposed to commercial, schools. *Id.* at 167.

required a considerable legal stretch to place a Boy Scout Troop in the category of "public accommodation" even under the New Jersey public accommodations law. Every other state supreme court or federal appellate court to consider the issue has concluded that Boy Scouting is not covered by such laws.[18] It is difficult to see how New Jersey can be said to have a compelling interest in coercing membership in a Boy Scout Troop when no other state has deemed Boy Scouting a public accommodation at all.

Third, while the state has a compelling interest in protecting the right of individuals to access to housing, medical care, transportation, and many other necessities of life, it is difficult to see respondent Dale's interest in a similar light. Being a Scoutmaster is a service rather than a benefit; it is not something that most adults without children in the Scout Troop would have any desire to do. It may be a civil right to go to school or even to join a private business networking organization, but it is not a civil right to assist in raising other people's children.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Brief for Petitioners, the judgment of the Supreme Court of New Jersey should be reversed and the case remanded with directions that judgment be entered for Petitioners.

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18. *See, e.g., Welsh v. Boy Scouts of America*, 787 F. Supp. 1511 (N.D. Ill. 1992), *aff'd*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993); *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998); *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal. 4th 736, 952 P.2d 261 (1998); *Quinnipiac Council, Boy Scouts of America, Inc. v. Comm'n on Human Rights & Opportunities*, 204 Conn. 287, 528 A.2d 352 (1987); *Seabourn v. Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (1995); *Schwenk v. Boy Scouts of America*, 275 Or. 327, 551 P.2d 465 (1976).

Respectfully submitted,

MICHAEL W. MCCONNELL
2301 S. Benchmark Cir.
Salt Lake City, Utah 84109

GEORGE A. DAVIDSON
Counsel of Record
CARLA A. KERR
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
(212) 837-6000

SANFORD D. BROWN
CERRATO, DAWES, COLLINS, SAKER, BROWN & WILDER
509 Stillwells Corner Road
Freehold, New Jersey 07728

DAVID K. PARK
National Legal Counsel
Boy Scouts of America
1325 Walnut Hill Lane
Irving, Texas 75038

Attorneys for Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

BOY SCOUTS OF AMERICA, ET AL.,

Petitioners,

v.

JAMES DALE,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

BRIEF IN SUPPORT OF THE PETITIONERS BY *AMICI CURIAE*, JOHN J. HURLEY AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL

CHESTER DARLING
Counsel of Record
MICHAEL WILLIAMS
Citizens for the Preservation of Constitutional Rights, Inc.
306 Dartmouth Street
Boston, MA 02116
(617) 536-1776

DWIGHT G. DUNCAN
333 Faunce Corner Road
North Dartmouth, MA 02747
(508) 998-9600 ext. 124

February 28, 2000

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

26pp

QUESTIONS PRESENTED FOR REVIEW

Whether a court can, relying on a public accommodation statute, compel a private and intimate organization to admit someone to membership who promotes a message in direct contradiction of the organization's core principles?

Whether it is permissible for a court to declare one point of view in a public debate concerning Political and moral issues to be the "correct" view and to then circumscribe the expressive and associational abilities of those who espouse the view which that court deemed to be "wrong"?

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TABLE OF CONTENTS

Questions Presented for Review i

Table of Authorities iii

Statement of Consent 2

Introduction And Statement of Interest Of *Amicus Curiae* 2

Statement Of The Case 2

I. Argument 5

A. The Court Below Restructured The Speech Of A Private Organization Which In That Court's View Is "Wrong," In Order To Produce An Expression Which That Court Deems To Be More Appropriate 5

(i) BSA's Message of Moral Fitness 5

(ii) Respondent Dale's Message Would Subvert BSA's Own Message 7

(iii) BSA's Message is Protected by the First Amendment Guarantee of Freedom of Speech 7

(iv). BSA Has a Right To Refrain From Conveying Respondent Dale's Message 9

B. The Court Below Improperly Based its Determination of Whether an Expressive Association is Protected by the First Amendment on the Court's Approval of the Association's Beliefs, Morals, and Values 11

(i) BSA Is An Inherently Expressive Organization .. 11

(ii) BSA Is Protected By Freedom of Expressive Association 12

C. The New Jersey Supreme Court Improperly Denied BSA Its Freedom of Intimate Association 16

(i) "Relative Smallness" 16

(ii) "Selectivity" 17

(iii) "Deep Attachments and Commitments ... Personal Aspects of One's Life" 18

(iv) "Child Rearing and Education" 19

II. Summary 20

III. Conclusion 20

TABLE OF AUTHORITIES

CASES

Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 14, 18

Curran v. Mount Diablo Council of BSA, 29 Cal. Rptr. 2d 580 (Cal. Ct. App. 1994) 5, 6, 13, 15

Dale v. Boy Scouts of America, 160 N.J. 562, 734 A.2d 1196 (1999) ..... passim

Democratic Party of U.S. v. Wisconsin, 450 U.S. 107 (1981) 12

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) 16

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) ... passim

Invisible Empire, Ku Klux Klan v. Mayor et al. Of Thurmont, 700 F.Supp. 281 (D. Md. 1988) 14

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 9, 10

Meyer v. Nebraska, 262 U.S. 390 (1923) 19

Minnesota State Bd. For Community Colleges v. Knight, 465 U.S. 271 (1984) 12

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 15

New York State Club Assn. v. City of New York, 487 U.S. 1 (1988) 14

Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal., 475 U.S. 1 (1986) 8, 9

Palko v. Connecticut, 302 U.S. 319 (1937) 7

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) 19

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) ... passim

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 17

Welsh v. BSA, 993 F.2d 1267 (7th Cir. 1993) 17, 18

West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) 9

OTHER AUTHORITIES

Boy Scout Handbook (9th ed. 1979) 18
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Dara N. Sharif, Gay, Expelled Scout Sues to Regain His Membership Cites N.J. Anti-bias Law, Rec. N. N.J., July 30, 1992 7
David Schwab, Scout's Honor, Star-Ledger (Newark), July 30, 1992 ..... 7, 17
Deposition of James Dale, May 10, 1993 4
The Boy Scout Handbook (11th ed. 1998) 6, 11, 17, 18
The Official Boy Scout Handbook (9th ed. 1979) .. 3, 6
The Scoutmaster Handbook (1998) 4, 5, 17, 19

No. 99-699

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ON A PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF NEW JERSEY

BRIEF IN SUPPORT OF THE PETITIONERS BY *AMICI CURIAE*, JOHN J. HURLEY AND THE SOUTH BOSTON ALLIED WAR VETERANS COUNCIL

Amici submit that the ruling of the Supreme Court of New Jersey below, 160 N.J. 562, 734 A.2d 1196 (1999), presents an unconstitutional application of the New Jersey Law Against Discrimination ("LAD") to petitioners Boy Scouts of America ("BSA") and Monmouth Council, BSA. In keeping with First Amendment jurisprudence regarding the rights of expressive and intimate association within private organizations, see, e.g., *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), *amici* urge this Court to reverse the decision of the New Jersey Supreme Court

STATEMENT OF CONSENT

Pursuant to Rule 37.3 of the Rules of this Court, *amici* have obtained the written consent of each of the parties to the filing of this brief.

INTRODUCTION AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

As the defendants in *Hurley*, the *amici* are concerned that the rights they secured for themselves and other private organizations in the unanimous decision of this Court will be eroded if the decision of the New Jersey Supreme Court is allowed to stand. In 1995, John Hurley and the South Boston Allied War Veterans Council successfully petitioned this Court for reversal of an unconstitutional application of a Massachusetts anti-discrimination law that would have compelled Mr. Hurley and the Council to include in their annual St. Patrick's Day Parade, against their wishes, governmentally compelled messages and viewpoints. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., supra.* Citizens for the Preservation of Constitutional Rights, Inc. is a conservative and libertarian non-profit organization committed to pursuing constitutionai causes. *Amici* believe that the Court's holding in *Hurley* compels a decision in favor of BSA in the instant case.

STATEMENT OF THE CASE

The BSA is a many faceted organization. Although large, the operative, important units are very small (troops and patrols with as few as six to eight scouts). The several functions and missions of the BSA are important and vital to the whole: there is a religious component, a teaching component and a strong over-

all emphasis in shaping the moral character of young boys.

This controversy involves the control by government of the speech, associative rights, associative expression and viewpoints of a private organization.

The BSA has been required by the court below to include a scout leader who has acknowledged his intention to proselytize unwanted viewpoints within the BSA.

BSA is a private, non-profit organization whose mission is to instill within growing boys those virtues it considers integral to sound adulthood and to the expression of good citizenship. Many Scouting activities involve exploring and appreciating the outdoors, "[b]ut Scouting is far more than fun in the outdoors, hiking, and camping. Scouting is a way of life. Scouting is growing into responsible manhood, learning to be of service to others." *The Official Boy Scout Handbook* 9 (9th ed. 1979).

Before a boy can become a Scout, he must satisfy his Scoutmaster that he "[u]nderstand[s] and intend[s] to live by the Scout Oath or Promise, the Scout Law, the Scout motto, and the Scout slogan."[1] *Id.* at 11. Scout leaders likewise must "[a]gree to live by the Scout Oath and Law" before they can serve, see *The*

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[1] The Scout Oath states "On my honor, I will do best to do my duty to God and my country and to obey the Scout Law; to help other people at all times, to keep myself physically strong, mentally awake, and morally straight." The Scout Law states "A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent." The Scout motto is "Be Prepared," and the Scout slogan is "Do a good turn daily." BSA prefers to instruct its members as to what *should* be done, not as to what should *not* be done. The founder of Scouting, Robert Baden-Powell, initially considered including an additional point in the Scout Law, "A Scout is not a fool," but discarded it in the view that the Law should be a catalogue of affirmative virtues. The Official Boy Scout Handbook 515 (9th ed. 1979).

Scoutmaster Handbook 3 (1998), and they are expected to set "an example for themselves and for others by living the Scout Oath and Law to the best of their abilities." *Id.* at 6.

Because much BSA activity is instructional in nature, the Scoutmaster serves as a teacher and role model to the boys in his troop. The Scoutmaster Handbook advises the potential leader that "[t]he Scouts in your troop will look up to you for guidance on a number of levels, many of them unspoken. The way you treat others, provide leadership, and act during meetings and on Scout outings will influence Scouts' actions." *Id.* at 3. Although his mentoring duties are most often executed in other areas of Scouting, the Scout leader's teaching and role model responsibilities occasionally extend to the arena of sexuality. BSA instructs its leaders in such circumstances to promote a message of sexual abstinence until marriage, in accordance with the "morally straight" provision of the Scout Oath. *See id.* at 132. When further questions arise, leaders are instructed to "answer them as honestly as [they] can and, whenever it is appropriate, encourage him [the Scout] to share his concerns with his parents or guardian, spiritual leader, or a medical expert." *Id.*

In 1990 Dale became co-president of the homosexual student group at Rutgers University. Since that time he has openly affirmed his "being proud about [his] status as a gay man." Deposition of James Dale, May 10, 1993, at 93.

I. ARGUMENT

A. The Court Below Restructured The Speech Of A Private Organization Which In That Court's View Is "Wrong," In Order To Produce An Expression Which That Court Deems To Be More Appropriate

(i) BSA's Message of Moral Fitness

In *Hurley*, the trial judge in the Massachusetts Superior Court based his decision to restrict the First Amendment Rights of the organizers of the South Boston Saint Patrick's Day parade on his belief that the parade organizer's attitude on inclusion of a homosexual protest group in their parade was based on bigotry and that the veterans' parade fell within the Massachusetts public Accommodation Act. *Hurley*, 515 U.S. at 562. The Massachusetts court went on to order the parade organizers to include a group and its message in their parade. *Id.* The New Jersey Supreme Court has ordered the BSA to alter its message after concluding its beliefs were based on prejudice. *Dale*, 160 N.J. at 618.

Scouting is a "values-based program with its own code of conduct." *The Scoutmaster Handbook* 10 (1998). The principles of BSA are found in the Scout Oath and Law, and all Scouts and Scout leaders are expected to live according to them. *See* Statement of the Case, *supra*. Some of BSA's activity involves development of boys' outdoorsmanship skills, including camping, hiking, and cooking, but Scouting's founder Robert Baden-Powell made clear the higher purpose of Scouting: "Don't let the technical outweigh the moral. ... [C]amping, hiking, good turns, jamborees ... are all means, not the end. The end is character. Character with a purpose." *Curran v. Mount Diablo Council of BSA*, 29 Cal. Rptr. 2d 580, 584 (Cal. Ct. App. 1994), *judgment aff'd, opinion superseded by* 17 Cal. 4th

670, 952 P.2d 218 (Cal. 1998). *See also Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) ("Even the training of outdoors survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."). Even the New Jersey Supreme Court acknowledged that BSA "expresses a belief in moral values and uses its activities to encourage the moral development of its members." 160 N.J. at 613, 734 A.2d at 1223.

BSA teaches Scouts to be persons of good character in all aspects of their lives, including that of sexuality. Scouts are expected to adhere to a standard of sexual morality that emphasizes abstinence before marriage: "When you live up to the trust of fatherhood your sex life will fit into God's wonderful plan of creation. Fuller understanding of wholesome sex behavior can bring you lifelong happiness." *The Official Boy Scout Handbook* 525 (9th ed. 1979).[2] The *Handbook* also provides the following principles of responsibility in relation to "true [sexual] maturity":

> Your Responsibility to Young Women
>
> Your Responsibility As a Future Parent
>
> Your Responsibility to Your Beliefs
>
> Your Responsibility to Yourself

The Boy Scout Handbook 376–77 (11th ed. 1998). Inherent in BSA's teachings is adherence to a limitation on sexual activity to within a traditional marriage. *See id.*

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[2] The *Handbook* continues: "A moment of so-called sexual freedom can turn into a lifetime of regrets. 'The good life that could have been' is wrecked for many unwed teenagers burdened by babies for whom they are unable or unready to shoulder full responsibility of parenthood." The Official Boy Scout Handbook 525 (9th ed. 1979).

BSA's view of sexual morality is promoted through "quiet persuasion, inculcation of traditional values, instruction of the young, and community service." *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring). This view is neither "strident, contentious, [nor] divisive," *id.*, but it is nonetheless an important message at the very core of Scouting's mission to develop men of good character.

(ii) Respondent Dale's Message Would Subvert BSA's Own Message

Mr. Dale has stated publicly that he disagrees with BSA's moral position on homosexuality and that he "owe[s] it to the organization to point out to them how bad and wrong this policy is." Dara N. Sharif, *Gay, Expelled Scout Sues to Regain His Membership Cites N.J. Anti-bias Law*, Rec. N. N.J., July 30, 1992, at A3. Dale has also counseled Scouts about being homosexual. David Schwab, *Scout's Honor*, Star-Ledger (Newark), July 30, 1992. These statements confirm that Dale, if re-admitted to BSA, would propound a competing message of sexual morality antithetical to that of BSA.

(iii) BSA's Message is Protected by the First Amendment Guarantee of Freedom of Speech

The right to express freely one's own beliefs or ideas, regardless of their popularity, is essential to "nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). In compelling BSA to admit Dale to membership, the government compelled a revision of BSA's message and has violated "the most basic guarantee of the First Amendment—that citizens, not the government, control the content of public discussion." *Roberts*, 468 U.S. at 634 (O'Connor, J., concurring). If government were "freely

able to compel . . . speakers to propound . . . messages with which they disagree, [then] protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion). Finally, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." *Hurley*, 515 U.S. at 575.

In the present case, the New Jersey Supreme Court's interpretation of the LAD has compromised BSA's freedom to present a message of sexual morality consistent with BSA's understanding of its own long-standing principles. The New Jersey Supreme Court's assertion that its "reinstatement of Dale does not compel the Boy Scouts to express any message" fails to recognize that BSA regards its adherence to traditional notions of morality and good character as fundamentally important. *Dale*, 160 N.J. at 624, 734 A.2d at 1229. Dale's "manifest views" on homosexuality are "at odds" with the position taken by BSA. *Hurley*, 515 U.S. at 581.

The New Jersey Supreme Court's denial of BSA's freedom of speech is contrary to this Court's holding that government is "not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579. The court below interjected its own interpretation of the Scout Oath and Law's requirements that a Scout be "morally straight" and "clean," asserting that they do not "express anything about sexuality." *Dale*, 160 N.J at 614, 734 A.2d at 1224. Nothing could be more inconsistent with First Amendment principles than for the state to deny an organization its free speech rights on the reasoning that the organization does not accurately understand its own philosophy. A state decision to allow or disallow speech based on the perceived social or political propriety of the message "grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis." *Hurley*, 515 U.S. at 579. Furthermore, "[d]isapproval of a private speaker's statement does not legitimize the use of the [state's] power to compel the speaker to alter the message by including one more acceptable to others." *Hurley*, 515 U.S. at 581.

(iv). BSA Has a Right To Refrain From Conveying Respondent Dale's Message

The Scout Oath and Law present a positive set of values by which to live, rather than a litany of prohibitions. *See* Statement of the Case, *supra*. The same is true of Scouting's message on sexual morality. Rather than focus on conduct that is not morally straight, Scouting promotes a positive message, emphasizing marriage and fatherhood. BSA prefers not to discuss homosexuality explicitly, see *id.*, but it may nonetheless exclude Dale as advocating a message with which it disagrees.

This Court unanimously affirmed in *Hurley* that "all speech inherently involves choices of what to say and what to leave unsaid." *Hurley*, 515 U.S. at 573 (quoting *Pacific Gas & Electric*, 475 U.S. at 11). A crucial "manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Id.* (internal quotations omitted). A speaker has the right to tailor his speech as he sees fit, including "expressions of values, opinion, or endorsement, [as well as] statements of fact the speaker would rather avoid." *Id. See also West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995).

Like the parade organizers of *Hurley*, BSA has the right to determine its own message. Dale would use the machinery of the state to commandeer BSA and promote a contrary message. Dale has stated publicly he is proud of his homosexuality, that he disagrees with BSA's moral position on homosexuality, and that he "owe[s] it to the organization to point out to them how bad and wrong this policy is." Sharif, Part I.B., *supra*. BSA disagrees with Dale's position on this matter and has chosen not to adopt a view consistent with Dale's. In doing so, BSA has made the "choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley*, 515 U.S. at 575. Finally, although the "size and success" of BSA "make[] it an enviable vehicle for the dissemination of" Dale's "views, . . . that fact, without more, would fall far short of supporting a claim that petitioners enjoy an abiding monopoly of access to spectators." *Hurley*, 515 U.S. at 577–78.

If a single self-identifying banner in a multifarious parade triggers constitutional protection, surely appointment of a person "whose *manifest views* [are] at odds with a position taken by the club's existing members," *Hurley*, 515 U.S. at 581 (emphasis added), constitutes an intrusion worthy of similar protection. *See Roberts*, 468 U.S. at 623 ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire").

B. The Court Below Improperly Based its Determination of Whether an Expressive Association is Protected by the First Amendment on the Court's Approval of the Association's Beliefs, Morals, and Values

(i) BSA Is An Inherently Expressive Organization

BSA is an expressive association. Scouting's purpose of instilling traditional notions of morality and good citizenship in its members is expressive and thus entitled to constitutional protection from state interference. *See Roberts*, 468 U.S. at 636 (O'Connor, J., concurring) ("The purposes of an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression"). The choice of a leader is a particularly expressive decision, the expressive quality of which goes far beyond the communication of specific explicit messages.

The New Jersey Supreme Court suggested that the Oath and Law are mere platitudes, serving no genuine purpose of selectivity. *See Dale*, 160 N.J. at 599, 734 A.2d at 1216. Notwithstanding the court's condescending attitude toward the virtue-building mission of BSA, however, the principles of the Oath and Law reside at the core of Scouting's effort to build men of good character and citizenship.[3] This goal is not secondary. *The Boy Scout Handbook* 164 (11th ed. 1998).

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[3] The depth and purposeful meaning of the Scout Oath and Law are discussed by Brian Burrell in *The Words We Live By: The Creeds, Mottoes, and Pledges That Have Shaped America*. He writes, "[t]he ideal of personal honor within a principled society is nowhere better represented than by the Boy Scout Laws, which comprise perhaps the best-known code of ethics." Brian Burrell, *The Words We Live By* 120 (1997). Burrell concludes that the Scout Oath and Law "are the very preconditions of civility, of good citizenship." *Id.* at 121. Similarly, Burrell notes that *The Boy*

Infrequently candidates do refuse to accept Scouting principles when first joining, but BSA will expel members who, after admission, explicitly or implicitly reject those principles. Scouts are not perfect all the time, nor are they required to be. BSA sets high ideals for its members in the expectation that Scouts constantly strive to recognize those ideals in their lives. When a Scout's conduct demonstrates a sustained rejection of BSA's core principles, however, expulsion of that member becomes necessary to preserve the integrity of the BSA message. BSA consistently revokes the membership of individuals who present a message antithetical to its own.

(ii) BSA Is Protected By Freedom of Expressive Association

Like-minded individuals form expressive associations for the purpose of promoting shared ideas, values, and philosophies. The First Amendment protects such groups from state-imposed inclusion of others who do not share their fundamental beliefs. *See Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271, 288 (1984) ("the First Amendment guarantees the . . . freedom to associate *or not to associate* with whom [members] please") (emphasis added). Freedom of association presupposes the "freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 122 (1981). The criteria for membership in an expressive association are themselves expressive and constitute the identity of the organization. See *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its

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Scout Handbook itself has been praised as a work of "permanent social and psychological consequence." *Id.* at 44 (quoting Paul Fussell).

membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice").

BSA is an expressive association. "The purposes of an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression." *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring). Scouting's purpose of instilling traditional notions of morality and good citizenship in its members is expressive and thus entitled to constitutional protection from state interference. The choice of a leader is a particularly expressive decision, the expressive quality of which goes far beyond the communication of specific explicit messages.

There can be few more effective ways to frustrate Scouting's promotion of traditional notions of morality than to admit vocal opponents of that message as members, and especially as leaders, into the organization. As the court in *Curran* acknowledged, the "forced inclusion of a Scout Leader who has publicly acknowledged his or her homosexuality and has expressed beliefs contrary to the Boy Scouts' view . . . would substantially impact the [BSA's] ability to get across its preferred message in its preferred way." *Curran*, 17 Cal.4th at 683, 952 P.2d at 226 (quoting the trial court). The New Jersey Supreme Court should not be able to circumvent First Amendment protections by asserting that its forced inclusion of Dale would have no effect on BSA.

This case is distinguishable from the *Roberts* trilogy cases. Therein the Court rejected First Amendment challenges to state public accommodation laws because the reasons posed by the challengers for exclusion were insufficiently related to views advanced by the organizations. See *Roberts*, 468 U.S. at 627, (finding that the statute "require[d] no change in the

[organization's] creed" and "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members"); *New York State Club Assn. v. City of New York*, 487 U.S. 1, 13 (1988) (law erected no obstacle to "a club seek[ing] to exclude individuals who do not share the views that the club's members wish to promote"); *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (statute did "not require the clubs to abandon or alter" any expressive activities).

The BSA is not required to have specific, taxonomic views on sexuality. *Hurley* teaches: "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." 515 U.S. at 569-70. BSA need not present a "narrow, succinctly articulable message [as] a condition of constitutional protection . . . ." *Id.* at 569. The New Jersey Supreme Court's restricted interpretation of "shared goals," however, would circumscribe constitutional protection under freedom of expressive association to pure advocacy groups and unseemly entities such as the Ku Klux Klan. *See Invisible Empire, Ku Klux Klan v. Mayor et al. Of Thurmont*, 700 F.Supp. 281, 288-89 (D. Md. 1988) [need parenthetical here]. BSA's view on homosexuality need not be its singular or primary purpose in order to be protected. It is sufficient is that BSA has a message of morality with which Dale disagrees.

This Court has clearly indicated that associational freedom is of fundamental importance in checking governmental control over citizens' expression of ideas. *See Hurley*, 515 U.S. at 579 (noting that if the "point of applying the state law to expressive conduct" is to produce neutral expressive conduct, "it is a decidedly fatal objective"). Even regulation having an

incidental impact on associational freedom is permitted only in "narrowly defined circumstances." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982). To justify even limited regulation of associational activity, the state must advance an interest that is both "compelling" and "unrelated to the expression of ideas." *Roberts*, 468 U.S. at 623.

New Jersey can claim no compelling state interest in applying the LAD outside the commercial context. The *Roberts* trilogy addressed commercial settings and recognized "radically different constitutional protections for expressive and nonexpressive associations." *Roberts*, 468 U.S. at 638.[4] Furthermore, the New Jersey courts' application of the LAD to BSA is directly related to the expression of ideas. Compelling BSA to accept Dale is to give more credence to his moral views than those of BSA, an unconstitutional application of the state law to an expressive association. As noted by a justice of the California Supreme Court, "the *Hurley* decision raises grave doubts whether [a] Legislature could ever constitutionally enact, or this court enforce, a law requiring an organization like the Boy Scouts, whose mission is to instill in boys a certain philosophy or moral behavior, to admit an individual who advances contrary views." *Curran*, 17 Cal.4th at 727, 952 P.2d at 256 (Kennard, J., concurring). Even if New Jersey has a legitimate interest in promoting Dale's views on sexual morality, the First Amendment prohibits the state from conscripting a private organization to serve as a mouthpiece for those views. The right of an expressive association to dictate its own standards of membership cannot be

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[4] *See Roberts*, 468 U.S. at 638 (O'Connor, J., concurring) ("The First Amendment is offended by direct state control of the membership of a private organization engaged exclusively in protected expressive activity, but no First Amendment interest stands in the way of a State's rational regulation of economic transactions by or within a commercial association.").

based on the state's approval or disapproval of the association's beliefs. *See Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974).

C. The New Jersey Supreme Court Improperly Denied BSA Its Freedom of Intimate Association

In *Roberts*, the Court addressed the concept of intimate association in relation to one's constitutionally afforded liberty. On behalf of the Court, Brennan, J., opined that:

> the constitutional shelter afforded [intimate] relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to the concept of liberty.

468 U.S. at 619. Associations sufficiently intimate to deserve this Constitutional protection include those that have "played a critical role in the culture and tradition of the Nation by cultivating and transmitting shared ideals and beliefs," *id.* at 618–19, as well as those involving "the raising and education of children." *Id.* at 619. Other factors include "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Id.* at 620. The intimate nature of members' association within BSA justifies the heightened constitutional protection afforded such relationships.

(i) "Relative Smallness"

Although the total national membership of BSA at any particular time is quite large, most Scouting is done within small groups of boys and adult leaders:

"Scouting units are small, intimate groups. In the Cub Scout and By Scout programs, the units are made up of even smaller groups, dens and patrols, which often meet regularly in private homes." *Rules and Regulations of the Boy Scouts of America*, Article XI, Section 3, Clause 8, *quoted in* Scoutmaster Handbook at 138. BSA members are organized into local groups called troops, chartered to local community organizations. A typical troop consists of fifteen to thirty boys, see *Dale*, 160 N.J at 609, 734 A.2d at 1221, but many troops are smaller. Dale's troop, for example, consisted of only ten Scouts. *See* David Schwab, *Scout's Honor*, Star-Ledger (Newark N.J.), July 30, 1992. Troops are further subdivided into patrols, which contain six to eight boys. *See* Boy Scout Handbook 17 (11th ed. 1998). The patrol is the core unit around which a Scout's activities are centered. *The Official Boy Scout Handbook* 12 (9th ed. 1979).

(ii) "Selectivity"

BSA consists of a large number of boys from diverse backgrounds, but admission to membership is not without the exercise of discretion. To characterize BSA as unselective disregards an important manifestation of selectivity this Court has emphasized, a "plan or purpose of exclusiveness." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236 (1969). BSA is selective in requiring all candidates for membership to "understand *and agree to live by* the Scout Oath ... [and] Law." *The Boy Scout Handbook* (11th ed.) at 4 (emphasis added). Those who refuse to accept the Oath and the Law are not permitted to join. *See, e.g., Welsh v. BSA*, 993 F.2d 1267 (7th Cir. 1993) (excluding a boy for failing to profess his "duty to God"). Individuals have been dismissed from BSA for multiple reasons, including atheism, see *id.*, possession of alcohol or illicit substances, see *Boy Scout Handbook*

(9th ed. 1979) at 131, and advocating views antithetical to BSA's principles. *See* Ness, *Scouts Expel Longtime Leader*, *supra* (Scout leader dismissed for contesting BSA's views on religious observance, homosexuality, and female membership). As the Seventh Circuit observed, "[i]n order to maintain [its] principles, it is essential that [BSA] exercise selectivity." *Welsh*, 993 F.2d at 1276.

(iii) "Deep Attachments and Commitments ... Personal Aspects of One's Life"

The nature of the Scouting experience gives rise to close, personal relationships. Scouts hike together, cook together, camp together, pray together, and work together. *See, e.g., The Boy Scout Handbook* (11th ed.) at 129 (prayer), 216 (camping), 247 (cooking). They meet in one another's homes for patrol meetings. *See* Part V.A., *supra*. They develop personal moral values, the desire to be good citizens, and reverence for religious beliefs. *See* Statement of the Case, *supra*. Scouting is much more an extension of home, church, and friendship than it is of the commercial or public sphere.

This Court has declined to accept the notion that constitutional protection under intimate association is restricted to familial relationships. *See Board of Directors of Rotary, Int'l*, 481 U.S. at 545 ("Of course, we have not held that constitutional protection is restricted to relationships among family members."). If BSA is constitutionally indistinguishable from a Rotary chapter, however, as held the New Jersey Supreme Court, one is left with precious little idea of what non-familial organization would classify for constitutional protection under the doctrine of intimate association. There are few Rotary meetings conducted in pup tents.

(iv) "Child Rearing and Education"

Scouting is invested with a fundamental educational role in its efforts to instruct growing boys in matters of good character, citizenship, and skill in the outdoors. The Scoutmaster Handbook inquires "Is Scouting educational? You bet it is. Scouts have many opportunities to learn skills of leadership, of the outdoors, and of life." Scoutmaster Handbook at 7. Scout leaders are expected to embrace the educational aspect of Scouting, as "a Scout troop is an extension of [the boys'] school activities, their families, and their religious affiliations. For [some boys], a Scout troop might serve as the most stable part of their lives." *Id.* at 126. Scouts often spend significant lengths of time away from their homes with their fellow Scouts and their Scout leaders, for example, at outdoor activities and summer camps.

Parents and guardians have the right "to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925). This includes choosing both their children's teachers and the subjects of instruction. *See Meyer v. Nebraska*, 262 U.S. 390, 403 (1923); *Pierce*, 268 U.S. at 534. Parents choose to enroll their sons in BSA as much to expose them to the message and values promoted by BSA as to grant them the outdoor experiences Scouting offers. If BSA is compelled to alter its core organizational principles by action of government fiat, it will be unable to teach those values it regards essential to Scouting and will, furthermore, depart from the standard of adherence to traditional morality it has represented for decades both parents of Scouts and to the community at large.

II. SUMMARY

Under the rule of *Hurley*, "a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." 515 U.S. at 581. *Amici* Hurley and the South Boston Allied War Veterans Council believe that the instant case mirrors the situation foreseen by the Court five years ago and urge the Court to grant relief to the Boy Scouts of America and to dismiss Respondent's underlying complaint.

As the Court stated in *Roberts*, "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." 468 U.S. at 623. In the instant case, the State of New Jersey, acting through its judiciary, seeks to compel Boy Scouts of America to change its messages and viewpoints.

III. CONCLUSION

Therefore the decision of the New jersey Supreme Court in *Dale v. Boy Scouts of America, et al.*, 160 N.J. 562, 734 A.2d 1196 (1999) should be reversed.

Date: February 28, 2000

Respectfully submitted,

JOHN J. HURLEY, INDIVIDUALLY, and the SOUTH BOSTON ALLIED WAR VETERANS COUNCIL.

By their attorneys,
CHESTER DARLING
Counsel of Record
MICHAEL WILLIAMS
Citizens for the Preservation of Constitutional Rights, Inc.
306 Dartmouth Street
Boston, Massachusetts 02116-2206
(617) 536-*1776*

DWIGHT G. DUNCAN
333 Faunce Corner Road
North Dartmouth, MA 02747
(508) 998-9600 ext. 124

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No. 99-699

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent,

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

AMICUS CURIAE
AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF PETITIONERS

PETER J. FERRARA
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
1220 Rosecrans St.
#325
San Diego, CA 92106
(619) 222-0770

23pp

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE DECISION BELOW VIOLATES THE CONSTITUTIONALLY PROTECTED RIGHTS OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION OF THE BOY SCOUTS OF AMERICA 4

A. The Decision Below Threatens the Freedom of All Americans to Join Together to Advance Traditional Moral Values or Any Other Beliefs 4

B. The Decision Below Contradicts the Established Precedents of this Court Regarding Freedom of Speech and Freedom of Association 11

1. The Decision Below Violates the Right to Freedom of Speech of the Boy Scouts 11

2. The Decision Below Violates the Right to Expressive Association of the Boy Scouts 15

3. The Decision Below Violates the Right to Intimate Association of the Boy Scouts 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES Page

Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987)..... 15,19

Boyd v. Harding Academy of Memphis, Inc. 88 F.3d 410 (CA6 1996) 11

Boy Scouts of America v. Teal, 374 F. Supp. 1276 (E.D. Pa. 1974)..... 12

Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (CA81987)..... 11

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 952 P.2d 218 (1998)..... 5

Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 US 107 (1981) 15

Harvey v. YWCA, 533 F. Supp. 949 (W.D.N.C.1982) 11

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 1995).....6,11, 14-15

McConnell v. Anderson, 451 F.2d 193 (CA81971) 11

Minnesota State Bd. For Community Colleges v. Knight, 465 U.S. 271 (1984)..... 16

NAACP v. Alabama ex rel. Patterson 357 U.S. 449 (1958)..... 15

New York State Club Ass'n v. City of New York, 487 U.S.1(1988)..... 15

Roberts v. United States Jaycees, 468 U.S. 609 (1984)...6,16

INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Director of the U.S. Commission on Civil Rights Linda Chavez, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Editor-in-Chief of the Reader's Digest and former Director of the Voice of America Kenneth Y. Tomlinson, and nationally syndicated columnist Joseph Perkins.

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about protecting those whose rights and liberties may be overlooked or infringed due to political correctness or other political bias. In this case, we are particularly concerned that the liberty interests of the Boy Scouts to promote their traditional moral values are properly understood.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief has been granted by the parties. Their letters of consent are enclosed with this brief.

SUMMARY OF ARGUMENT

The central question in this case is who should choose the leaders and messages of the Boy Scouts of America – the Boy Scouts, or the state, acting at the behest of respondent Dale.

The Boy Scout program advances traditional moral values such as honesty, courage, reverence, hard work, patriotism, thriftiness and others. This also includes traditional family values, emphasizing marriage and fatherhood for the boys. As a result, part of the Boy Scout message is that heterosexual sex before marriage, adultery, and heterosexual promiscuity are all wrong. Concomitantly, part of the message as well is that homosexuality activity is morally wrong and should be avoided.

Respondent Dale opposes this long established Boy Scout position on homosexuality. He is leading a high profile public campaign propounding the opposite of the view of the Boy Scouts regarding homosexual conduct. Indeed, he publicly attacks the Boy Scout view on homosexuality and publicly proclaims his own personal homosexual conduct.

Consequently, if the state forces the Boy Scouts to reappoint Dale as a uniformed adult leader in their organization, an Assistant Scoutmaster, their position regarding homosexual conduct would be completely nullified. Indeed, the entire Boy Scout value system regarding family life and sexual activity would break down.

Moreover, as a uniformed adult Scout leader, Dale would serve as a role model for the boys. The Boy Scouts may properly decide that they do not want a gay activist as a role model for their boys, even if the Scouts did not otherwise wish to teach the boys moral values regarding sexual conduct. In other words, even apart from Dale interfering with the affirmative messages the Scouts want to send, the Scouts may also decide that they just do not want to

send the messages that accepting Dale as a uniformed adult Scout leader would send.

Dale may engage in whatever personal conduct he desires. He may publicly advocate the views and values in which he believes. He may openly criticize the Boy Scouts and the values they espouse. But what he may not do is impose his own views and values on the Boy Scouts by forcing them to accept him as a uniformed adult leader, an Assistant Scoutmaster, despite his openly expressed views and conduct directly contradicting the values the organization seeks to express. Yet, that is precisely what Dale seeks in this case and that is the result of the decision below.

We believe that the decision below sets a dangerous precedent that threatens the very freedom of citizens to join together in private voluntary organizations to advance traditional moral values. If the decision is affirmed, then apparently we have reached the point in America where parents and socially minded citizens cannot join together to form an organization to teach boys traditional moral values, including that they should not engage in homosexual activity and that it would be morally wrong for them to do so.

Moreover, we think the decision below threatens promotion of traditional values across the board, not just those regarding homosexuality. Indeed, the decision of the court below, and the doctrine advanced by Dale in this Court, would establish a foundation for suppressing the freedom of all citizens to form private voluntary organizations to advance the moral principles in which they believe. It would constrain them instead towards advancing only the politically correct moral principles approved by the state.

Based on this analysis, the decision of the court below would violate the Constitution in at least three ways. First, the ruling violates the freedom of speech of the Boy Scouts. Secondly, the decision violates the right to expressive

association by the Boy Scouts. Thirdly, the decision violates the Boy Scouts' right to intimate association.

Respondent Dale has no interest in serving as a Boy Scout leader that would remotely come close to outweighing these core liberty interests of the Boy Scouts. The Boy Scout organization is for the boys, not for the adult Scout leaders. It is not a vehicle for the Scout leaders to advance their personal interests or agendas, or to pursue commercial or business interests or activities. Indeed, the only interest Dale has asserted in seeking to force his acceptance as a Scout leader is his desire to impose his own, differing values on the organization. He says that through his forced leadership he wants to point out to the organization "how bad and wrong" their policy regarding homosexuality is. That is not a valid, legitimate interest to outweigh the liberty interests of the Boy Scouts discussed above.

ARGUMENT

I. THE DECISION BELOW VIOLATES THE CONSTITUTIONALLY PROTECTED RIGHTS OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION OF THE BOY SCOUTS OF AMERICA

A. The Decision Below Threatens the Freedom of All Americans to Join Together to Advance Traditional Moral Values or Any Other Beliefs

This is not a gay rights case, properly understood. No law or action of the state restricts the rights or liberties of respondent James Dale in any way. Rather, this case is about who should choose the leaders and messages of the Boy Scouts of America – the Boy Scouts, or the state, acting at the behest of respondent Dale.

The Boy Scout program is not primarily social or recreational. Courts have long recognized that the point of

the program is to teach boys sound moral values, with its various activities all geared to reinforce that central goal. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal.4th 670, 697, 952 P.2d 218, 236 (1998) (The Boy Scouts is a "charitable, expressive, and social organization" whose "primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose.").

The Boy Scout program advances traditional moral values such as honesty, courage, reverence, hard work, patriotism, thriftiness, and others. This also includes traditional family values, emphasizing marriage and fatherhood for the boys. As a result, part of the Boy Scout message is that heterosexual sex before marriage, adultery, and heterosexual promiscuity are all wrong. Concomitantly, part of the message as well is that homosexual activity is morally wrong.

The Boy Scouts are not outsiders to the boys. Fathers are also involved in the program and its various activities, often volunteering to serve as local adult leaders. Neighbors and fellow church members also often serve in the local leadership pool.

Respondent Dale opposes the long established Boy Scout view that homosexual conduct is wrong and should be avoided. As Co-President of the Rutgers University Lesbian/Gay Alliance, Dale is, in fact, leading a high profile public campaign propounding the opposite of the view of the Boy Scouts regarding homosexual conduct. (JA 495-98; JA 503-04.)[2] Indeed, Dale publicly attacks the Boy Scout view on homosexuality. He states that he owes it to the Boy Scouts "to point out to them how bad and wrong" their position on homosexuality is. He also publicly proclaims that he personally engages in homosexual conduct.

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[2] Numbers preceded by "JA" refer to pages in the Joint Appendix filed in this case. Numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition for Writ of Certiorari.

Consequently, for the Boy Scouts to accept Dale as a uniformed adult leader in their organization, an Assistant Scoutmaster, would completely nullify their position regarding homosexual conduct. It would send a clear message to all of the boys that the Boy Scout moral values regarding homosexual conduct are not to be taken seriously. And if nonmarital homosexual conduct is acceptable, then how can premarital heterosexual conduct not be? Indeed, if adult Boy Scout leaders can be active homosexuals publicly advocating that lifestyle, how can the Boy Scouts effectively maintain teachings regarding marriage and fatherhood? Certainly, these leaders could not propound that message and their presence in the organization would directly contradict it. As a result, the entire Boy Scout value system regarding family life and sexual activity would break down.

Moreover, even apart from the moral value system the Boy Scouts seek to promote, forcing the Boy Scouts to accept Dale as a uniformed adult leader creates another problem. For as an adult Scout leader, Dale would serve as a role model for the boys. The Boy Scouts may properly decide that they do not want a gay activist as a role model for their boys, even if the Scouts did not otherwise wish to teach the boys moral values regarding sexual conduct. In other words, even apart from Dale interfering with the affirmative messages the Scouts want to send, the Scouts may also decide that they just do not want to send the messages that accepting Dale as an adult Scout leader would send. This is exactly the position taken by this Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), discussed further below.

Dale may engage in whatever personal conduct he desires. He may publicly advocate the views and values in which he believes. He may openly criticize the Boy Scouts and the values they espouse. These are his valid civil rights.

But what Dale may not do is impose his own views and values on the Boy Scouts by forcing them to accept him as a uniformed adult leader, an Assistant Scoutmaster, despite his

openly expressed views and conduct directly contradicting the values the organization seeks to express. *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an organization than a regulation that forces the group to accept members it does not desire.").

Yet, that is precisely what Dale seeks in this case and that is the result of the decision of the court below. The right or liberty interest that Dale asserts in this case is the freedom to impose his own values and views on an unwilling Boy Scout organization.

This is further illustrated in Dale's brief opposing the granting of certiorari in this case.[3] In that brief, respondent Dale and his representatives seek to redefine the message of the Boy Scouts, denying that the organization has any view regarding homosexuality. Brief in Opp. 9-17. Indeed, Dale argues that it is his exclusion from the Boy Scouts that violates the Scout Oath and Law. Brief in Opp. 12 n.8. Consequently, Dale seeks to impose his own interpretation of the Scout Oath and Law and his own values on the Boy Scouts.[4]

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[3] Brief in Opposition, *Boy Scouts of America v. James Dale*, No. 99-699, November 24, 1999 (hereafter "Brief in Opp.").

[4] Dale's brief also tediously repeats over and over that the Boy Scout position and message regarding homosexuality described by the Scouts in this case is "anti-gay" and a message requiring or involving discrimination. Brief in Opp. 2n.3, 4, 9, 11, 16, 24, 25, 30n.21. But this language just amounts to further denunciation of the traditional moral values the Boy Scouts seek to communicate and support. The Boy Scout viewpoint and message regarding homosexuality is not anti-gay, nor does it involve discrimination to the extent that word is defined to involve unjust or invidious treatment. The Boy Scouts are not interested in attacking or criticizing gay people in any way. Rather, through the Boy Scouts, parents, their neighbors, and fellow church members simply seek to communicate to their children the traditional moral values that homosexuality, as well as heterosexual sex outside of marriage, are morally wrong and that they should not engage in such conduct. This is hardly a novel position. It is a view widely and commonly held among

That is shown by the decision of the court below as well. That decision was openly grounded in outright hostility to the moral values espoused by the Boy Scouts. The court actually stated that in its view the position of the Boy Scouts on homosexuality is "based on little more than prejudice" and denounced it as "bigotry". (59a,61a.) In a concurring opinion, Justice Handler stated that it is "untenable" for the Boy Scouts to remain "entrenched in the social mores that existed at the time of its inception" (100a), which the court effectively ruled are now outdated and socially unacceptable. Quite simply, the court acted to impose its views and values regarding homosexuality on the Boy Scouts.[5]

The New Jersey court is apparently unaware that tens of millions of Americans believe in the moral values espoused by the Boy Scouts, including the values regarding homosexuality. Millions and millions believe as well that these views regarding homosexual conduct are directly derived from the words of the Bible and Judeo-Christian doctrines. Major religious denominations support this position. To rule that this is simply stupid bigotry is to pit the power of the state against these traditional, religiously based beliefs.

We believe that this decision sets a dangerous precedent that threatens the very freedom of citizens to join together in private voluntary organizations to advance traditional moral values. If the decision is affirmed, then apparently we have reached the point in America where parents and socially minded citizens cannot join together to

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the American people and among many others around the world for hundreds, in fact, thousands of years. Rather than invidious discrimination, the message of the Boy Scouts regarding homosexuality simply involves a constitutionally protected exercise of their rights to freedom of speech and association.

[5] The court stated as well, "Boy Scouts teaches that 'moral fitness' is an individual choice and defers the ultimate definition to its members." (55a). But if that were true, the Boy Scouts would not be an organization aimed at teaching boys moral values at all. Again, the court seeks to define the Boy Scouts in its preferred image.

form an organization to teach boys traditional moral values, including that they should not engage in homosexual activity and that it would be morally wrong for them to do so. Courts can denounce such views as just stupid bigotry, even though they are based on widely subscribed religious doctrines thousands of years old, and force the group to accept gay activists as leaders who will teach the boys by word and deed the opposite view.

Indeed, if traditional values can be legally styled as simple bigotry and prejudice, then how long will it be before actions taken to promote them are declared illegal as well? We do not think it is a far step from the decision below, and from the arguments of respondent Dale, to hold that a group organized to teach such bigoted and prejudiced values to children is, by those very teachings, engaged in illegal discrimination, or activity that could be banned by a supposed civil rights statute, or a statute supposedly preventing child abuse.

Moreover, we think the decision below threatens promotion of traditional values across the board, not just those regarding homosexuality. Any traditional moral values a group seeks to promote may be deemed politically incorrect at some point or may be otherwise disapproved by the state. The doctrine fashioned by the court below, and advanced by Dale here, provides a foundation for the state then to force the group to accept as members and even leaders others who disagree with the organization's values and who will then insist that it promote the politically correct view.

After all, the assailants of the group will argue, are the politically incorrect views really the core expressive purpose of the group? Aren't there dissenters from the politically incorrect view in the organization? Has the group clearly specified their support of the politically incorrect view? Can't the group continue to promote its main central purposes even admitting the dissenters from the politically incorrect view? If the group has had any shyness about

loudly proclaiming a politically incorrect view as one of its main purposes, that may well be fatal to any defense against the assailants. Finally, based on the decision below, the assailants may argue that in any event their civil rights to participate outweigh any expressive purpose of the group.

Ultimately, such a doctrine threatens the rights of everyone. For if groups promoting traditional values can be constrained towards promoting only the values approved by the state, this will ultimately be true for every other group as well, including groups of antiwar activists, draft protestors, anti-tax agitators, and even gay and lesbian groups. As political climates shift, any group with a politically incorrect view can be assaulted by the acolytes of political correctness, on the basis of the doctrines advanced by Dale and accepted by the court below. If today the Boy Scouts can be forced to accept a homosexual activist as an adult leader, then under a different political climate a gay/lesbian group officially recognized at a public university may be forced to accept as members or even leaders fundamentalist Christian students professing their desire to aid and minister to gays. After all, we can't allow discrimination against these students based on their religion, which is expressly protected by the Constitution. Of course, the idea of assistance to gays held by these fundamentalist students may turn out to be quite different from the views of the current gay and lesbian leaders of such a group.

As a result, the decision of the court below, and the doctrine advanced by Dale in this Court, would create a foundation for suppressing the freedom of all citizens to form private voluntary organizations to advance the moral principles in which they believe. It would constrain them instead towards advancing only the moral principles approved by the state.

Those who disagree with the current views and policies of the Boy Scouts regarding homosexuality should start their own similar organization for boys. They can then promote their own values through that organization and we

can see how the public responds in the marketplace of ideas. That is how the issue would be handled in a truly free society.

B. The Decision Below Contradicts the Established Precedents of this Court Regarding Freedom of Speech and Freedom of Association.

Fortunately, the established precedents of this Court make clear that the decision of the court below is in error. Based on these precedents, the decision below violates the Constitution in at least three ways. First, the decision violates the freedom of speech of the Boy Scouts. Secondly, the decision violates the right to expressive association of the Boy Scouts. Thirdly, the decision violates the Boy Scouts' right to intimate association.

1. The Decision Below Violates the Right to Freedom of Speech of the Boy Scouts.

As discussed above, forcing the Boy Scouts to retain Dale as a uniformed adult leader, an Assistant Scoutmaster, when he openly challenges, by word and deed, values the organization is trying to communicate to boy scouts cripples the ability of the organization to send its message. Rather, it forces the organization to send the contrary messages Dale wants to send. This is a clear violation of the First Amendment free speech rights of the Boy Scouts. *Hurley; Boyd v. Harding Academy of Memphis, Inc.* 88 F.3d 410 (CA6 1996); *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (CA8 1987); *McConnell v. Anderson*, 451 F.2d 193(CA8 1971); *Harvey v. YWCA*, 533 F.Supp. 949 (W.D.N.C. 1982).

The main argument of respondent and the court below is that, incredibly, the Boy Scouts have no message regarding homosexuality. So forcing the Scouts to retain Dale as an adult leader would not affect the freedom of speech of the Scouts.

The idea that the message of the Boy Scouts is to be defined by a gay activist litigant and his lawyers rather than the organization itself is a quite remarkable new legal innovation. We do not have in this case a runaway rump group of the Boy Scouts dismissing Dale based on some peculiar misinterpretation of scouting. The decision of the local Monmouth Council of Boy Scouts is fully supported by the national Boy Scouts of America, which is, in fact, a defendant in this case. Their stance reflects a longstanding and settled Boy Scout position. It is quite consistent with the overall Boy Scout doctrine supporting traditional values, including marriage and fatherhood, and should come as no surprise.

Indeed, the Boy Scouts have fought for this position in other litigation around the country. They have also long denied other Boy Scout leadership positions on the same grounds as they have dismissed Dale here. See, e.g., (JA 551-53; JA 554-55); *Boy Scouts of America v. Teal,* 374 F. Supp. 1276, 1279n. 2 (E.D. Pa 1974). Other than the court below, no other Federal or state Supreme Court has attempted to redefine the Boy Scouts to fit some politically correct notion. Rather, they have all accepted that the position of the Boy Scouts of America is what the organization says it is.

Contrary to the representations of respondent Dale, there was no factual finding in the courts below that the Boy Scouts do not hold any common position on homosexuality. At the trial stage, this case was decided for the Boy Scouts on cross-motions for summary judgment. Surely the appellate courts could not find on this record that there is not even an issue of material fact as to the position of the Boy Scouts on homosexuality.

Though there may be some dissenters from this Boy Scout position within the organization, that does not change the fact that the organization has an established position and message regarding homosexuality. Just about every organization will have some dissenters on positions

regarding major controversial issues. That does not deprive the organization of the constitutional protection of freedom of speech on those issues.

Indeed, the argument of Dale and the court below that the presence of dissenters within the Boy Scouts nullifies the organization's freedom of speech on this issue shows just how restrictive and oppressive their doctrine is. Respondent Dale argued in opposing certiorari in this case that "the members of Scouting do not all share the same sexual morality or conception of the terms 'morally straight' or 'moral fitness', nor do they come together for expression regarding that which divides them." Brief in Opp. 16. In other words, the constitutional protection of freedom of speech applies only to organizations whose members have a unanimous view on an issue. This could not make more clear why the doctrine of Dale and the court below threatens the freedom of organizations to promote traditional values and all other values across the board.

Moreover, even if the Boy Scouts did not have an established message regarding homosexuality, the organization could still choose not to send the message that retaining a gay activist as a uniformed adult scout leader would send. As discussed above, an adult scout leader serves as a role model for the boys. The First Amendment protects the decision of the Boy Scouts that they do not want a gay activist touting the morality of homosexuality as a role model for their boys. Retaining Dale as an adult leader under these circumstances would amount to a Boy Scout endorsement of the acceptability of his moral view, which the Scouts have a constitutionally protected free speech right to decline.[6]

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[6] Respondent objects that allowing the Scouts to dismiss Dale on these grounds would punish him for who he is rather than what he says or does. Brief in Opp. 25. But as a gay activist publicly promoting the morality of homosexuality, the problem is exactly what Dale says and does. The Boy Scouts do not even have any direct knowledge as to whether Dale is gay, apart from what he says and does.

Hurley could not more clearly support precisely this analysis. In that case, this Court held unanimously that forcing private organizers of a St. Patrick's Day parade to include the Gay, Lesbian and Bisexual Group of Boston (GLIB) under a state antidiscrimination statute was unconstitutional. Such forced participation, the Court said, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," which includes the right to decide "what not to say". 515 U.S. at 573.

The parade organizers in *Hurley* did not have "a specific expressive purpose" 418 Mass. 238, 249, 636 N.E.2d 1293, 1299 (1994) (trial court below), or a "narrow, succinctly articulable message"515 U.S. at 569, as Dale and the court below have insisted are necessary in this case. The parade organizers certainly did not have any message regarding homosexuality. Nevertheless, the organizers could deny participation by GLIB simply because they did not want to send the message that such participation would send.

The Court found that the parade organizers could decline GLIB's participation, even though GLIB would merely carry a banner stating its identity and not make any other statement. Through such participation, GLIB would still send the message of "celebrat[ing] its members identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants." Id. at 570. The parade organizers had a first amendment right to decide that they did not want to include the GLIB message "bear[ing] witness to the fact that some Irish are gay, lesbian, or bisexual" and the implicit moral "view that people of their sexual orientations have as much

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Respondent also complains that non-gay Scout leaders are retained regardless of what views they express on homosexuality or other moral issues and the effect this has on their service as role models. Brief in Opp. 16, 25. But the Boy Scouts do dismiss other leaders for failure to propound the organization's views and moral code correctly or for other failings that undermine their ability to function as valid role models. (38a; JA 299-303; JA 694-95; JA751-52.)

claim to unqualified social acceptance as heterosexuals." Id. at 579.

Analogously, even without a Boy Scout position on homosexuals, the Boy Scouts could refuse to retain Dale as a uniformed adult Boy Scout leader, an Assistant Scoutmaster, even if Dale would merely express self-identification in that role. In the context of an organization explicitly designed for the moral education of boys, that would even more powerfully send a message regarding the moral equivalence of homosexual conduct. Surely the Boy Scouts are free under the First Amendment to choose not to send that message to their boys. When Dale goes further, and publicly proclaims his plan to use his position to discredit the Boy Scout position on homosexuality, far more clearly than even in *Hurley* the Boy Scouts may reject that message.[7]

2. The Decision Below Violates the Right to Expressive Association of the Boy Scouts.

As discussed above, the purpose of the Boy Scouts is to teach the boys sound moral values, including the traditional values regarding marriage, fatherhood, and sex. To force the Boy Scouts to accept Dale as a uniformed adult leader violates the group's right to associate with whom they want in order to send the messages they want. *Hurley; Democratic Party of United States v. Wisconsin ex. rel. LaFollette*, 450 U.S. 107, 122 (1981); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487

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[7] Respondent repeatedly attempts to distinguish *Hurley* on the grounds that it is a "pure free speech" case. Brief in Opp. 20, 21, 28. But no one was giving speeches in the *Hurley* parade. Participation in that parade was an expressive act like participation in Boy Scouts. Indeed, participation in Boy Scouts arguably involves more expression, because the Boy Scouts is designed to send particular moral messages, which the parade in *Hurley* was not.

U.S. 1 (1988); *Roberts v. United States Jaycees,* 468 U.S. 609, 633 (1984) (Justice O'Connor concurring wrote, "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."). *See also Minnesota State Bd. For Community Colleges v. Knight,* 465 U.S. 271 (1984).

If the Boy Scouts retain a gay activist as a uniformed adult leader, that sends a clear message about the organization's values. It teaches the boys in the organization certain values regarding the morality of sexual conduct. But these are not the messages and values the organization wants to teach. Indeed, they are the opposite of the traditional moral values the organization seeks to communicate. To force the organization to retain as a uniformed adult leader someone who confounds its message by sending a directly contrary one is an exact violation of constitutionally protected freedom of association.

The main argument of the court below on this issue is the same as on the free speech issue – the Boy Scouts have no message or doctrine regarding homosexuality.[8] Consequently, the ability of the Boy Scouts "to disseminate its message is not significantly affected by Dale's inclusion." (52a.) Also, with no Boy Scout message regarding homosexuality, forcing the Scouts to reappoint Dale as an adult leader would not require the organization to abandon or alter its expressive activities or message, and would not impose any serious burden on the Boy Scouts' expression or

[8] In denying the Boy Scouts protection of the right to expressive association, the Court below said "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral" and "Boy Scouts discourages its leaders from disseminating *any* views on sexual issues." (52a.) The court also again supported this position by arguing that some Boy Scout members dissent from its position on homosexuality, saying, "Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality." Id.

association. Moreover, without a Boy Scout position on homosexuality, Dale has no manifest view contrary to the Boy Scout message.

This shows how important the rewriting of the Boy Scouts' message by the court below and Dale is to their argument in this case. But the contention that the Scouts have no message regarding homosexuality has already been thoroughly rebutted in the discussion of the free speech issue above. Not only do the Scouts have a longstanding position that is directly contradicted by Dale, the Scouts also have the right in any event to decline the message Dale's adult leadership would send.[9]

3. The Decision Below Violates the Right to Intimate Association of the Boy Scouts.

Boy Scout activities involve private, intimate associations between family, friends, and neighbors. Boys participate in the organization through Boy Scout troops usually ranging from 15 to 30 boys. These Scout troops take private hikes and camp out together in remote areas. Scouts and their leaders engage in personal communications on moral and intimate subjects. Their meetings are closed to outsiders except during periods when prospective recruits and their parents may attend. No commercial or business activities are involved. Individual troops are not required to accept all boys that apply, but may exercise discretion based

[9] Respondent quotes the Boy Scouts as stating, "Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy." Brief in Opp. 2. But this is an expression of the openness of the Scouts to all boys regardless of race or ethnic background. It is not a waiver of the organization's right to a message on homosexual conduct. Indeed, boys as well as adult leaders who refuse to comply with the Scout Law or Oath will be denied membership. Moreover, Dale in any event is not a boy seeking Scout membership, but an adult demanding the adult leadership position of an Assistant Scoutmaster.

on size of the troop, commitment to the program by applicants, compatibility, and other factors.

Outsiders should have no right to force their way into such a private, intimate group. Doing so by force of the state violates a basic constitutional right of citizens and groups to choose their own intimate associations. We agree with petitioners that if the Boy Scouts do not qualify for constitutional protection as a private intimate group then no group other than a family would.

The court below rejected the intimate association defense because the "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that [the Boy Scouts] is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." (48a.)

This analysis is plainly erroneous. While millions of boys and adult leaders belong to the Boy Scouts nationwide, the experience of each boy in the organization takes place in the context of a Boy Scout troop of 15 – 30 boys and a few adult leaders. While the Boy Scouts are nonselective in terms of race, or ethnic background, or religion (as long as the boys and adult leaders believe in God), the Boy Scouts are quite selective in the terms relevant here. The Scouts will not accept as adult leaders individuals who cannot promote the organization's moral code by word, deed, and example. Similarly, the Scouts will not accept as members boys who refuse to comply with the Scout Oath and Law. The Scouts are inclusive as to the former issues (race, ethnic background, or religion), but exclusive as to the latter issues (ability to promote and exemplify the organization's moral code), which again are what is relevant here. Lastly, the Boy Scouts do not allow nonmembers to attend meetings except for the purpose of recruitment. Otherwise, among

nonmembers, only families of member boys have limited participation, primarily attendance at award ceremonies.[10]

Finally, most frighteningly, the court below and respondent Dale argue that even if compelling the Boy Scouts to reappoint Dale as a uniformed adult leader violates the organization's rights to freedom of speech and expressive and intimate association, such compulsion is justified because the state has a compelling interest in eradicating discrimination. (63a-64a.) But the Boy Scouts are not engaged in wrongful discrimination. They are engaged in the promotion of traditional values. And, despite the fulminations and obvious prejudices of the court below, the state does not have a compelling interest in the eradication of such traditional values or their promotion. This argument merely displays most powerfully why the decision below is a threat to the freedom of Americans to advance traditional values or, indeed, any other values that may be politically incorrect at the time.

Dale, in fact, has no interest in serving as a Boy Scout leader that would remotely come close to outweighing the rights of the Boy Scouts. The Boy Scout organization is for the boys, not for the Scout leaders. The point of the organization is to teach the boys sound moral values, help them develop bonds with friends, neighbors, and their community, and foster enjoyable experiences for them such as camping trips. The organization is not a vehicle for

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[10] Respondent argues that the Boy Scouts are perfectly analogous to a Rotary club, which this Court has found does not qualify for the right to intimate association. *Rotary*, 481 U.S. at 546-47. But, critically, Rotary clubs are not focused on the moral upbringing, education, and supervision of children. The Boy Scouts are, and the freedom of intimate association is essential to carrying out these purposes properly and effectively. Moreover, the exclusionary practices of the Rotary clubs challenged in *Roberts* were not related to the self-described general philosophy of the organization, unlike this case. Finally, unlike the Boy Scouts, Rotary clubs are organizations for adults and have a substantially commercial purpose and effect. So exclusion of adult members from such clubs presents issues that exclusion from adult leadership in the Boy Scouts does not.

advancing the personal interests of adult Scout leaders, commercial or otherwise. Parents and neighbors may enjoy serving as Scout leaders to provide service to their local community and its children, but that pales to insignificance compared to the core liberty interests of the Boy Scouts discussed above. Moreover, Dale has many other avenues for serving his local community.

In fact, the only interest Dale has asserted in forcing his reappointment as a uniformed adult Scout leader is his desire to impose his own, differing values on the organization. Again, he says that through his forced leadership role he wants to point out to the Boy Scouts "how bad and wrong" their policy regarding homosexuality is. That is not a valid, legitimate interest to outweigh the liberty interests of the Boy Scouts discussed above.

CONCLUSION

For all of the reasons above, the American Civil Rights Union urges this Court to reverse the decision of the court below and dismiss this case.

Respectfully Submitted,

Peter J. Ferrara
Counsel of Record
American Civil Rights Union
1220 Rosecrans St.
#325
San Diego, CA 92106
(619) 222-0770

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In the Supreme Court

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United States

OCTOBER TERM, 1999

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,
vs.
JAMES DALE,
Respondent.

BRIEF OF AMICI CURIAE CALIFORNIA STATE CLUB ASSOCIATION AND NATIONAL CLUB ASSOCIATION IN SUPPORT OF THE POSITION OF PETITIONERS

WILLIAM I. EDLUND
Counsel of Record
ADRIAN MURPHY
900 Front Street, Suite 300
San Francisco, California 94111
Telephone: (415) 956-1900
Facsimile: (415) 956-1152
Counsel for Amicus Curiae California State Club Association and National Club Association

BARTKO, ZANKEL, TARRANT & MILLER
900 Front Street, Suite 300
San Francisco, California 94111
Of Counsel

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. PUBLIC POLICY BARRING DISCRIMINATION APPLIES ONLY TO PUBLIC, NOT TO PRIVATE LIFE	3
II. AFFIRMANCE OF THE DECISION BELOW WILL HAVE A CHILLING EFFECT UPON PRIVATE NON-COMMERCIAL ASSOCIATIONS AND CLUBS THROUGHOUT THE UNITED STATES AND WOULD LEAD TO THE EVISCERATION OF THE FIRST AMENDMENT PROTECTIONS FOR ALL SUCH ASSOCIATIONS AND CLUBS	8
A The Result-Oriented Legislative Definition And Judicial Construction of "Private" Club or Association to Mean "Place of Public Association" or "Business Establishment" are Constitutionally Flawed And Have a Chilling Effect Upon The Membership Selection and Activities of Private Non-Commercial Associations And Clubs	8
B Coerced Companionship And Forced Fraternization Dilute The Constitutionally Nurtured Freedom of Association And Ultimately Will Destroy The Diversity Among Free People That is Enriched by Private Associations and Clubs Safe From Government Regimentation	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

Page

Bell v. Maryland, 378 U.S. 226 (1964) 4

Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 4

Bohemian Club v. Fair Employment and Housing Commission, (1986) 187 Cal. App. 3d 1 11

Civil Rights Cases, 109 U.S. 3 (1883) 4

Curran v. Mount Diablo Council of the Boy Scouts, 17 Cal 4th 670 (1998) ..... *passim*

Edward v. South Carolina, 372 U.S. 229 (1963) 16

Evans v. Newton, 382 U.S. 296 (1966) 4

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) ...4

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston 515 U.S. 557 (1995) 6, 14, 16

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 4

Nat. Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) 15

National Endowment for Arts v. Finley, 524 U.S. 569 (1998) 15, 16

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 8

Olmstead v. United States, 277 U.S. 438 (1928) 7

Pacific-Union Club v. Superior Court (State Franchise Tax Board), 232 Cal.App.3d 60 (1991) 14

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 3, 5, 6

TABLE OF AUTHORITIES

CASES

Page

United States v. Virginia, 518 U.S. 515 (1996) 10

Warfield v. Peninsula Golf & Country Club, 10 Cal 4th 594 (1995) 9

Statutes

Cal. Civil Code §§ 51, 52, 52.2 10

Cal. Penal Code § 422.9 10

Conn. Gen. Stat. § 52-571d(a) 9, 10

Kan. Stat. Ann. §§ 44-1002(h) (West 2000) 9, 10

Kan. Stat. Ann. § 36-501 (West 2000) 9, 10

Mich. Comp. Laws Ann. §§ 37.2301, 37.2303 .....9, 10

Nev. Rev. Stat. § 651.050 (West 2000) 9, 10

Other Authorities

Associations in a Nutshell, Nov. 30, 1999, American Society of Association Executives 6

Bay Area Clubs, Organizations & Associations, A Guide to Getting Involved (April 1, 1999) San Francisco Chamber of Commerce 6

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Bloustein, *Group Privacy: The Right to Huddle* (1977) 8 Rutgers-Camden L. J. 219 7

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Frank and Munro, *The Original Understanding of "Equal Protection of the Law"* (1950) 50 Col. L. Rev. 131 ...4

TABLE OF AUTHORITIES

Page

Gutmann, Amy, editor, *Freedom of Association* (1998) 5, 7, 11, 12, 15

Rosenblum, Nancy L., *Membership and Morals: The Personal Uses of Pluralism in America* (1998) 5, 7

Note, State Power and Discrimination by Private Clubs: First Amendment Protection for Non-expressive Associations (1991) 104 Harv.L.Rev. 835 ..... 8, 12

The Encyclopedia of Associations (33rd ed.) Volume 1 6

INTEREST OF AMICI CURIAE[1]

The California State Club Association ("CSCA") is a California non-profit, mutual benefit corporation. Its membership includes more than 100 private voluntary, non-profit clubs in California that were formed and are operated for recreational and private social purposes. Membership in the clubs is based upon a goal of furthering and preserving conviviality, congeniality and common interests of the individual members. Use of the clubs and their facilities is typically reserved to club members and their accompanied guests.

CSCA's purpose and activities have been and are to monitor judicial decisions of interest to its members, to inform its members of those developments through publications and seminars, and to speak for its members before the state legislature and the courts. CSCA asserts the right of voluntary private clubs and their individual members to enjoy and practice the freedoms of association and assembly guaranteed by the Constitution.

The National Club Association ("NCA") is an association of over 1,000 private clubs which have approximately 1 million individual members. NCA performs at the national level essentially the same functions as CSCA performs in California.

Amici do not advocate or endorse discrimination. Amici's interest in this case arise from their concern that a decision holding a *bona fide* voluntary non-commercial private organization, such as the Boy Scouts, subject to the New

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[1] Pursuant to Rule 37, written consent of counsel of record for all of the parties in this case has been lodged with the Clerk of the Court. No party or parties' counsel authored this brief in whole or in part, and no person or entity other than amici curiae, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief.

Jersey law could have a serious and irreparable prejudicial impact on private clubs and associations throughout the United States. It would send a signal to other states' courts, legislators, and government officials to follow the lead of the New Jersey court in construing similar public accommodation anti-discrimination laws to infringe upon constitutional provisions protecting freedom of association. Amici urge this Court to reverse the judgment below and to make clear that public accommodation anti-discrimination laws may not be constitutionally applied to private voluntary social clubs and associations that are predominantly non-commercial regardless of whether those clubs and associations are expressive or are sending any message.

SUMMARY OF ARGUMENT

Public accommodation anti-discrimination laws cannot be enacted or construed to apply to private voluntary non-commercial associations and clubs because they would intrude upon the constitutionally protected right of association. There are thousands of clubs in the United States, many of which are members of amici, that are private, voluntary and non-commercial with genuinely selective membership, purely social purposes and policies prohibiting commercial or business activities. If this Court sustains the New Jersey Supreme Court decision stretching its "public accommodation" law to include the Boy Scouts, there are few private clubs that would not be exposed to claims based on governmental compelled access laws. Such claims would have a chilling effect upon First Amendment rights, including membership policies, selection of leaders, and typical club activities. They would result in burdensome, expensive and oppressive litigation. The near universal impact of these compelled access laws and claims based on them will inevitably change the composition and quality of life in

private associations and clubs, and the values they help to preserve.

Government intrusion mandating membership and leader selection within private clubs and associations against the shared views and ideals of members of even non-expressive associations would alter and transform those associations, and ultimately undermine and diminish diversity with its universally accepted value to our pluralistic society. It will inevitably raise issues of political intrusion into private associations and present the always lurking danger of the politically correct dogma invading the cloister of private friendships, collegial association, and social discourse. Rather than promoting the goal of greater diversity among free peoples gathering together, congeniality and individuality will be sacrificed under the banner of bias eradication for a sterile collection of governmentally approved homogenous and fungible groups.

ARGUMENT

I.

PUBLIC POLICY BARRING DISCRIMINATION APPLIES ONLY TO PUBLIC, NOT TO PRIVATE LIFE.

New Jersey, like California and all other states, has a deep and continuing interest in "ensuring nondiscriminatory access to commercial opportunities in our society." *Roberts v. United States Jaycees,* 468 U.S. 609, 632 (1984) (O'Connor and Kennedy JJ., concurring). That interest does not extend to private voluntary associations of a non-commercial nature. Discrimination in public and other commercial places is banned, but in our homes, our clubs and other private associations, we are free to choose our associates and companions.

The wall between the ban on discrimination in public arenas and the freedom to choose one's associates in private associations was erected early in the first civil rights era, and has long been recognized by this Court. "In the debates that culminated in the acceptance of the Fourteenth Amendment, the theme of granting 'civil,' as distinguished from 'social,' rights constantly recurred." *Bell v. Maryland* 378 U.S. 226, 294 (1964) (Goldberg, Warren, C.J., and Douglas, JJ. concurring). (Footnote omitted.)

Recognizing its constitutional significance, this Court has insisted upon the clear distinction between legally protected equality of civil rights and unregulated personal choice of social rights. *See Civil Rights Cases,* 109 U.S. 3, 48, 59 (1883) (Harlan, J., dissenting); *Bell v. Maryland,* 378 U.S. 226, 294, 313 (1964). *Accord, Evans v. Newton,* 382 U.S. 296, 298-299 (1966); *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 179-180 (1972) (Douglas, J., dissenting); *Gilmore v. City of Montgomery,* 417 U.S. 556, 575 (1974) (adopting referenced portion of Douglas, J. dissent); *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 547 note 6 (1987). "One central theme emerges from the talk of 'social equality': there are two kinds of relations of men, those that are controlled by the law and those that are controlled by purely personal choice. The former involves civil rights, the latter social rights." *Bell v. Maryland, supra,* 378 U.S. at 294 note 14 (Goldberg, J., concurring) (*quoting* Frank & Munro, *The Original Understanding of "Equal Protection of the Law"* (1950) 50 Col. L. Rev. 131, 148-149).

This distinction between civil and social rights is comparable and sets the same limits to anti-discrimination laws and a state's interest in enforcing those laws. "[T]he Congress that enacted the Fourteenth Amendment was particularly conscious that the 'civil' rights of man should be distinguished from his 'social' rights." *Bell v. Maryland,*

supra, 378 U.S. at 313. Justice Goldberg's opinion emphasized that "the constitutional right of every person to close his home or club to any person" are social rights, which like other "rights pertaining to privacy and private association are themselves constitutionally protected liberties." *Id.*

The freedom to choose one's associates, to form private groups, associations and clubs, and to select leaders for those groups, serve important values. Because "individuals draw much of their emotional enrichment from close ties with others," freedom of association "safeguards the ability independently to define one's identity that is central to any concept of liberty." *Roberts v. United States Jaycees, supra,* 468 U.S. at 619. The freedom of association is integral to being a free person. Freedom to choose one's own companions, colleagues, associates or friends is what being free means.

Private associations and clubs are fundamental building blocks of pluralism and social diversity, a bulwark against the power of the state. *See Roberts v. United States Jaycees, supra,* 468 U.S. at 619 (1984); Alexis de Tocqueville, *Democracy in America,* Vol. 1, 196 (Henry Reeve, trans., Rev. Ed. 1900); C. & M. Beard, *The Rise of American Civilization* Vol. 2, 730-731 (1927) (referring to de Tocqueville and the "tendency of Americans to unite with their fellows for various purposes"). In our increasingly fragmented, mobile and impersonal world, private groups and associations provide a critical sense of belonging, a fellowship and a comfortable environment for social interaction and the pursuit of happiness. Amy Gutmann, *Freedom of Association: An Introductory Essay,* in *Freedom of Association* 3-4 (Gutmann, ed., 1998); Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in*

America 3, 18, 25-26 (1998).[2] Freedom to select leaders and members is essential to the continued vitality and diversity of voluntary private associations and clubs.

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire .... Freedom of association therefore plainly presupposes a freedom not to associate. (Citation omitted.)

Roberts v. United States Jaycees, supra, 468 U.S. at 623. *Accord, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 581 (1995) (a private club may exclude anyone "whose manifest views were at odds with a position taken by the club's existing members").

Just as the Boy Scouts provide emotional enrichment, discipline, fun and identity formation for the young men in

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[2]What was true in de Tocqueville's time is equally true now. There are tens of thousands of private associations and clubs in the United States. *The Encyclopedia of Associations* (33rd ed.) Volume 1 identifies 23,000 national associations, including over 600 fraternal, nationality and ethnic organizations, over 2000 cultural organizations, over 100 social fraternities and sororities, and over 2300 hobby and avocational groups. The Encyclopedia also reports over 110,000 local, state, and regional associations. *Associations in a Nutshell,* Nov. 30, 1999, American Society of Association Executives, http://www.asaenet.org/research/fa. There are over 1000 fraternal, foreign interest, nationality and ethnic associations headquartered in California. NCA membership of over 1000 private clubs represents an estimated 20% of the total universe of 5000 private clubs. There are well over 5 million individual members in the private club community alone and several more millions if nationality, ethnic and cultural organizations and clubs are included. The San Francisco Chamber of Commerce lists over 800 groups in *Bay Area Clubs, Organizations & Associations, A Guide to Getting Involved* (April 1, 1999), including categories from Animals and Arts to Women and Youth. The great variety and distinctiveness of clubs and associations necessarily foster diversity and its accepted values.

Scouting, social clubs provide conviviality, a sense of belonging, a sharing of interests, and pleasure and relaxation for their members. These benefits flow from voluntary associations. They do not blossom in forced association with others one would rather avoid.

> People find in association a value itself. The point is obvious, but it has not received enough judicial attention or protection .... [T]he web of relations housed in an association can take on a tremendous value, greater than the goals of the association.

George Kateb, *The Value of Association,* in *Freedom of Association,* 37 (Gutmann, ed. 1998). *See also,* Bloustein, *Group Privacy: The Right to Huddle* (1977) 8 Rutgers-Camden L. J. 219, 278-279; Nancy L. Rosenblum, *Membership & Morals, supra,* 30. "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness .... [They] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone ..." *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). That right would be diminished and adulterated by the affirmance of the decision below.

II.

AFFIRMANCE OF THE DECISION BELOW WILL HAVE A CHILLING EFFECT UPON PRIVATE NON-COMMERCIAL ASSOCIATIONS AND CLUBS THROUGHOUT THE UNITED STATES AND WOULD LEAD TO THE EVISCERATION OF THE FIRST AMENDMENT PROTECTIONS FOR ALL SUCH ASSOCIATIONS AND CLUBS.

A The Result-Oriented Legislative Definition And Judicial Construction of "Private" Club or Association to Mean "Place of Public Association" or "Business Establishment" are Constitutionally Flawed And Have a Chilling Effect Upon The Membership Selection and Activities of Private Non-Commercial Associations And Clubs.

In 1988, this Court sustained against facial attack a local anti-discriminatory law targeting non-private organizations which were "commercial" and "where business deals are often made." *New York State Club Ass'n v. City of New York,* 487 U.S. 1, 12 (1988). Since then there has been ever increasing governmental intrusion into the membership and activities of *bona fide* voluntary private associations with scant or no attention to a fundamental premise of that decision, namely, the requirement as a matter of constitutional law that they be "sufficiently 'public' in nature" to be regulated. *Id.* at 5; *see also id.* at 12, 18 (referring to the "critical respect of whether business activity is prevalent"); *Note, State Power and Discrimination by Private Clubs: First Amendment Protection for Non-expressive Associations* (1991) 104 Harv.L.Rev. 1835.

Thus, for example, Michigan's Civil Rights Act defines a "place of public accommodation" to include the facilities of

each "private club" which is a "country club or golf club," a "boating or yachting club," a "sports or athletic club," or a non-religious "dining club." Such clubs are expressly excluded from the Act's private club exemption. Mich. Comp. Laws Ann. §§ 37.2301 and 37.2303. Connecticut's equal access law covers a "golf country club" which is defined as any association of twenty or more persons which maintains a golf course of nine holes or more that accepts payments, "directly or indirectly, from or on behalf of non members." Conn. Gen. Stat. §52-571d(a). Nevada's equal access law exempts private clubs yet includes any facility "where food or spirituous or malt liquors are sold", "any place of "exhibition or entertainment", any "service" establishment, any place of "exercise or recreation", and any establishment which serves patrons of such described establishments. Nev. Rev. Stat. § 651.050 (West 2000). The Kansas anti-discrimination statute expressly incorporates "private clubs" within food service establishments, which comprise public accommodations, yet exempts religious, nonprofit fraternal, or social associations smaller than 100 members. Kan. Stat. Ann. §§ 44-1002(h) and 36-501 (West 2000). And in California a private association or club that permits a member to sponsor a non-member's bar mitzvah or allows gratuitous use by non-members of its facilities is exposed to becoming a "business establishment" making it subject to the state's anti-discrimination law. *Warfield v. Peninsula Golf & Country Club,* 10 Cal 4th 594 (1995); Cal. Civil Code § 50.[3] In his concurring opinion, Justice Mosk empha-

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[3]The California Supreme Court held as a matter of law that any revenue from a non-member of a private non-profit country club was a "business transaction" regardless of the character of the "transaction"' (*e.g.*, a member "sponsored" fashion show or wedding reception attended by non-members) or its quality (*e.g.*, the local high school team using the golf facility) or the relationship of the non-member (*e.g.*, non-member employees using club facilities when the club was closed) or whether such "business transactions" provided a net financial benefit.

sized the "vast array of voluntary associations, nonprofit organizations, and charitable groups" potentially subject to California law and presciently cautioned against "interpretation" based "on the personal views of individual judges regarding a preferred composition of a private noncommercial organization." *Id.* at 632. *See also, United States v. Virginia,* (1996) 518 U.S. 515, 601 (Scalia, J., dissenting) (critically referring to Supreme Court dispositions based on the Court's "Members' personal view of what would make a 'more perfect Union' " in the admission policy of Virginia Military Institute).

Violations of such state and local laws may result in substantial and serious exposure to multiple damages, penalties and fines (e.g., California: three times actual damages but no less than $1,000 for "each and every offense," attorney's fees, and criminal sanctions, including possible imprisonment (Cal. Civ. Code § 52, 52.1; Cal. Penal Code § 422.9); Michigan: injunction, damages, punitive damages, costs and attorney's fees (Mich. Comp. Laws Ann. §§ 37.2801, 37.2802); Connecticut: actual damages but no less than $250, statutory civil and attorneys' fees (Conn. Gen. Stat. § 52-571(g)); Nevada: injunction, damages, costs and attorneys' fees (Nev. Rev. Stat. § 651.050); and Kansas: damages for pain and suffering (Kans. Stat. Ann. § 44-1002). Private associations, and their officers and directors, are constantly in peril of application of these laws. If the Boy Scouts — an archetypical voluntary association not

Id. at 599-601, 621-623. The Court ruled that any club becomes a "business establishment" if such non-member "business transactions" were "regular and repeated" (which "business transactions" were less in aggregate than 5% of the Club's total revenues in this case.) *Id.* at 602 note 3. As the dissenting Chief Justice points out, this ruling provides no "principled basis" to determine when a private club is transformed into a "business establishment." *Id.* at 640 (Lucas, C.J.). *See also, Curran v. Mount Diablo Council of the Boy Scouts* ("Curran"); 17 Cal 4th 670, 721-722, 732-733, 733-734 (1998).

resembling a Rotary chapter in any meaningful way (Appendix 482 - 502) — is a "place of public accommodation," there are few private clubs that would not be subject to claims based on government compelled membership requirements.[4] Notwithstanding the New Jersey statutory command not to construe the law to apply to "distinctly private" *bona fide* clubs or places of accommodation, private non-commercial life will have been constitutionalized for government regulation if Respondent prevails. Professor George Kateb makes this exact point:

> If a private social club cannot be free of governmental interference, . . . [t]he right of association is left in a precarious state: if social clubs can be regulated invasively, almost any kind of association can be; and the regulation can proceed with less reluctance.

George Kateb, *The Value of Association, in Freedom of Association, supra,* at 41.

Clubs and associations will be required to vet each proposed club activity to make certain it has no non-member element. Caution will dictate that the club monitor all activities and events, ask each member the identity and position of each guest, and inventory that information for possible government review. Private clubs and associations, on pain of compelled membership of statutorily preferred classes, will become more parochial; charitable, community and other non-member usage will be discouraged or prohibited; and the value to pluralism of many private social,

[4] Neither do the number of troop members nor the attendance of non-members at certain troop meetings demonstrate a lack of that private, intimate atmosphere deserving constitutional protection. In *Bohemian Club v. Fair Employment and Housing Commission* (1986) 187 Cal. App. 3d 1, *appeal dismissed,* (1987) 484 U.S. 805 for example, the court noted that in a 2,000-member men's club "the consequent relationship among members is undoubtedly 'intimate' in associational terms" (187 Cal.App.3d at 13).

recreational, cultural and ethnic organizations and clubs will be diminished or lost. "[G]overnment control over membership policies [of private social clubs] may destroy or irreversibly alter the character of the organization." *Note, supra,* 104 Harv.L.Rev. at 1839. The pervasive impact of laws such as those of New Jersey, California, and others like them, necessarily has a chilling effect on the membership policies and day-to-day activities of even the most private of associations and clubs. *See* Nancy L. Rosenblum, *Compelled Association,* in *Freedom of Association, supra,* 87 ("Once the justification for compelled association is loosed from its tether to public accommodation law and the aim of 'clearing the channels of commerce,' there is nothing to stop the argument to cover every arbitrary and unjustified subordination and exclusion").

B Coerced Companionship And Forced Fraternization Dilute The Constitutionally Nurtured Freedom of Association And Ultimately Will Destroy The Diversity Among Free People That is Enriched by Private Associations and Clubs Safe From Government Regimentation.

Curran, 17 Cal. 4th 670 (1998), the California Supreme Court decision holding the Boy Scouts not to be a "business establishment," is correct and the decision below holding the Boy Scouts to be a "place of public accommodation" is erroneous, but the opinions of both courts are fundamentally flawed. While both opinions engage in complicated "interpretation" and "construction" of the coverage definition citing and referring to dozens of decisions, even a superficial analysis shows that each "merely purports to apply the phrase 'business establishment' in [California Civil Code] section 51 [or "place of public accommodation" in N.J.S.A. 10:5-5] to the peculiar facts presented, and then asserts that its words are broad enough to reach the entity in question." *Id. at* 722 (Mosk, J., concurring). This result orientation

"fail[s] to give guidance for lawful conduct outside of court or for principled decision making within" the court. *Id.*

More importantly, this *ad hoc* approach diverts from the fundamental inquiry with its proper focus on the importance of the constitutional freedoms of private voluntary associations of a non-commercial nature. In California, as in New Jersey and other jurisdictions, "[t]his vice [developing discrimination rules on an *ad hoc* basis] did not become pernicious until recently because the results [of earlier decisions] appeared consistent with the legislative intent to prohibit discrimination by those engaged in commercial activity regardless of its form" *Curran, supra,* 17 Cal. 4th at 733 (Brown, J., concurring). This "pernicious" vice has brought California and, we submit, New Jersey and some other states, to the point where there is an absence of "useful guidance" in determining coverage or "predictability" in applying nondiscrimination laws. In joining in the judgment that the Boy Scouts were not a "business establishment," all four concurring Justices in the California Supreme Court recognized the ambiguity of that term and its erroneous application to the Boy Scouts. *Id.* at 703, *et seq.,* (Mosk, J.), 722, 728 (Kennard, J.), 730, 732-733 (Werdegar, J.), 733-734 (Brown, J.). "[T]he law is a mess . . . [and] now desperately in need of critical reexamination." *Id.* at 733. As this Court has properly focused in the constitutional context on discrimination in public entities and commercial opportunities and activities, the opinions of two of the concurring Justices in *Curran* expressly recognized that "principled" decisionmaking limits the anti-discrimination law to commercial settings — activities involving the providing of goods and services for a price in the course of a non-continuous, non-personal and non-social dealing and not relationships of a gratuitous, continuous,

personal and social nature. *Id.* at 720 (Mosk, J.), 734 (Brown, J.); see also 731 (Werdegar, J.).[5]

The goal of some states since the New York State Club Association decision has not been "ensuring nondiscriminatory access to commercial opportunities in our society;" instead — apparently based on a determination to cleanse all society of improper bias — their purpose appears to be coerced social relations within all associations and clubs as to certain approved classes. Such coercion is constitutionally permissible when public places or commercial associations are involved, but it is essential that this Court not authorize that coercion of voluntary private non-commercial associations. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 579 (1995) (the goal of ridding society of discrimination against certain classes "is a decidedly fatal objective"). Regardless of any message, private non-expressive associations are entitled to constitutional protection. There is "no authority for the premise that intimate associations are relegated to the basement of First Amendment protection while expressive ones glide to the penthouse." *Pacific-Union Club v. Superior Court (State Franchise Tax Board),* 232 Cal.App.3d 60, 77 (1991). If New Jersey and other states have decided, as they are entitled to do, not to remain neutral in the regulation and rationing of economic opportunities to certain preferred categories in the market place, the First Amendment requires that neutrality in homes, private clubs, and Scout troops.

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[5] At least two of those Justices would simply jettison the result oriented construction of past private association decisions and the majority opinion in the Boy Scouts case because those "decisions have almost universally failed to formulate a coherent and comprehensive interpretation of 'business establishment.'" *Id.* at 733 (Brown, J., concurring), 722 (Mosk, J., concurring). *See also, id.* at 732-733 (Werdegar, J., concurring.)

Where the goal is diversity among free people, there can be no question that it is best achieved by autonomous activity by many persons pursuing their own individual interests and ideals without inhibiting government direction, regulation and oversight.

> History and our own observations tell us that in a free society, people associate for the sake of achieving an indefinitely large range of ends. Association is essential to their lives. . . . In pursuing their ends, and needing to associate to do so, people discover numerous sources of pleasure. . . . They discover numerous opportunities for many diverse kinds of experience. Associations of every form provide accommodations for experience, much of it pleasurable.

Kateb, *The Value of Association, in Freedom of Association, supra,* at 37.

A government need not encourage associations whose viewpoint it does not approve, but it cannot constitutionally interfere with the viewpoint of individuals or, we submit, private associations. *Cf. National Endowment for the Arts v. Finley,* 524 U.S. 569, 587-588 (1998) and Souter, J., dissenting at 603 note 2. Many associations through control of their membership criteria or their name alone reflect a viewpoint or an identity which would be changed or destroyed by government access dictates. Hadassah would lose its identity and purpose if forced to admit Buddhist men; the Loyal Orange Institution of the United States of America would suffer a similar fate if compelled to accept a Knight of Columbus; and the Italian Catholic Federation would be significantly transformed if it had to accept Eastern Jews. *See Curran, supra,* 17 Cal. 4th at 729 (Kennard, J. concurring). For the same reasons, private associations and social clubs are constitutionally entitled to preserve their own identity and objectives. A message may be offensive, *Nat. Socialist Party v. Village of Skokie,* 432 U.S. 43 (1977), or

loud and noisy, *Edward v. South Carolina,* 372 U.S. 229, 241 (1963), subtle or not (*cf. National Endowment for Arts v. Finley, supra,* 524 U.S. at 581-585, 590-591, 603-604), or even the result of silence. *Hurley v. Irish-American Gay Group, supra,* 515 U.S. at 574. The decision to include or exclude a message from a communication, like a decision to include or exclude an individual from an association — when no public place or public benefit is present — cannot constitutionally justify "mandated access." *Id.* at 580-581. Regardless of the after-the-fact analysis by the New Jersey Supreme Court about the clarity of the Boy Scouts' historically announced message of its membership criteria, (17a-18a, 36a-39a, 52a-56a), the Scouts cannot be constitutionally compelled to accept as members and leaders those individuals it does not want.

CONCLUSION

For the foregoing reasons, the judgment below must be reversed and this Court should rule that the New Jersey law may not be constitutionally applied to non-commercial private clubs and associations whether expressive or not.

Respectfully submitted,

WILLIAM I. EDLUND
Counsel of Record
ADRIAN J. MURPHY
Counsel for Amicus Curiae
California State Club Association
and National Club Association

BARTKO, ZANKEL, TARRANT & MILLER
900 Front Street, Suite 300
San Francisco, California 94111
Of Counsel

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In the

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF REVERSAL

OF COUNSEL
HAROLD E. JOHNSON
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN H. FINDLEY
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae

27pp

QUESTIONS PRESENTED

1. May government compel a private association with an expressive purpose to accept as a leader someone who rejects the association's tenets?

2. May a court graft onto an expressive association's defining mission an ideology that the association rejects?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

IDENTITY AND INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. THE FREEDOM OF EXPRESSIVE ASSOCIATION THAT THE NEW JERSEY RULING ASSAULTS IS NOT MERELY A CONSTITUTIONAL MANDATE, IT IS ALSO A COMPELLING PRACTICAL NECESSITY FOR PRESERVATION OF PLURALISTIC DEMOCRACY 8

A. Freedom of Expressive Association Is a First Amendment Mandate That Includes the Right of Private Organizations Dedicated to Expressive Purposes to Condition Their Membership Policies So as to Promote Those Purposes 8

B. Boy Scouts of America Enjoys Expressive Associational Rights Just as Much as the Parade Organizers in *Hurley* 10

C. Tocqueville and Other Political Theorists Have Explained How Freedom of Expressive Association Is a Guarantor of Pluralism and a Defense Against Tyranny ... 12

TABLE OF CONTENTS—Continued

Page

II. FREEDOM OF EXPRESSIVE ASSOCIATION BARS COURTS FROM EDITING OR REINTERPRETING THE MISSIONS OR IDEOLOGIES OF SUCH ASSOCIATIONS 16

A. The Boy Scouts' Right to Expressive Association Includes the Freedom to Define Their Teaching for Themselves 16

B. The New Jersey Court Implicitly Demands That the Scouts Adopt a Strident Tone in Order to Secure Judicial Protection for Scouting Principles 18

C. The New Jersey Court's Reinterpretation of Scout Doctrine Verges on Theological Speculation, an Indulgence Prohibited to the Courts 19

D. To Deny the Scouts' Right to Determine Their Own Policies and Principles Would Imperil All Other Expressive Associations ... 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases

Arkansas Educational Television Commission v. Forbes, 118 S. Ct. 1633 (1998) 1

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670 (1998) 3, 11-12, 16-17, 20

Dale v. Boy Scouts of America, 308 N.J. Super. Ct. App. Div. 516 (1998) 2-5, 10-12, 16, 18-19

Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457 (1997) 1

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) 5-6, 8-9, 11-12, 17

Keller v. State Bar of California, 496 U.S. 1 (1990) 1

Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) 18

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995) 1

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 1

Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993) 7, 10, 14-15

Widmar v. Vincent, 454 U.S. 263 (1981) 19

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

William N. Eskridge, Jr., "A Jurisprudence of 'Coming Out': Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law, 106 Yale L.J., 2411 (June, 1997) 8-9

Seymour Martin Lipset, Martin Trow, and James Coleman, *Union Democracy* 82-83 (Anchor Books, 1962) (quoting Alexis de Tocqueville: *Democracy in America*, (Alfred A. Knopf, Inc., 1945) at 376-86) 13

Seymour Martin Lipset, *Political Man* 67 (Doubleday & Co., Inc. 1960) 14

Robert A. Nisbet, *The Quest for Community*, at 256 (Oxford University Press, 1953) 15, 16

Alexis de Tocqueville, *Democracy in America* 177 (J.P. Mayer and Max Lerner, eds., Harper & Row, 1966) 6, 13, 14, 17

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of reversal.[1] Written permission for amicus participation in this case was granted by counsel of record for all parties and has been lodged with the Clerk of this Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in the United States. Founded in 1973, PLF provides a voice in the courts for individuals who believe in limited government and individual freedom. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has a tradition of litigating in support of First Amendment rights. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1 (1990). PLF has also participated as a friend of the court in many other First Amendment cases this Court has heard. *See Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633 (1998); *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995); and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

Additionally, because PLF is a private nonprofit organization with a stated philosophical purpose, the Foundation has an institutional interest in championing freedom of association and in particular the liberty of private expressive

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

organizations to define their goals without government coercion.

PLF submitted a friend of the court brief in the case at bar, in support of Petitioners' petition for certiorari; PLF now seeks to augment the arguments of Petitioners by further elucidating the grave implications for American freedom if government is allowed to dictate to private expressive associations their principles and membership policies. PLF believes its public policy perspective and litigation experience dealing with constitutional law will provide a unique viewpoint on issues in this case. PLF believes this additional viewpoint will aid this Court in the resolution of this case.

STATEMENT OF THE CASE

The Boy Scouts of America is a nonprofit, private organization incorporated in 1910. Unlike a recreational facility open to any and all, the Scouts operate with specified membership criteria. For instance, willingness to express a belief in God is a basic and distinguishing philosophy and purpose. Participants meet regularly in small groups, often in private homes, with the aim of fostering fellowship and trust. The organization's ideals are announced in its Mission Statement:

> It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential. The values we strive to instill are based on those found in the Scout Oath and Law:

> Scout Oath
>
> On my honor I will do my best, To do my duty to God and my country to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight.

Quoted in Dale v. Boy Scouts of America, 308 N.J. Super. Ct. App. Div. 516, 524 (1998).

Scouting's leaders maintain that the duty to remain morally straight encompasses a view with respect to homosexuality, among other principles. This position is reflected in a 1978 memorandum by the national Scout leadership:

> "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?
>
> A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership.
>
> Q. May an individual who openly declares himself to be a homosexual be a registered unit member?
>
> A. No. As the Boy Scouts of America is a private, membership organization, participation in the program is a privilege and not a right. We do not feel that membership of such individuals is in the best interests of Scouting."

Quoted in Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 735 n.7 (1998).

James Dale, a veteran Boy Scout, applied for adult membership and leadership status in Scouting about the time he entered college. It was also around this time that he announced to friends and family that he was gay, and eventually he became co-president of the Rutgers University Lesbian/Gay Alliance. In July, 1990, he was interviewed by the *Newark Star-Ledger* in connection with a seminar he attended relating to gay and lesbian teenagers. The newspaper article identified him as co-president of the Rutgers Gay/Lesbian organization.

Upon learning of this information, the Monmouth Council of the Boy Scouts revoked Dale's membership. In a letter to Dale, the Council cited as grounds for this action, "[T]he standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals."

The assistant regional director of the Scouts' Northeast Region, and the Scouts' National Council, both offered similar explanations for Dale's termination. Dale declined to seek National Council review of the issue, instead bringing a lawsuit in New Jersey state court challenging the Scouts' right to exclude him.

The trial court rejected Dale's claim that New Jersey's Law Against Discrimination applied to the Boy Scouts. The court also found that the Boy Scouts' position with respect to active homosexuality was clear and the Scouts had a First Amendment right not to accept Dale as an adult leader. *Dale v. Boy Scouts of America*, No. MON-C-330-92 (Ch. Div. Nov. 3, 1995), at 71.

Appellate Division reversed and remanded for further proceedings, holding that Scouting is a "public accommodation" subject to antidiscrimination laws, and the organization could not bar Dale from being a volunteer assistant Scoutmaster solely because of his announced sexual orientation. The court also declared that the Scouts did not have a First

Amendment right to restrict membership according to sexual orientation. *Dale v. Boy Scouts of America*, 308 N.J. Super. Ct. App. Div. at 516.

The New Jersey Supreme Court upheld the Appellate Division's ruling that for the Scouts are subject to state antidiscrimination law, and that applying that law does not violate the First Amendment. *Dale v. Boy Scouts of America*, 160 N.J. 562, 624 (1999).

The Boy Scouts petitioned this Court for a Writ of Certiorari. This Court granted the writ on January 14, 2000 (No. 99-699).

SUMMARY OF ARGUMENT

This case asks whether the Boy Scouts of America will be allowed to define their own principles and to condition membership accordingly, or whether, to the contrary, government may impose upon a private, expressive association an altered mission and reworked ideology. Because the Scouts are a voluntary organization dedicated to certain ethical propositions, the question of whether they may adhere to their own vision puts to the test the constitutional freedom of expressive association.

On this issue, the First Amendment does not equivocate. The sturdy defense that it accords freedom of expressive association was recognized by this Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), which upheld the right of a St. Patrick's Day Parade to exclude a contingent of openly gay marchers because their message was not the Parade's message. The case at bar calls for a comparable acknowledgment of constitutional principle. The Boy Scouts are every bit as much a private expressive enterprise as a parade. *Hurley* explicitly says that the parade organizers' right to restrict participation so as to control their message is similar to a private club's right to

exclude an applicant who rejects the club's principles. *Id.* at 580-81.

The New Jersey Supreme Court does not stop at forcing on the Scouts a *member* at odds with their historic policies. The court also forces on the organization a *philosophy* that jars with its organization's traditions. In pronouncing that Scouting's defining doctrines do not include opposition to homosexuality, the New Jersey Supreme Court contradicts Scout leadership. Beyond the fact that there is significant evidence contradicting the New Jersey Court's reinterpretation of Scouting principles, the court's pronouncement is audacious because it so brazenly flouts the First Amendment. Freedom of speech means that private speakers--and private expressive associations--can craft their messages free from government attempts to critique or tweak. If government were permitted to dictate doctrine and membership rules to voluntary expressive associations, the boundary between public and private sectors would be marked in disappearing ink. Expressive freedom in the private sector would be a revocable privilege rather than a bedrock right.

The liberty of expressive association that the New Jersey Court assaults plays a key role in the infrastructure of ordered liberty. It nurtures the multitudes of private organizations that promote shared causes and hone habits of cooperation and responsibility. Such private expressive associations, representing the entire range of philosophical outlooks, counterbalance centralizing trends in government and society. They are the life force of American diversity and pluralism. As alternative centers of allegiance and involvement, they ensure that there are institutions other than the state to which individuals look for philosophical kinship and tutelage. This is why Tocqueville celebrated America's profusion of private associations as not merely a force for social betterment but also as a "dike to hold back tyranny of whatever sort." Alexis de Tocqueville, *Democracy in America* 177 (J.P. Mayer and Max Lerner, eds., Harper & Row, 1966).

In the context of affirming that federal law does not require the Boy Scouts to admit atheists, the United States Court of Appeals, Seventh Circuit, has noted Scouting's status as one of those mediating institutions that serve as schools and safeguards of liberty:

> When the government, in this instance through the courts, seeks to regulate the membership of an organization like the Boy Scouts in a way that scuttles its founding principles, we run the risk of undermining one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs.

Welsh v. Boy Scouts of America, 993 F.2d 1267, 1278 (7th Cir. 1993).

Regardless of whether one agrees with the particular Scout policy that is challenged by Mr. Dale, upholding the Scouts' right to adhere to that policy is essential to the organization's independence, to the expressive rights of all other associations, regardless of their perspectives, and to the vitality of American pluralism and freedom.

ARGUMENT

I

THE FREEDOM OF EXPRESSIVE ASSOCIATION THAT THE NEW JERSEY RULING ASSAULTS IS NOT MERELY A CONSTITUTIONAL MANDATE, IT IS ALSO A COMPELLING PRACTICAL NECESSITY FOR PRESERVATION OF PLURALISTIC DEMOCRACY

A. Freedom of Expressive Association Is a First Amendment Mandate That Includes the Right of Private Organizations Dedicated to Expressive Purposes to Condition Their Membership Policies So as to Promote Those Purposes

The First Amendment right of a private expressive organization to align its membership with its message was unanimously affirmed by this Court in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). The Court declared that Massachusetts could not compel a St. Patrick's Day Parade to admit a group aiming to "celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants." *Id.* at 569-70, 578. The Court found that the parade constituted "expressive activity"--even if it lacked any "narrow, succinctly articulable message." *Id.* at 570. Therefore, for the state, through an anti-discrimination law or any other instrument, to compel the parade to accept "an expressive contingent with its own message" would violate the organizers' First Amendment rights. *Id. at* 580-81.

> "[T]he best reading of Hurley is to establish the following canon of statutory interpretation:
>
> General antidiscrimination statutes will not be read expansively, beyond their clear application, when the broad reading would directly burden protected First Amendment rights. Such a clear statement rule not only would ameliorate clashes between nondiscrimination and free speech norms but would appropriately place the burden on the legislature to consider First Amendment values when it adopts antidiscrimination laws."

William N. Eskridge, Jr., "A Jurisprudence of 'Coming Out': Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law, 106 Yale L.J., 2411, 2462-63 (June, 1997).

The New Jersey Supreme Court flouted this message in the case at bar, insisting on exalting a statute or rather, an expansive interpretation of the statute over the Constitution's protection of free speech.

So uncompromising is the Constitution that not even the goal of promoting broad-mindedness or liberality would justify forcing on speakers a message that is not their own:

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.

Hurley, 515 U.S. at 579.

For many contemporary Americans, the Boy Scout policy at issue here is an affront to modern orthodoxy, and certainly there are many people of goodwill who disagree with it. From the standpoint of the Constitution, however, those facts are not relevant. Under the First Amendment, heresy and orthodoxy find equal shelter. Even if one believes the Scouts are wrong in their policy, their right to be wrong is shielded by the First Amendment.

B. Boy Scouts of America Enjoys Expressive Associational Rights Just as Much as the Parade Organizers in *Hurley*

The expressive, philosophically focused mission of the Boy Scouts is self-evident from their defining formulae and their traditional membership criteria.

> Although the Scouts intentionally admit a large number of boys from diverse backgrounds, admission to membership is not without the exercise of sound discretion and judgment. This is evident from the Constitution and By-laws as well as the Boy Scouts Oath and Scout Law. The Oath reflects the commitment of each member, and has remained unchanged since the publication of the Scouts' first handbook in 1911. . . .
>
> . . . .
>
> This Oath offers a clear statement of the beliefs, principles and purpose of the Scouts, i.e., to nurture belief in God, respect for one's country and his fellow man, and being of good moral character.

Welsh v. Boy Scouts of America, 993 F.2d 1267, 1276 (7th Cir. 1993).

Even the New Jersey Supreme Court acknowledges that the Scouts are an expressive organization:

> [W]e agree that Boy Scouts *expresses a belief in moral values* and uses its activities to *encourage the moral development* of its members.

Dale v. Boy Scouts of America, 160 N.J. 562, 613 (1999) (citations omitted; emphasis added). The Scouts are involved in "Disseminat[ing a] message. . . ." *Id.* at 612 (emphasis added).

But logic gives way to ideology as the New Jersey Supreme Court goes on to deny the Scouts the First Amendment protections accorded the *Hurley* parade, essentially on the grounds that Scouting, by some delicate judicial calculus, is *not expressive enough*. The court asserts that the Scouts cannot deny a leadership role to Mr. Dale because "Boy Scout leadership [is not] a form of 'pure speech' akin to a parade." *Id.* at 623.

The truth is, Boy Scout operations are significantly *more* expressive than a parade. This Court found a St. Patrick's Day Parade expressive enough to warrant First Amendment protection even though it lacked any "narrow, succinctly articulable message." It was enough that a "parade" generically is understood as "includ[ing] marchers who are making some sort of collective point, not just to each other but to bystanders along the way." *Hurley*, 515 U.S. at 558, 569.

In contrast to a parade without a "succinctly articulable" message, the Scouts maintain a Mission Statement, and an "oath" deemed so important that the oath-taker pledges his "honor." The organization sees its leaders who join in this Oath as communicating a message, as clearly implied in a 1978 Scout memorandum:

> "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout Leader?
>
> A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership.

Quoted in Curran v. Mount Diablo Council of Boy Scouts, 17 Cal. 4th 670, 735 n.7 (1998).

According to the New Jersey Supreme Court, "Dale's status as a scout leader is not equivalent to a group marching in a parade" because "Dale does not come to Boy Scout meetings . . . to promote homosexuality, or any message inconsistent with Boy Scouts' policies." *Id.* at 623. Here, too, the court departs from the guidance of *Hurley,* which recognizes that voluntary organizations may be expressive in character without being as public as a parade. According to *Hurley*, the St. Patrick's Day Parade could condition participation "*just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.*" *Hurley*, 515 U.S. at 581 (emphasis added). Mr. Dale's leadership in a campus lesbian/gay organization and his interview with a newspaper made his views "manifest" and so triggered his exclusion by the Boy Scouts. *Dale*, 160 N.J. at 577-79. Regardless of how one views the wisdom of Scout's policy, the Scouts have as much constitutional freedom to implement it as did the parade organizers in *Hurley*.

C. Tocqueville and Other Political Theorists Have Explained How Freedom of Expressive Association Is a Guarantor of Pluralism and a Defense Against Tyranny

The freedom of expressive association that is protected by the First Amendment--the freedom that shields the Scouts' right to impose membership criteria to advance Scout principles--plays a crucial practical role in the structure of American Liberty. Indeed, having a multitude of robust, independent voluntary associations appears to be one of the preconditions for a society to enjoy stable freedom.

One of the earliest efforts to define the relationship between voluntary organizations and freedom in the political realm was advanced by the French scholar

Alexis de Tocqueville. Writing in the early 19th Century, Tocqueville

> "wanted to find out why the United States alone among the countries of his day had a successful and stable democratic political order. He pointed to the fact that as compared with Europeans of his day, 'Americans . . . constantly form associations.' "

Seymour Martin Lipset, Martin Trow, and James Coleman, *Union Democracy* 82-83 (Anchor Books, 1962) (quoting Alexis de Tocqueville: *Democracy in America*, (Alfred A. Knopf, Inc., 1945) at 376-86).

Tocqueville offered a vivid summary of Americans' associational impulse:

> There are not only commercial and industrial associations in which all take part, but others of a thousand different types--religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give fetes, found seminaries, build churches, distribute books, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. Finally, *if they want to proclaim a truth or propagate some feeling by the encouragement of a great example,* they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.

Tocqueville, *Democracy in America*, at 485 (J.P. Mayer and Max Lerner, eds., Harper & Row, 1966) (emphasis added).

Tocqueville argued that Americans' tendency to associate did more than merely contribute to social betterment. It also served as a counterforce to centralizing tendencies in

government and society, and thus tempered "omnipotence" of the majority. It acted as a "dike to hold back tyranny of whatever sort." *Id.* at 177.

Tocqueville's insight has been embraced and expanded upon by a number of 20th Century political theorists:

> Tocqueville and [twentieth century] exponents of what has come to be known as the theory of the 'mass society' have argued that a country without a multitude of organizations relatively independent of the central state power has a high dictatorial as well as revolutionary potential. Such organizations serve a number of functions: they inhibit the state or any single source of private power from dominating all political resources; they are a source of new opinions; they can be the means of communicating ideas, particularly opposition ideas, to a large section of the citizenry; they train . . . in political skills and so help to increase the level of interest and participation in politics. Although there are no reliable data on the relationship between national patterns of voluntary organization and national political systems, evidence from studies of individual behavior demonstrates that, regardless of other factors, [individuals] who belong to associations are more likely than others to give the democratic answer to questions concerning tolerance and party systems, to vote, or to participate actively in politics.

Seymour Martin Lipset, *Political Man* 67 (Doubleday & Co., Inc. 1960) (*citations omitted*).

> The central question for those concerned about maintaining the health of our republic must be, "how do individuals acquire the virtues necessary for self-government?" History provides only one answer:

> through the institutions of civil society, like the family, religious groups, and voluntary associations, which inculcate a sense of moral values in the young.

Welsh v. Boy Scouts of America, 993 F.2d 1267, 1278 (7th Cir. 1993).

Some theorists see freedom threatened in modern democracies by a concerted drive to divest private associations of their uniqueness and sap them of their strength. The ultimate result would be a society deprived of those mediating institutions that serve as alternatives to the central government as focuses of people's allegiance and involvement:

> It has surely become obvious that the greatest single internal problem that liberal democracy faces is the preservation of a culture rich in diversity, in clear alternatives--*and this is a cultural problem that cannot be separated from the preservation of the social groups and associations within which all culture is nourished and developed.* . . . The State grows on what . . . it takes from competing social relationships--family, labor union, profession, local community, and church.

Robert A. Nisbet, *The Quest for Community*, at 256 (Oxford University Press, 1953) (emphasis added).

For some exponents, this analysis takes on urgency in the wake of the lessons of 20th Century totalitarianism. The totalitarian regimes have shared at least one unifying principle: *absence of truly independent voluntary associations.* Such a society is marked by

> [T]he absolute, the total, political community. As a community it is made absolute by the removal of all forms of membership and identification which might, by their existence, compete with the new

> order. It is, further, made absolute by the insistence that all thought, belief, worship, and membership be within the structure of the State."

Id. at 204-05.

By denying the Scouts' right to operate according to their own philosophical lights--and by imposing instead a government dictate as to who must be made a Scout leader--the New Jersey Supreme Court hints at an absolutist vision hostile to genuine independence for private associations. Not just Scouting's independence is threatened, but that of expressive associations of all philosophical stripes. The court's vision is alien to the First Amendment and poisonous to the diverse flowering of voluntary organizations that has long been America's pride and freedom's protection.

II

FREEDOM OF EXPRESSIVE ASSOCIATION BARS COURTS FROM EDITING OR REINTERPRETING THE MISSIONS OR IDEOLOGIES OF SUCH ASSOCIATIONS

A. The Boy Scouts' Right to Expressive Association Includes the Freedom to Define Their Teaching for Themselves

Not content with merely commanding the Boy Scouts to admit someone whom they rejected for philosophical reasons, the New Jersey Supreme Court makes bold to foist on the Scouts the court's own interpretation--or editing--of Scout doctrine. For instance, the court declares that the "Scout Oath" pledge to be "morally straight," does not on its face, "express anything about sexuality." *Dale*, 515 U.S. at 614.

This reading of Scout doctrine confronts significant contrary evidence. For instance, in litigation in California concerning Boy Scout membership policies, the Scouts

> introduced a memorandum written in 1978 by the national Boy Scouts of America setting forth--in question and answer form--the official position of the Boy Scouts relating to homosexuality and scouting. The document states in relevant part:
>
> "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?
>
> A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate."

Curran, 17 Cal. 4th at 735 n.7.

More fundamentally, the New Jersey Court's ideological correction of the Scouts violates the constitutional principle that a private expressive organization has the right to define its own creed. It is a "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573.

This First Amendment doctrine ensures the integrity and independence of private associations, protecting against a danger that Tocqueville observed in his day, on his native continent:

> In all European nations some associations cannot be formed until the state has examined their statutes and authorized their existence. In several countries efforts are made to extend this rule to all associations. One can easily see whither success in that would lead.

Tocqueville, *Democracy in America*, at 662.

The New Jersey Supreme Court has subjected Scout principles--or "statutes," to use Tocqueville's term--to a critical review and found them wanting. If allowed to stand, this judicial overreach would move the United States in the direction of those nations described by Tocqueville where private associations needed government preapproval of their message before they could formally be established.

B. The New Jersey Court Implicitly Demands That the Scouts Adopt a Strident Tone in Order to Secure Judicial Protection for Scouting Principles

The Constitution does not require a speaker--or an expressive organization--to shout a message in order to enjoy free speech rights. "[P]rotected expression may also take the form of *quiet persuasion*, inculcation of traditional values, instruction of the young." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) (emphasis added). The New Jersey Supreme Court is deaf to this principle in its refusal to acknowledge the Scouts' First Amendment liberty. The court suggests that the absence of explicit references to homosexuality in the Scout Oath defeats Scouting's claim that it has an official position on the subject, and so justifies the court in forcing the Scouts to accept Mr. Dale as a leader. 160 N.J. at 614.

Does this mean that only if the Scouts bellow their message are they to be permitted to act on it? But what if "quiet persuasion"--an avoidance of stridency--is itself part of the Scouts' chosen form of expression? Why must the organization adopt a vociferous voice in order to be secure in its rights? In fact, any such requirement is repugnant to the Constitution. The First Amendment gives the Scouts freedom to speak in tones of their own choosing without fear that their message can be silenced for not being sufficiently shrill.

C. The New Jersey Court's Reinterpretation of Scout Doctrine Verges on Theological Speculation, an Indulgence Prohibited to the Courts

Among the New Jersey Supreme Court's justifications for supplanting the Scouts' philosophy with its own is that Boy Scouts of America has a working relationship with various churches and there is evidence that "the Boy Scouts' religious sponsors differ in their views about homosexuality." *Dale*, 160 N.J. at 615. Invoking religious doctrine--or asserted doctrinal differences between or within religions--carries the judiciary toward forbidden terrain, because it involves judges in trying to define what particular religious groups *believe*. Such inspection of conscience and catechism has generally been regarded as beyond judicial authority. Inquiring "into the significance of words and practices to different religious faiths . . . would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Widmar v. Vincent*, 454 U.S. 263 (1981).

The fact that the Boy Scouts themselves have an avowed commitment to God makes judicial review of their mission especially ominous. The Scouts do not hold themselves out to be a church, but they do make an institutional assertion of the existence and importance of a higher power. If the New Jersey court has no qualms about inquiring into--and, indeed, aggressively challenging--"the significance of words and practices" of an organization with a religious component in its teaching, how much more vulnerable to court dictation are expressive organizations that are overtly secular? Fortunately, the First Amendment stands against such judicial forays into realms of private expression. It protects speakers, religious and secular alike, from government efforts to augment or edit their messages.

D. To Deny the Scouts' Right to Determine Their Own Policies and Principles Would Imperil All Other Expressive Associations

In *Curran v. Mount Diablo Council of Boy Scouts*, 17 Cal. 4th 670, the California Supreme Court ruled that the Boy Scouts did not constitute a "business establishment" and so were not barred under California antidiscrimination law from excluding an admitted homosexual from leadership.

In her concurring opinion, Justice Kennard addressed federal constitutional issues. Citing *Hurley,* she observed that the First Amendment protected the Boy Scouts' right to exclude the plaintiff:

> Were we to hold that the membership decisions of the Boy Scouts of America are subject to regulation under [California civil rights law], the organization would have a compelling argument that requiring it to accept plaintiff, or anyone else who espouses views contrary to its guiding precepts, violates the First Amendment rights of expressive association and free speech enjoyed by the organization and its members.

Curran, 17 Cal. 4th at 725-26.

Justice Kennard noted how chilling it would be for associations of varying viewpoints if the Boy Scouts were denied expressive rights:

> Could the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-semite? If the First Amendment protects the membership decision of these groups, must it not afford the same protection to the membership decisions of the Boy Scouts?

Id. at 729.

If the Boy Scouts are stripped of First Amendment protection, what confidence can any other association have that it might not also one day be subjected to government thought control if their doctrines fall afoul of a shift in public sentiment?

CONCLUSION

To compel private associations to hew to a governmentally approved line of thinking would transform such associations from outposts of pluralism into agents of majoritarian uniformity. The First Amendment protects against such a coercive homogenizing of American Culture. It declares that private expressive associations can define their principles without supervision or preclearance by lawmakers or the courts, and can implement policies that conform with those principles. As a voluntary, private, expressive organization, the Boy Scouts are entitled to the full benefit of these associational freedoms. The test of the nation's commitment to freedom comes when that freedom is invoked in behalf of a controversial idea. The fact that the Scout policy challenged by Mr. Dale is controversial does not strip the Scouts of the right to embrace it. To the contrary, it makes it even more imperative that their rights be affirmed. Amicus Pacific Legal Foundation therefore urges this Court to reverse the ruling by the New Jersey Supreme Court.

DATED: February, 2000.

Respectfully submitted,

OF COUNSEL
HAROLD E. JOHNSON
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN H. FINDLEY
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF NATIONAL CATHOLIC COMMITTEE ON SCOUTING, GENERAL COMMISSION ON UNITED METHODIST MEN OF THE UNITED METHODIST CHURCH, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE LUTHERAN CHURCH-MISSOURI SYNOD, AND THE NATIONAL COUNCIL OF YOUNG ISRAEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

VON G. KEETCH
Counsel of Record
ALEXANDER DUSHKU
KIRTON & MCCONKIE
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
(801) 328-3600
Attorneys for Amici

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. WITH THE FULL INVOLVEMENT OF CHURCHES AND SYNAGOGUES, SCOUTING IN AMERICA WAS FOUNDED AS A MOVEMENT TO TEACH AND INSTILL IN BOYS A SPECIFIC SET OF MORAL PRECEPTS AND CHARACTER TRAITS	5
A. The Birth of the Scouting Movement: The British Vision of Scouting	6
B. The Scouting Movement in America: Religion at the Fore	9
II. SCOUTING CONTINUES TO BE AN EXPRESSIVE, VALUE-INCULCATING MOVEMENT THAT MANY CHURCHES AND SYNAGOGUES HAVE ADOPTED AS A MEANS OF YOUTH MINISTRY	14
A. Today's Scouting Continues the Tradition of Character Education	14
B. Scouting Promotes an Affirmative Vision of What a Man Should Be	16
C. Scout Patrols and Troops are Intimate, Expressive, and Value-Inculcating Associations Where Adult Scout Leaders Guide the Development of Impressionable Boys	17
D. Churches and Synagogues Presently Sponsor the Majority of Scout Troops Nationwide and Almost Half of Those in New Jersey, Infusing Scouting's Religious Themes and Character Training With Meaning That Is Specific to Their Particular Religious Traditions	20

TABLE OF CONTENTS—Continued

Page

III. COERCING BOY SCOUTS OF AMERICA TO INSTALL OPENLY HOMOSEXUAL SCOUT LEADERS VIOLATES THE FIRST AMENDMENT 23

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 25
Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 566 (1995) 24, 27
Jones v. Wolf, 443 U.S. 595 (1979) 27
Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) 5
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 23
New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 25
Randall v. Orange County Council, 17 Cal. 4th 736, 952 P.2d 261 (1998) 15, 27
Roberts v. United States Jaycees, 468 U.S. 609 (1984) 5, 20, 24, 25, 29
Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 26
Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) 27
Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993) 27
Widmar v. Vincent, 454 U.S. 263 (1981) 26

STATUTES

N.J. Stat. Ann. §§ 10:5-1 to -49 (West 1993) 5
29 U.S.C. §§ 151 to 169 30

MISCELLANEOUS

Acts 6:6 (King James) 22
ROBERT BADEN-POWELL, SCOUTING FOR BOYS (22nd ed. 1944) 7, 8
BOY SCOUTS OF AMERICA, THE BOY SCOUT HANDBOOK (10th ed. 1990) 10-12, 14, 15, 17, 18
BOY SCOUTS OF AMERICA, THE BOY SCOUT HANDBOOK (11th ed. 1998) 11, 12, 14, 15, 19
Boy Scouts of America, *Foundations for Selecting Unit Leaders* (BSA pamphlet) 20
Virgil Burke, *Redefining Your Troop's Religious Program*, SCOUTER MAGAZINE, vol. 1, issue 6 (ca. 1999) 15

TABLE OF AUTHORITIES—Continued

	Page
CHARTER AND BYLAWS OF THE BOY SCOUTS OF AMERICA, art. IX, § 1, cl. 1 (Declaration of Religious Principle) (Sept. 1998)	13
GBCS Communications, *Some Frequently Asked Questions about GBCS* (visited Feb. 24, 2000) <http://www.umc-gbcs.org/faqgbes.htm>	2
Terry Howerton, *Our Mission*, SCOUTER MAGAZINE, vol. 1, issue 6 (ca. 1999)	19
ROBERT H. MACDONALD, SONS OF THE EMPIRE (1993)	8
ANCORA E. MILANO, FOOTSTEPS OF THE FOUNDER (1984)	9
WILLIAM D. MURRAY, THE HISTORY OF THE BOY SCOUTS OF AMERICA (1937)	4, 8-13, 18
MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS (1991)	29
Psalms 4:3 (King James)	22
MICHAEL ROSENTHAL, THE CHARACTER FACTORY: BADEN-POWELL AND THE ORIGINS OF THE BOY SCOUT MOVEMENT (1986)	6-9
ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer ed. & George Lawrence trans., Harper-Perennial 1969) (1835)	27-29

INTEREST OF THE *AMICI CURIAE*

Among all of Scouting's supporters, there are none more important to Boy Scouts of America ("BSA") than *amici*.[1] The organizations joining in this brief are by far the largest religious sponsors of Scouting in America. Religious institutions charter over 60% of all Scouting units in the United States. Of these, a full two-thirds are chartered by *amici*. Nationally, *amici* sponsor over 50,000 Scouting units and almost 1.2 million scouts, with over 20,000 scouts in New Jersey alone.

For many decades *amici* have employed Scouting as a tool of religious ministry, making Scouting an integral part of their youth programs. The right of BSA and its sponsoring organizations to determine eligibility requirements for scout leaders is therefore of paramount importance, directly impacting the ability of these *amici* to organize and control their Scouting programs.

1. *Amicus* National Catholic Committee on Scouting ("NCCS") oversees the Catholic Church's Scouting ministry in the United States. The purpose of the NCCS is to utilize and ensure the constructive use of the Scouting program as a viable form of youth ministry within the Catholic Church. Nationwide, the Catholic Church sponsors over 355,000 scouts and almost 10,000 Scouting units (troops and packs), making it the third largest sponsor of Scouting units among religious institutions in the United States. In New Jersey, the Catholic Church is the largest religious supporter of Scouting, sponsoring over 14,000 scouts and about 370 Scouting units.

2. *Amicus* General Commission on United Methodist Men of The United Methodist Church ("United

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief in whole, and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

Methodist Men") is the church-wide organization within The United Methodist Church authorized to oversee and coordinate the denomination's Scouting ministries. It carries out these responsibilities through the Office of Scouting Ministries, whose National Director reports directly to the General Secretary of the United Methodist Men. In this brief, the United Methodist Men speaks for the Office of Scouting Ministries. Nationwide, The United Methodist Church sponsors over 424,000 scouts and almost 12,000 Scouting units, making it the largest single sponsor of individual scouts and the second largest sponsor of Scouting units in the United States. In New Jersey, The United Methodist Church sponsors over 8,000 scouts and almost 200 Scouting units.

Another Methodist organization—the General Board of Church and Society (the "GBCS")—joined an *amici curiae* brief in opposition to the Petition for Writ of Certiorari and may file an *amicus* brief on the merits in support of James Dale. To clarify, the GBCS neither oversees nor manages Scouting in The United Methodist Church. The GBCS's principal focus is social and political advocacy on behalf of a variety of issues. The GBCS does not speak for the Church's Office of Scouting Ministries.[2]

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[2] The prime responsibility of the GBCS is to seek the implementation in society of the Social Principles of The United Methodist Church. According to the GBCS's website, the major issues GBCS works on are: "Environmental justice issues such as endangered species and genetic science; Social and economic justice concerns such as gambling and campaign finance reform; Peace with justice issues such as immigration and military spending; Women's issues, reproductive rights, human sexuality; Civil and human rights such as the death penalty and gun control; Health care issues such as mental illness and HIV/AIDS; Children, youth and family concerns such as welfare reform and public education." GBCS Communications, *Some Frequently Asked Questions about GBCS* (visited Feb. 24, 2000) <http://www.umc-gbcs.org/faqgbes.htm>. Neither the United Methodist Men nor the GBCS speaks for the entire denomination. That right belongs exclusively to the Church's General Conference.

3. *Amicus* The Church of Jesus Christ of Latter-day Saints sponsors over 400,000 scouts and over 30,000 Scouting units nationwide, making it the largest single sponsor of Scouting units in the United States. In New Jersey, The Church of Jesus Christ of Latter-day Saints sponsors over 700 scouts and about 60 units.

4. *Amicus* Lutheran Church-Missouri Synod sponsors approximately 1,000 Scouting units nationwide, including units in New Jersey.

5. *Amicus* National Council of Young Israel sponsors a number of Scouting units nationwide.

SUMMARY OF THE ARGUMENT

Scouting is a social movement that exists to instill in boys the character traits and religious values that BSA and its sponsors believe necessary for honorable manhood. Religious organizations such as *amici* have long been the prime sponsors of the Scouting Movement. America's churches and synagogues charter tens of thousands of Scouting units across the nation, selecting and training thousands of adult scout leaders every year according to BSA standards and their own religiously informed criteria. For many religious organizations, and especially these *amici*, the Scouting program is a means of youth ministry. By selecting adult leaders who uphold and exemplify Scouting's ideals, BSA and its sponsors ensure that the message of Scouting is properly taught and modeled to impressionable boys. The decision of the New Jersey Supreme Court would force BSA to appoint as the bearers and prime inculcators of its message persons who do not believe in or uphold Scouting's fundamental values. The First Amendment rights of free speech and free association preclude the government from requiring such a result.

"Those who established Scouting in America deliberately planned to promote Scouting as a Movement . . . ." WILLIAM D. MURRAY, THE HISTORY OF THE BOY SCOUTS OF AMERICA 514 (193 . From its inception, Scouting has indeed been a character movement dedicated to teaching and inculcating particular moral and religious values. Religious principles are a fundamental element of the Scouting Movement's program of character education; themes such as "duty to God" are part of Scouting's most basic creeds. Moreover, for over nine decades, America's churches and synagogues have provided overwhelming support to Scouting, effectively becoming the backbone of the movement. Religious organizations now sponsor the great majority of Scouting units in America. Although Scouting is broader than any single religion, the Scouting Movement complements the spiritual efforts of churches and synagogues. Many religious organizations (and certainly *amici*) support the Scouting Movement as a vehicle for youth ministry. At the same time, sponsorship by religious organizations has enabled the Scouting Movement to expand and increase its influence on this nation's boys. The Scouting Movement and organized religion are deeply (and productively) intertwined.

Scouting's principles are instilled in boys primarily through adult scout leaders, especially scoutmasters. The criteria for selecting such leaders are, therefore, absolutely essential to the movement. Scoutmasters exist not only to espouse the ideals of Scouting, but more importantly to live and embody them; they are the role models of the Scouting Movement. Further, religious organizations often expect their adult scout leaders to uphold and exemplify the ideals of their particular religions. Scouting's program for character development is effective precisely because it teaches through both precept and the concrete examples of its adult leaders. The success and very nature of the

movement are directly dependent on BSA's right to determine who will teach and model its ideals.

The failure of the court below to take adequate account of the nature of the Scouting Movement drove its erroneous decision not to afford First Amendment protection to BSA's membership and leadership criteria. Stepping back from doctrinal intricacies, the very notion of government having the power to regulate the selection of youth leaders in private, value-inculcating organizations like Scouting is directly contrary to the purpose of the First Amendment. Much like the prohibition against governmental interference with the selection of clergy, *see Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), such organizations have always had the freedom to choose their own members and leaders. Throughout our history, that right has been "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). As interpreted by the court below, New Jersey's Law Against Discrimination ("LAD"), N.J. Stat. Ann. §§ 10:5-1 to -49 (West 1993), directly abridges that fundamental right, and thus is unconstitutional. The decision below should be reversed.

ARGUMENT

I. WITH THE FULL INVOLVEMENT OF CHURCHES AND SYNAGOGUES, SCOUTING IN AMERICA WAS FOUNDED AS A MOVEMENT TO TEACH AND INSTILL IN BOYS A SPECIFIC SET OF MORAL PRECEPTS AND CHARACTER TRAITS.

The decision below proceeds from a basic misunderstanding of the nature of the Scouting Movement—or at a minimum, from a failure to appreciate the constitutional implications of what Scouting truly is. For the Supreme Court of New Jersey, Scouting is apparently little more than a recreational program for any interested youth,

much like Little League. (*See* 20a-24a.) Based on this extremely truncated view, the court held that BSA is a place of public accommodation under New Jersey law. (*See* 31a.) The interpretation of New Jersey law is, of course, the prerogative of the Supreme Court of New Jersey. However, this Court is not bound by the inability or unwillingness of the court below to properly apprehend the nature of the Scouting Movement. With the full involvement of churches and synagogues, Scouting in America was founded as a movement to teach and instill in boys particular moral precepts and character traits.

A. The Birth of the Scouting Movement: The British Vision of Scouting.

"You cannot maintain an A-1 Empire on C-3 men," Lt. General (later Lord) Robert Baden-Powell was fond of saying, borrowing a line from Lloyd George. MICHAEL ROSENTHAL, THE CHARACTER FACTORY: BADEN-POWELL AND THE ORIGINS OF THE BOY SCOUT MOVEMENT 3 (1986). In Edwardian Great Britain at the dawn of the 20th century, with the trauma of the Boer War (1899-1902) still fresh, many socially conscious persons agreed, and were deeply concerned:

> Britain suddenly looked around to find itself inundated with physically deficient men with pigeon chests, bad teeth, flat feet, and slack wills, lacking the passionate loyalty to British ideals that had helped to extend the empire over so much of the world's surface. . . . The stout yeomen of yesteryear, on whom Britain had always seemed to depend in times of crisis, appeared upon examination to be mere memories of a grander time.
>
> How could Britain hope to compete with the evolving industrial threat of other countries—not to speak

> of the possible military threats to its empire—with a race of morally and physically inferior men?

Id.

Back from the war in South Africa, Baden-Powell had an answer to the perceived moral and physical anemia of the British male and the threat it posed to the well-being of the nation. According to Baden-Powell, many of the gravest problems afflicting Britain's men stemmed from lack of vigorous character education. *See id.* at 5. His remedy was Scouting.

Baden-Powell believed that "Scout training, rightly understood and liberally applied, could bring about the regeneration of the [British] nation." *Id.* at 6. Scouting "aims for a different point than is possible in the average school training," Baden-Powell wrote in a retrospective preface to his seminal 1908 work, SCOUTING FOR BOYS. "It aims to teach the boys how to live, not merely how to make a living." ROBERT BADEN-POWELL, SCOUTING FOR BOYS 19 (22nd ed. 1944). In short, Scouting was to be no mere social club but rather, in Baden-Powell's stark term, a "character factory." ROSENTHAL, *supra*, at 6 (quoting Baden-Powell).

Creating a program to help suppress the narrow desires of the self and inculcate a powerful sense of social and religious duty was key to Baden-Powell's nascent character factory. Baden-Powell believed selfishness was a danger to the interests of the nation and community and thus a character flaw to be remedied. "Therefore the aim of Scout training," Baden-Powell wrote, "is to replace Self with Service, to make lads individually efficient, morally and physically[,] with the object of using that efficiency for the service of the community." BADEN-POWELL, *supra*, at 20. In this, Baden-Powell saw himself espousing practical religion: "In other words, we aim for the practice of [religion] in [the scout's] everyday life and deal-

ings, and not merely the profession of its theology on Sundays." *Id.* at 20. As one historian has noted, "the subordination of the individual will to the interests of the community" was of "prime importance" to Baden-Powell and the Scouting Movement. ROBERT H. MACDONALD, SONS OF THE EMPIRE 158 (1993) (internal quotation marks omitted). The Scouting Movement sought to replace "the selfish" and "the self-indulgent" with a sense of duty to God, country, and the common good. *Id.* at 164-65.

Scouting's founders believed boys needed to learn obedience and discipline if they were to overcome the self and serve the common good. "For Baden-Powell and the others [in the early British Scouting Movement], the basis of good character and good citizenship . . . was a firm sense of discipline." ROSENTHAL, *supra*, at 8. "[T]he morality of the Scout was centered in personal conduct, in behaving honorably, in being loyal to friends, and in obeying exactly the rules of the movement." MACDONALD, *supra*, at 160. Today's "do your own thing" individualism was utterly alien to the founding of Scouting. Obedience to moral precepts and sacrifice for the greater good were the crucial guiding lights. *See id.* at 148.

From the outset, religion was an essential element of the Scouting Movement's program of character formation. Baden-Powell "submitted his scheme of Scouting for boys to the great leaders of the day" for their approval and support, and found enthusiastic acceptance. MURRAY, *supra*, at 501. Scouting's mission was to make boys into good men, and Baden-Powell was convinced that for a man to be good he must "believe[] in God and obey[] His laws." *Id.* at 500. He insisted that "every Scout should have a religion." *Id.* In his first address in America, Baden-Powell extolled the importance of religion to

Scouting: "We surely expect of every boy that he shall have some form or other of religion, and that he shall practice what he preaches." *Id.* at 501. Indeed, for Baden-Powell it made no sense to speak of a "religious side" of Scouting because the entire movement was based on religion: "There is no religious side of the movement. The whole of it is based on religion, that is, on the realization and service of God." ANCORA E. MILANO, FOOTSTEPS OF THE FOUNDER 108 (1984) (quoting Baden Powell from the periodical *Headquarters Gazette* (Nov. 1920)).

A comprehensive history of the aims and hopes of Scouting's British founders is well beyond the scope of this brief. The point *amici* wish to establish—a point that seems to have been lost on the court below—is that from its inception Scouting has been far more than a recreational club for boys. Scouting was a movement to turn boys into men of character. Michael Rosenthal is essentially correct that Scouting was to be a way of life:

> What Baden-Powell had in mind was never a simple set of rules and games but rather a coherent, self-contained system of education intended to shape the entire life of the boy . . . . In its ideal embodiment Scouting was not just an organization a boy joined but a total ideology that he absorbed and that thereafter determined his thinking, feeling and acting.

ROSENTHAL, *supra*, at 10.

B. The Scouting Movement in America: Religion at the Fore.

Like their British counterparts, socially conscious Americans of the time were concerned about the character of their young men. Thus, Americans greeted the Scouting program with tremendous excitement. Many viewed Scouting as filling a void in the youth programs of the day. *See* MURRAY, *supra*, at 22.

British Scouting could not be adopted wholesale in America, however. The nature of the two countries was different; for one, America was not trying to save a crumbling empire. Therefore, while maintaining Scouting's sharp focus on character training, America's Scouting founders adapted Scouting to suit the unique needs and temperament of America and America's boys.

In 1910, a set of by-laws was adopted for the newly organized Boy Scouts of America. The by-laws included a broad statement of the purpose of American Scouting:

> The object of the Boy Scouts of America is to organize the boys of the District of Columbia and elsewhere in the United States into units, and to teach them or cause them to be taught through duly designated leaders, discipline, patriotism, courage, habits of preservation and self control and ability to care for themselves in all exigencies of life.

Id. at 41. This statement is short; no attempt was made to include the many specifics of Scouting's character-building program. Yet it makes perfectly clear that from its inception the purpose of Scouting in America, like its cousin in Britain, has been the inculcation of specific character traits. As with British Scouting, this was to be no mere social group.

The Scouting Movement in America has long "declare[d] the necessity of religion in character development and urge[d] its practice." *Id.* at 509. In fact, religion has played an even more prominent role in American Scouting than in its British counterpart. This can be seen, for instance, in the revisions American Scouting made to the British Scout Law and Oath and in the inclusion in its constitution of an article pronouncing the necessity of religion to character development.

The Scout Law is the fundamental creed of the Scouting Movement. *See, e.g.*, BOYS SCOUTS OF AMERICA, THE BOY SCOUT HANDBOOK 553 (10th ed. 1990) [hereinafter "Handbook-10th"].[3] It is therefore indicative of the emphasis American Scouting placed on religion that it modified the British version of the Scout Law to add a new provision, the Twelfth Scout Law: "A Scout is Reverent. He is reverent toward God. He is faithful in his religious duties, and respects the convictions of others in matters of custom and religion." MURRAY, *supra*, at 63.[4] The Chief Scout Executive at the time explained the reason for this change, highlighting the vital importance of religion to the American Scouting Movement:

> We took the nine English Laws [of Scouting] and analyzed each one of them. We had before us recommendations, including some fifty laws . . . . My judgment of the Twelfth Scout Law is that it is one of the very finest things in the whole scheme of Scouting and one of the reasons we have had such outstanding success. . . . I felt at that time, as I feel now, that there is nothing more essential in the education of youth in America than to give them religious instruction and I advocated that this be included in the Twelfth Scout Law . . . . [Y]ou will find that the basis for instructing the youth of America is first, reverence toward God; second, faithfulness in their own religious duties in accordance with their own religious convictions; and third, which is essential to democracy, is that we respect the convictions of others in matters of custom and religion.

Id. at 54-55.

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[3] *The Boy Scout Handbook* states that "[t]he Scout Law is a statement of facts: 'A Scout is trustworthy . . . loyal . . . helpful . . . friendly . . . courteous . . . kind . . . obedient . . . cheerful . . . thrifty . . . brave . . . clean . . . reverent.'" Handbook—10th at 553.

[4] This language has since been slightly modified. The last sentence was made into two sentences conveying the same message: "He is faithful in his religious duties. He respects the beliefs of others." BOY SCOUTS OF AMERICA, THE BOY SCOUT HANDBOOK 55 (11th ed. 1998) [hereinafter "Handbook—11th"].

Revisions to the Scout Oath, which already in its British form had a "duty to God" component, further imbued American Scouting with religious and moral themes. The American version added a new promise: "To keep myself physically strong, mentally awake, and morally straight"—an explicit focus on the character of the whole boy, "body, mind and spirit." MURRAY, *supra*, at 56.[5] In Scouting, to be "morally straight" is "[t]o be a person of strong moral character," one who guides his life with "honesty, purity, and justice" and is "clear in [his] speech and actions, and faithful in his religious beliefs." Handbook-10th at 551.

The "duty to God" requirement was also made part of the official constitution of Scouting. Article III of BSA's original constitution affirmed: "The Boy Scouts of America maintains that no boy can grow into the best kind of citizenship without recognizing his obligation to God," and that "[t]he recognition of God as the ruling and leading power in the universe, and the grateful acknowledgment of His favors and blessings, are necessary to the best type of citizenship, and are wholesome things in the education of the growing boy." MURRAY, *supra*, at 499. These same principles are to this day essential guideposts for the Scouting Movement in America.[6]

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[5] The Scout Oath states: "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and morally straight." Handbook—11th at 9.

[6] BSA's current charter and bylaws provide:

> The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout Oath or Promise the member declares, "On my Honor I will do my best to do my duty to God and my country and to obey the Scout Law." The recognition of God as the ruling and leading power in the universe and the grateful acknowledgment of His favors and blessings are necessary to the best type of citizenship and are wholesome precepts in the education of the growing members. No matter what the religious faith of the members may be, this fundamental need of good citizenship should be kept before them. The Boy Scouts of America, therefore, recognizes the religious element in the training of the members, but it is absolutely non-sectarian in its attitude toward that religious training. Its policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life.

CHARTER AND BYLAWS OF THE BOY SCOUTS OF AMERICA, art. IX, § 1, cl. 1 (Declaration of Religious Principle) (Sept. 1998).

However critical religion may be to the Scouting Movement, Boy Scouts of America has never presumed to be the font of the specific tenets of religious education. For that, Scouting's founders turned to America's churches and synagogues. An official history of Scouting in America explains that "[i]t is the genius of the Boy Scout Movement that . . . in order to accomplish its purpose in service to the boy, it must submerge itself in the parent institutions which administer its units. It is only on this basis that Scouting has been useful to the Church in its program of religious education." MURRAY, *supra*, at 508. "[R]ecogniz[ing] the essential part that religion must play in character building," *id.*, Scouting's American founders sought the sponsorship of America's churches and synagogues to create a Scouting experience that, while tolerant of religious diversity, would nonetheless have specific religious content.

Because of Scouting's devotion to the spiritual element of character education, and its willingness to submerge itself in the religious traditions of its sponsors, America's churches and synagogues enthusiastically embraced Scouting. The long history of religious support for Scouting cannot be related here. Suffice it to say that "Scouting in America has received almost universal acceptance and cooperation among the religious forces of our country," *Id.* at 515, making the "Church or Synagogue" "the outstanding and predominating sponsoring institution" of the Scouting Movement. *Id.* at 510. For many decades, BSA

and America's religious organizations have been in an extremely close and mutually beneficial partnership to inculcate moral values in boys. As explained below, that partnership continues to this day, though it is contingent on the Scouting Movement's adhering to the moral teachings it was created to champion.

II. SCOUTING CONTINUES TO BE AN EXPRESSIVE, VALUE-INCULCATING MOVEMENT THAT MANY CHURCHES AND SYNAGOGUES HAVE ADOPTED AS A MEANS OF YOUTH MINISTRY.

With the indispensable assistance of churches and synagogues, Scouting remains a character movement dedicated to molding boys into upstanding men.

A. Today's Scouting Continues the Tradition of Character Education.

Scouting's emphasis on character education is as strong now as ever. After almost nine decades, the Scout Law and Scout Oath are still the bedrock statements of the ideals to which each scout should aspire. "The Scout Law is the foundation of Scouting," declares the most recent version of *The Boy Scout Handbook*. Handbook-11th at 47. "Use the Scout Law," it enjoins, "to guide your actions when you are alone . . . ." *Id.* "The Scout Law will show you how to live as a boy and as a man." *Id.* The Scout Law continues to define who and what a scout is—and conversely the type of boy who is *not* a scout. "By doing all you can to live up to the Scout Law, you are a Scout. If you should willfully break the Scout Law, you violate the spirit of Scouting." Handbook-10th at 553. Through the Scout Oath, obedience to the Scout Law is affirmed by a solemn vow taken upon the boy's sacred "honor."

Duty to God remains a powerful and indispensable doctrine in Scouting. Elaborating on the "duty to God" section of the Scout Oath, the tenth edition (1990) of the Handbook explains that "[y]our family and religious leaders teach you to know and love God and the ways in which God can be served. As a Scout, you do your duty to God by following the wisdom of those teachings in your daily life . . . ." Handbook-10th at 550; *see also* Handbook-11th at 45 (affirming the same themes). The duty to God requirement in Scouting is not mere lip service to religious devotion.[7] A boy who is unwilling to affirm his duty to God cannot be a scout. *See Randall v. Orange County Council*, 17 Cal. 4th 736, 952 P.2d 261 (1998) (upholding decision by local BSA council not to allow an atheist to be a scout).

Scouting's teachings on sexuality have always affirmed traditional Judeo-Christian morality, centering on the importance of a boy someday becoming a responsible and loving husband and father within the traditional family structure. The *Handbook* teaches that when a scout is "fully grown" and has "become secure in [himself] and in [his] relationship" with a woman, he "may decide to marry and have a child." Handbook-11th at 376. But it also warns about the "feelings of guilt and loss" that premarital sexual relations can cause, advising that "[a]bstinence until marriage is a very wise course of action." *Id.*

As detailed more fully in BSA's brief on the merits, Scouting views homosexual conduct as inconsistent with its fundamental moral code. This position is consistent

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[7] For example, a recent article in a prominent independent Scouting periodical reminds adult leaders to make sure to emphasize the religious elements of Scouting:

> Duty to God and Reverence for God were not afterthoughts or add-ons in the Scouting program. They were foundational elements in the mind of Baden-Powell from the very first. They should not be afterthoughts or add-ons in the program of today's [troops] either. The 12th Point of the Scout Law [regarding reverence before God] should be given at least as much emphasis in the day to day program as knots, hiking, or campouts.

Virgil Burke, *Redefining Your Troop's Religious Program*, SCOUTER MAGAZINE, vol. 1, issue 6 at 24 (ca. 1999).

with the broader religious teachings about sexuality espoused by Scouting's major religious sponsors.[8] *Amici* all share a common, firmly held belief that sexual relations should occur only within the bonds of marriage. They believe and teach that extra-marital sex is sinful, and that one who engages therein is not qualified to lead impressionable youth. *Amici*'s view of extra-marital sexual relations remains the same whether the specific sexual acts are homosexual or heterosexual. BSA and *amici* share the view that for men the good of sexual intimacy is inextricably bound to being a faithful husband and loving father.

B. Scouting Promotes an Affirmative Vision of What a Man Should Be.

The Scouting Movement advocates and instills in its members an affirmative vision of what a man should be. In all its teachings, requirements, and activities, Scouting strives to mold naturally selfish boys into selfless men of duty to God, family, and country. Scouting's road to true manhood entails finding oneself through losing oneself in the service of higher principles and others. Scouting teaches a boy to sacrifice his own desires and to become a better person for the greater good; to keep his word; to be a leader to whom others can look for help and guidance; to be upbeat and courageous in the face of adversity; to be prudent in his expenditures; to respect the culture and beliefs of others even as he is true to his own faith; to submit to just authority; and to be morally up-

[8] The religious organizations that filed an *amici curiae* brief opposing BSA at the petition stage, and which may also file a brief on the merits supporting Dale, represent a very small portion of the total number of religiously sponsored scouts and Scouting units in the United States. Their dissenting voices on this issue are valued within the movement, of course, but their influence in this regard is extremely limited. As with all sponsors, their continued involvement in the Scouting Movement is contingent upon their willingness to uphold—especially before the boys—BSA's membership and leadership criteria, even as they disagree.

right in his personal conduct—all that he may more effectively serve his God, family, and country.

Hence, Scouting trains boys not only to be successful in their chosen walk, but to choose the right path. The mission of Scouting is not to equip a boy to pursue all possible destinies, but to discipline his character for a better life of ennobling obligation. In sharp contrast to the popular ethos of "to thine own self be true," Scouting's Motto is "Do a good turn [for others] daily;" its Oath is to do one's "duty to God and . . . Country" and to remain "morally straight;" and its Law is obedience, physical and moral cleanliness, and reverence before God.

Admittedly, not all see the merit of the Scouting way. Some may think talk of character education is a cultural relic, while others, like Dale, even seek to use the force of government to remake Scouting in the image of their dissent. Nevertheless, the Scouting vision continues to be upheld and vigorously promoted by those, like *amici*, who still believe in the worth of its core ideals.

C. Scout Patrols and Troops Are Intimate, Expressive, and Value-Inculcating Associations Where Adult Scout Leaders Guide the Development of Impressionable Boys.

Scouting's values are taught and instilled most powerfully in its local patrols and troops under the leadership of adult scout leaders. Every scout is "a member of a patrol, which is a group of three to eight boys who enjoy Scouting together." Handbook-10th at 10. A patrol is an intimate association of boys united in a common cause. "As a member of a patrol," the *Handbook* tells the boy, "you are no longer alone." *Id.* at 535. "A patrol is a team of good friends working together to make things happen," each member "shar[ing] with the others" and "look[ing] out for one another." *Id.* Patrol members hike

together, explore together, cook meals together, sleep in common tents together, serve together, and learn and live together the ideals of Scouting. In many of the troops *amici* sponsor, patrol members also worship together.

"No patrol stands alone. Each is a part of a troop made up of a number of patrols." Handbook-10th at 542. The troop looks out for each patrol and its members. At the troop level, adult leaders oversee the development of the boys as they guide and direct Scouting activities, ensuring that each boy is in a patrol that meets his needs and encourages him to become a true scout.

In the intimacy of the patrol and troop settings, Scouting's principles are inculcated, modeled, and lived. The Scout Law and Oath are typically repeated at the beginning of each meeting, impressing their importance upon the boys' minds. In many of *amici's* troops, opening and closing prayers are offered to remind the boys of God's watchful presence and the seriousness of their religious obligations. Patrols and troops give the boys the opportunity to lead and be led, to instruct and be instructed, to help and be helped—all according to the Scouting way. "The troop acts as a framework within which [the boy] can develop as a Scout and a leader." *Id.* Throughout, the express "goal" is to help the boy become a "young man who lives by the Scout Oath and Law." *Id.* at 10.

As mentors, Scouting's adult leaders are vital to this process. "The safety of the [Scouting] Movement lies in its leadership . . . ." MURRAY, *supra*, at 36. Nowhere is this more true than at the local level where adult scout leaders interact with highly impressionable boys. Adult leaders are intended to be counselors to boys who are often confused and looking for answers to life's difficult questions. The *Handbook* tells scouts that they "will come to know [their Scoutmaster] as a wise friend to whom [they] can always turn for advice." Handbook-10th at 542. The *Handbook* encourages the scout to talk to

his scout leaders even about such extremely sensitive matters as sex:

> If you have questions about growing up, about relationships, or about *sex*, **ask**. Talk with your parents, religious leaders, teachers, or *Scoutmaster*. They want what is best for you. Let them know your concerns.

Handbook-11th at 377 (italics added; bolding in original).

Scouting's program for character development is successful because it teaches morality and character not only through lessons, creeds, and activities, but also through the living examples of its adult leaders.[9] An adult scout leader, such as a scoutmaster or assistant scoutmaster, has a duty to live and embody Scouting's ideals. *See* JA 445. In a very real sense, the scout leader is not merely the messenger of Scouting—he is also the message; in *amici's* many decades of experience, the two cannot be separated in the mind of the boy. Moreover, sponsoring religious organizations often expect their adult leaders to uphold in word and deed the teachings of their respective religions. Adult scout leaders, therefore, are powerful role models. They inculcate the message of Scouting less by what they say than by who they are and what they do. The success of the entire Scouting Movement depends on the criteria used for selecting adult leaders.[10] In Scouting, to change the messenger is literally to change the message.

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[9] An article in a recent Scouting magazine puts the point this way:

> The [Scouting] Movement lives in the hearts and minds of all who have come into contact with it. But most of all, the Movement of Scouting can best be found in the mentoring relationship between a small group of adults and boys on a cold winter campout in the middle of nowhere.

Terry Howerton, *Our Mission*, SCOUTER MAGAZINE, vol. 1, issue 6 at 4 (ca. 1999).

[10] A BSA guide to chartering organizations for use in recruiting adult scout leaders stresses that "[t]he *most important* decision to

As adult leaders and boys participate in the Scouting program and remain faithful to its teachings, they become part of the Scouting narrative.[11] Within that narrative, the boy absorbs the principles of Scouting in real life situations. The Scouting narrative becomes for the boy a way of living that brings excitement, purpose, and structure to his life. He learns how to confront life's challenges because he knows what he is: a scout. Each Scouting unit has different boys and leaders and so naturally will have experiences unique to itself. The Scouting narrative varies in obvious and subtle ways depending on the circumstances. But because each unit affirms the basic teachings of Scouting, the narrative of each unit is infused with the same principles that have sustained the Scouting Movement in America for decades.

D. Churches and Synagogues Presently Sponsor the Majority of Scout Troops Nationwide and Almost Half of Those in New Jersey, Infusing Scouting's Religious Themes and Character Training With Meaning That Is Specific to Their Particular Religious Traditions.

Religion and the support of America's churches and synagogues have long been vital to Boy Scouts of America. Conversely, Scouting is also an extremely important part of the youth ministries of many of America's churches and synagogues, including those represented by

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be made [by the organization] is providing the [Scouting] program with a selection of leaders who represent the values of Boy Scouts of America and your organization." Boy Scouts of America, *Foundations for Selecting Unit Leaders* (BSA pamphlet) (emphasis added). The most crucial criteria in selecting a scout leader are "Personal commitment to Scouting's mission" and "High moral standards," coming before even "Ability to relate to young people." *Id.*

11 *Cf. Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.").

amici; a deeply symbiotic relationship exists between organized religion and BSA. Sponsorship by religious organizations imbues tens of thousands of Scouting units with both the general religious themes in the Scout Oath and Law and the particular religious beliefs of the sponsoring organizations.

At present, both nationally and in New Jersey, religious organizations sponsor over 60% of all Scouting units. JA 159. Of these, two thirds are sponsored by the churches and synagogues represented by *amici*. Through their overall support and dedication to Scouting—in recruiting young male members into the program, in evaluating and appointing adults to serve as leaders in Scouting units, in providing financial and spiritual support for those units, in developing Scouting's religious awards, in dedicating religious facilities for use in Scouting events, and in establishing Scouting traditions and other special programs important to their particular religions—sponsoring churches and synagogues infuse the nonsectarian structure of Scouting with meaning derived from their particular religious traditions. As such, each of the *amici* employs the Scouting program in somewhat different ways to further its own religious ends.

1. *Amicus* National Catholic Committee on Scouting ("NCCS") oversees Scouting in the Catholic Church. Scouting is an important part of the Catholic Church's pastoral efforts to take the Gospel message to both Catholic and non-Catholic youth. Under the guidance of ecclesiastical leaders, local Catholic committees on Scouting direct the Scouting ministries at the diocesan level. Ordained priests at times serve as scout leaders. The Catholic Church supports Scouting because its high ethics and God-focused programs provide a Christian setting that enables young people to cope with today's weakened moral standards and increased violence. Catholic

Scouting has also proved itself to be a time-honored means of shaping future Catholic leaders.

2. Scouting is likewise a substantial and indispensable aspect of the youth ministries of *amicus* General Commission on United Methodist Men of The United Methodist Church. The United Methodist Men employs Scouting's program of character education as part of its efforts to instill in boys of all faiths the basic principles of morality. United Methodist Scouting helps boys to have faith in God and to prepare for a life of Christian faith and witness. The pastor of each congregation sponsoring a Scouting unit is directly responsible for selecting qualified adult leaders and supervising Scouting activities. Such leaders must affirm and live Christian values.

3. *Amicus* The Church of Jesus Christ of Latter-day Saints uses Scouting as part of the activity program of its "Aaronic Priesthood," the lay priesthood held by all young men in the Church. Thus, although the Church welcomes nonmembers as full participants in its Scouting units, Scouting serves an important religious purpose. Scouting, including Cub Scouting, is an integral part of the priesthood training of LDS boys. The bishop of a Church congregation directly overseas Scouting, personally selecting (and releasing) the congregation's scout leaders in conformity with Church canons and his understanding of God's will. Only those who live in harmony with the teachings of the Church and Scouting are asked to serve as scout leaders. To provide divine approval to their Scouting ministries, senior priesthood officers typically "set apart" new scout leaders by the laying on of hands. *Cf. Psalms* 4:3 (King James); *Acts* 6:6 (King James).

4. Lutheran congregations have used the Scouting program for more than seventy years as a resource for Christian ministry to boys and their families. *Amicus* The Lutheran Church-Missouri Synod requires that its scout leaders promote the boys' loyalty to the Church, Christian faith and conduct, and responsible citizenship. It is the

duty of congregational leadership to provide Scouting units with motivation, guidance, and instruction compatible with the Holy Scriptures.

5. *Amicus* National Council of Young Israel and its local branch synagogues throughout the country have been using Scouting for over 30 years as an educational program for youth and their families. The rabbi and lay leadership of each congregation are heavily involved in choosing scout leaders who will be both role models and educators for the boys in proper Jewish faith and conduct. Each rabbi also oversees the teaching of the Scouting curriculum to ensure that proper information and ideals are passed on to the boys.

In brief, like many of BSA's religious sponsors, *amici* have integrated the Scouting program into their youth ministries as a means of instilling in boys and young men moral and religious values. When *amici* and their affiliated congregations select scout leaders, they are guided by BSA's general rules and also by the unique beliefs, doctrines, policies, and procedures of their respective religions. This is Scouting as it was envisioned by its earliest founders. To alter this vision is to alter Scouting itself.

III. COERCING BOY SCOUTS OF AMERICA TO INSTALL OPENLY HOMOSEXUAL SCOUT LEADERS VIOLATES THE FIRST AMENDMENT.

Adequate appreciation of the nature of the Scouting Movement—of its aims, methods, and principal sponsors—demonstrates why the government cannot regulate Scouting's membership and (especially) leadership-selection criteria. It is simply "beyond debate" that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the [Constitution]." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). If that basic constitutional principle does not apply to the Scouting Movement, it is essentially meaningless.

BSA's brief on the merits ably sets forth why the First Amendment—especially under this Court's rulings in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 566 (1995), and *Roberts*—precludes New Jersey from forcing BSA to install an openly homosexual male as a teacher and role model. Those doctrinal arguments will not be repeated here. Dale's arguments to the contrary are based on the narrowest and most hypertechnical interpretations of this Court's free speech and free association cases. A fair reading of those cases, however, can only lead to the conclusion that the decision below must be reversed. Several addtional points merit further emphasis:

1. The regulation at issue disrupts the message that BSA and its major religious sponsors desire to send about proper sexual conduct. As noted, Scouting "espouses family values" which emphasize marriage and fatherhood. *See* JA 697. Likewise, in their central tenets and beliefs, *amici* affirm that the good of sexual relations can be realized only in marriage, and that persons have a moral duty to limit their sexual activities accordingly. At times this message is taught expressly in the Scouting context, as when boys directly pose questions about sex to their scoutmasters. But most often it is taught implicitly through adult role models (often the fathers of boys in the troop) who simply live and embody the message, thereby setting an example and establishing a behavioral norm. To be coerced to install a scout leader who openly acknowledges his homosexuality would fundamentally disrupt the norm *amici* seek to instill in their impressionable youth. Yet that is precisely what the decision below would force BSA to do.[12]

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12 It is no response that someone (unlike Dale) might be able to conceal his homosexual conduct, or that some other person might be able to hide his extra-marital affairs. The Scouting Movement cannot survive, much less accomplish, its mission, if its leaders live a double standard. Hypocrisy is lethal to character education. *See* JA 257 ("[P]ractice what you preach . . . . The most destructive influence on boys is adult inconsistency and hypocrisy.") (quoting *The Scoutmaster Handbook*).

2. The ruling below threatens to fracture the Scouting Movement, destroying or at least severely diminishing BSA's ability to advocate and inculcate its values. If the appointment of scout leaders cannot be limited to those who live and affirm the sexual standards of BSA and its religious sponsors, the Scouting Movement as now constituted will cease to exist. *Amicus* The Church of Jesus Christ of Latter-day Saints—the largest single sponsor of Scouting units in the United States—would withdraw from Scouting if it were compelled to accept openly homosexual scout leaders. The other *amici* would be forced to reevaluate their sponsorship of Scouting, with the serious possibility of reaching the same conclusion.

To be sure, the lower court's decision does not apply nationwide. Moreover, none of the *amici* has made a final decision as to how it might respond should the impact of the holding below be confined to New Jersey—whether to part company with Scouting altogether, to withdraw from Scouting just in New Jersey, or to take some other tack. But without doubt the rule established by the decision below threatens the existence of Scouting, at a minimum in New Jersey and probably throughout the United States. Given the extent of their support, losing any of these *amici* as sponsors, whether in New Jersey or nationwide, would seriously disrupt BSA's ability to express and inculcate its message. The destruction or dismemberment of an expressive organization is perhaps the ultimate abridgment of the right of expressive association. That possibility was never faced in *Roberts*, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), or in *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). It is very real here.

3. The regulation at issue would entangle the government in religion and abridge free exercise rights. Scouting is infused with religion. Religious precepts, like "duty to God" and "reverence" before God, are at the heart of Scouting's most fundamental creeds and are affirmed constantly in the intimacy of the troop setting—indeed, inculcating such values is a core purpose of Scouting. Institutionally, churches and synagogues are the preeminent sponsors and supporters of Scouting, and have been since its inception; *amici* alone charter roughly 1.2 million scouts and over 50,000 Scouting units.

Government cannot regulate Scouting without unconstitutionally entangling itself in religion, for the simple reason that Scouting and religion are themselves so deeply intertwined. Moreover, any attempt by the government to regulate scoutmaster selection decisions in the more than 60% of Scouting units sponsored by religious organizations would interfere directly with the right of churches and synagogues to govern their own ecclesiastical affairs. Although scout leaders are typically not formal members of the clergy, the appointment of a scout leader by a religious sponsor (a decision often made by ecclesiastical authorities) may well call for the same type of sensitivity and care, and may well be governed by the same sorts of ecclesiastical canons and policies, as the appointment of clergy. In any event, such decisions are inevitably bound up with religious beliefs, as discussed above. This Court has long held that such matters are beyond the power of government to regulate; government cannot entangle itself in decisions that are so permeated with religious considerations. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710, 713-14 (1976) (government may not interfere with clergy selection); *Kedroff*, 344 U.S. at 116 (same); *cf. Widmar v. Vincent*, 454 U.S. 263, 284 (1981) (inquiry into significance of religious practices "would tend inevitably to entangle the State with religion in a manner forbidden by our cases");

Jones v. Wolf, 443 U.S. 595, 602-05 (1979) (no delving into religious doctrine); *see also Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29, 733-34 (1871).

4. The court below concluded that BSA's membership criteria are basically nonselective. (*See* 24a-31a.) In *amici's* experience, that is simply incorrect. Boys and adults who do not agree to live by Scouting's values cannot join *amici's* scout troops. *Cf. Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1276-77 (7th Cir. 1993) (BSA membership criteria are "selective"); *Randall*, 952 P.2d at 266 (atheist excluded from Scouting). But whatever significance that conclusion may have under the LAD, it does nothing for Dale here. In *Hurley*, the fact that the parade organizers were "rather lenient in admitting participants" to the parade could not defeat their First Amendment rights. 515 U.S. at 569. "[A] private speaker does not forfeit constitutional protection by combining multifarious voices, or by failing to edit their themes to isolate an exact message . . . ." *Id.* at 570. Even assuming that BSA is nonselective, the same holds here.

5. Finally, this case calls for serious reflection on the importance and vulnerability of America's voluntary associations, *i.e.*, those social institutions that empower the individual by mediating between the totally private realm of personal and family life and the mega-institutions of the marketplace and government. The insightful observations and commentary in Alexis de Tocqueville's seminal work DEMOCRACY IN AMERICA provide a good starting point for such reflection. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer ed. & George Lawrence trans., Harper-Perennial 1969) (1835). Visiting America from France in the early 1830's, Tocqueville marveled at the unique ability of Americans to form voluntary associations, and noted the tremendous social diversity such organizations enable:

> Americans of all ages, all stations in life, and all types of disposition are forever forming associations.

> There are not only commercial and industrial associations in which all take part, but others of a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give fêtes, found seminaries, build churches, distribute books, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. Finally, if they want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.

Id. at 513.

More critically, Tocqueville also observed that the vitality of such associations is key to American democracy. The "intellectual and moral associations in America," he wrote, are "as necessary as [political and industrial associations] to the American people; perhaps more so." *Id.* at 517. The right to form and define voluntary associations encourages the virtues of self-governance and independence of action which are necessary for a democratic society. By allowing citizens with common concerns to unite and participate in the public square, associational liberty permits a healthy venting of social and religious passions; it empowers the individual to stand against majoritarian pressures for social conformity, protecting diverse voices in the nation; and it helps ensure adequate social and legal space for both the flourishing of new communities and the preservation of established ones. A rich and dynamic pluralism is the product of a robust right of association. Within such associations, standards of excellence and morality can be established, affirmed, and pursued in the face of competing social and economic trends. This last point was especially significant to

Tocqueville in light of the leveling tendencies of American democracy: "If [people] are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads." *Id.*

For Tocqueville, and surely for most Americans today, the right to associate freely in voluntary associations is fundamental. Tocqueville wrote: "The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together." *Id.* at 193; *see* MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS 391 (1991) ("For most [individuals], to be deprived of the right of voluntary association . . . would be a far greater and more deeply felt loss of liberty than to be deprived of the right to speak freely."). Excessive governmental regulation of voluntary associations degrades the ability of citizens to form such associations, leaving them increasingly dependent on the state: "The more government takes the place of associations, the more will individuals lose the idea of forming associations and need the government to come to their help. That is a vicious circle of cause and effect." TOCQUEVILLE, *supra*, at 515. Hence, state usurpation of the social place of voluntary associations is a direct threat to a self-governing democratic people: "The morals and intelligence of a democratic people would be in as much danger as its commerce and industry if ever a government wholly usurped the place of private associations." *Id.*

This Court's jurisprudence has been sensitive to such concerns. The Court stated in *Roberts* that the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends" has always been a defining characteristic of American liberty. 468 U.S. at 622. Throughout our history, that right has been "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Id.*

Of course, some associations are properly the subject of appropriate governmental regulation. For instance, the law has long regulated labor unions and other commercial associations to guard against serious economic disruptions. *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 151 to 169. However, religious, cultural, and moral associations are very different from commercial associations. Regulation of voluntary, noncommercial associations—especially those, like Scouting, which are dedicated to promoting religious, cultural, and moral ends—raises the gravest constitutional and social concerns. A free and democratic polity depends on the right of voluntary associations to govern themselves—to decide what they believe and how they will advance those beliefs—free from governmental control. As interpreted by the decision below, the LAD denies that basic right to BSA and its sponsors.

CONCLUSION

For the reasons stated herein, and those contained in the brief of Boy Scouts of America, the ruling of the court below should be reversed.

Respectfully submitted,

VON G. KEETCH
Counsel of Record
ALEXANDER DUSHKU
KIRTON & MCCONKIE
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
(801) 328-3600
Attorneys for Amici

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BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL OF BOY SCOUTS OF
AMERICA, *Petitioners*

v.

JAMES DALE, *Respondent.*

BRIEF *AMICI CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND FOCUS ON THE FAMILY SUPPORTING PETITIONERS

JAY ALAN SEKULOW
Counsel of Record

VINCENT MCCARTHY
THE AMERICAN CENTER
FOR LAW AND JUSTICE
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

JOHN P. TUSKEY
LAURA B. HERNANDEZ
THE AMERICAN CENTER
FOR LAW AND JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 226-2489

Attorneys for Amici Curiae

3000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. FORCING THE BOY SCOUTS TO APPOINT HOMOSEXUAL ADVOCATES TO LEADERSHIP POSITIONS VIOLATES ITS FIRST AMENDMENT RIGHTS OF FREE SPEECH AND EXPRESSIVE ASSOCIATION. 8

A. This Court's Decision in *Hurley v. Irish American Gay, Lesbian and Bi-Sexual Group of Boston, Inc.* Establishes that Private Associations Cannot Be Coerced Into Endorsing the View that Homosexuality is a Morally Neutral Lifestyle. 10

B. Nothing in this Court's Expressive Association Cases Supports the New Jersey Supreme Court's Holding that the First Amendment Does Not Protect an Organization's Decision to Require Certain Moral Standards as Part of Its Leadership Criteria Unless those Moral Standards are the Centerpiece of its Mission. 14

II. PROTECTING HOMOSEXUALS FROM DISCRIMINATION IS NOT A COMPELLING STATE INTEREST THAT TRUMPS THE BOY SCOUTS' FIRST AMENDMENT RIGHTS. 20

CONCLUSION 24

TABLE OF AUTHORITIES

CASES: Page(s)

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-35 (1977) 9
Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) 22
Ben Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) . 22
Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 3
Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569 (1987) 3
Board of Education of Westside Community Schools v. Mergens, 496 U.S. 224 (1990) 3
Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987) 6, 17, 18, 21
Bowers v. Hardwick, 478 U.S. 186 (1986) 22
Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 545 (1992) 23
Curran v. Mount Diablo Council of Boy Scouts, 952 P.2d 218, 236 (Cal. 1998) 11
Dale v. Boy Scouts of America, 734 A.2d 1196, 1229 (N.J. 1999) 12, 13, 14, 17, 20
Democratic Party v. Wisconsin, 450 U.S. 107, 122 (1981) 15, 16
Equality Foundation v. City of Cincinnati, 128 F.3d 289, 292, (6th Cir. 1997) 22
Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214, 233 (1988) 15, 16, 17
High Tech Gays v. Defense Ind. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) 22

Hill v. Colorado, No. 98-1856 3
Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) .... *passim*
Kirchberg v. Feenstra, 450 U.S. 455 (1981) 21
Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993) 3
National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984) 22
New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 17, 18
Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) ... 22
Roberts v. United States Jaycees, 468 U.S. 609 (1984) ..... *passim*
Santa Fe Independent School District v. Doe, No. 99-62. 3
Schenck v. Pro-Choice Network of Western New York, 519 U.S. 855 (1997) 3
Steffan v. Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) 22
Texas v. Johnson, 491 U.S. 397, 404 (1989) 14
United States v. Kokinda, 497 U.S. 720 (1990) 3
United States v. Virginia, 518 U.S. 515 (1996) 21
Welsh v. Boy Scouts, 993 F.2d 1267, 1274 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993) 12
Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980) 21
West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) 9
Widmar v. Vincent, 454 U.S. 263, 276 (1981) 23

Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) 22

STATUTES

N.J. Stat. Ann. § 2A: 143-1 (West 1985) (formerly N.J. Stat. Ann.§ 2:168-1), *repealed by* L. 1978 C95, § 2C: 98-2 23

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Douglas Laycock & Oliver Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 223-24 (1994) 23
LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 791 (1st ed. 1978) 16
SCOUTMASTERS' HANDBOOK (1972) 12, 13, 14, 15

No. 99-699

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL OF BOY SCOUTS OF
AMERICA, *Petitioners*

v.

JAMES DALE, *Respondent.*

BRIEF *AMICI CURIAE* OF THE AMERICAN CENTER FOR LAW AND JUSTICE, THE ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND FOCUS ON THE FAMILY SUPPORTING PETITIONERS

INTEREST OF AMICI*

The Ethics and Religious Liberty Commission of the Southern Baptist Convention is the ethics, moral concerns,

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* Counsel of record for the parties in this case have consented to the filing of this brief. Pursuant to Rule 37.6, amici ACLJ and Ethics and Liberty Commission disclose that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amici curiae*.

public policy, and religious liberty agency of the Southern Baptist Convention, the nation's largest Protestant denomination with nearly sixteen million members in 40,000 local congregations. The Southern Baptist Convention has assigned the Ethics and Religious Liberty Commission the responsibility of addressing a wide range of moral and public policy concerns, including First Amendment issues. The Ethics and Religious Liberty Commission is profoundly concerned about the deleterious effect the New Jersey Supreme Court's decision will have on the Boy Scouts' First Amendment right to instill traditional moral values in the boys and young men who join Scouting.

Focus on the Family is a California Nonprofit Religious Corporation committed to strengthening the family in the United States and abroad. The president of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing and family relations. Dr. Dobson hosts and Focus on the Family distributes a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada, and around the world. Focus on the Family publishes and distributes *Focus on the Family* magazine and other literature that is received by more than 2 million households each month. Focus on the Family's interest in this case stems from the fact that Focus on the Family offers a ministry to those who are seeking to leave the homosexual life-style and to adopt either a heterosexual or abstinent sexual relationship. Focus on the Family conducts seminars and publishes materials addressing the dangers associated with the practice of homosexuality and

the dangers posed to young children, boys in particular, by exposure to homosexual role models.

Representing the Ethics and Religious Liberty Commission and Focus on the Family, and appearing on its own behalf as well is the American Center for Law and Justice (ACLJ). The ACLJ is a non-profit, public interest law firm and educational organization dedicated to protecting First Amendment freedoms, human life, and the family. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before the United States Supreme Court and lower federal courts, and Chief Counsel Jay Sekulow has presented oral argument before this Court in the following cases: *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 855 (1997); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 224 (1990); *United States v. Kokinda*, 497 U.S. 720 (1990); and *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987). Also, the ACLJ presently has two cases pending before this Court: *Hill v. Colorado*, No. 98-1856 (argued January 19, 2000), and *Santa Fe Independent School District v. Doe*, No. 99-62 (oral argument March 29, 2000).

In this case and in other cases across the nation, the ACLJ opposes the misuse of state anti-discrimination laws to compel individuals and organizations to endorse currently fashionable sexual ethics at the expense of First Amendment rights to

choose one's own message and to associate for the purpose of promulgating a message.

STATEMENT OF THE CASE

The Amici adopt the statement of the case set forth in Petitioners' Brief.

SUMMARY OF THE ARGUMENT

This case concerns whether New Jersey can use its Law Against Discrimination to coerce the Boy Scouts into presenting the state-approved message that a man's sexual morality is irrelevant to the question of his suitability as a leader in the Boy Scouts. This case is about an expressive organization's right under the First Amendment to exercise autonomy over the content of its message through its leadership selection criteria.

The First Amendment to the United States Constitution protects the unfettered expression of ideas, including those values that have fallen out of favor in some segments of society. The First Amendment also protects the right to associate with others to advance shared values. The right to associate belongs to all expressive organizations, including the Boy Scouts, whose indisputable purpose is to produce character in young boys through the inculcation of traditional morals. Long before gay rights became a politically controversial issue, the Boy Scouts determined that a Scout leader should adhere to traditional sexual mores, *i.e.*, that sexual expression is properly

reserved to the marital relationship between a man and a woman. The Boy Scouts present its message to young men primarily by the role models it provides these young men.

The Boy Scouts' views are absolutely protected under the First Amendment, and James Dale's attempt to change them through New Jersey's Law Against Discrimination should fail. This Court established five years ago that state anti-discrimination laws could not be used to coerce private organizations into endorsing homosexuality. In *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the Court ruled that the principle of speaker autonomy must be preserved even where the speaker's message is relatively inarticulate. The state may not, even in the interest of cultural "enlightenment," force the speaker to make a statement he does not want to make. The Boy Scouts' message is and has been clear: avowed homosexuals are not suitable Scoutmasters because they are not suitable role models. The Boy Scouts' message that homosexual behavior is wrong becomes hopelessly muddled if the state compels the Boy Scouts to appoint as a leader a militantly gay man who admitted that he wants to teach the Boy Scouts how wrong their position on homosexuality is. In ordering the Boy Scouts to accept Dale as an assistant Scoutmaster, the New Jersey Supreme Court violated the principle of speaker autonomy protected by the First Amendment.

The New Jersey Supreme Court erred in ignoring *Hurley's* significance for this case. The court refused to recognize the Boy Scouts as an expressive organization whose distinct message extolling traditional sexual morality would be

compromised if a homosexual advocate like Dale is exalted as a role model in the organization. Rather, substituting its own interpretation of various Scout principles and finding the Scouts' principles either disingenuous or too insignificant to be worthy of First Amendment protection, the court indulged in an unconstitutional exercise of judicial presumption. The court's decision applying New Jersey's Law Against Discrimination tramples the Boy Scouts' First Amendment rights to free speech and expressive association.

The New Jersey Supreme Court also distorted other of this Court's expressive association cases in holding that the Boy Scouts has no right to exclude avowed homosexuals from leadership. The court read this Court's decision in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987) to mean that because the Boy Scouts was not formed primarily to promote the view that homosexual conduct was immoral, admitting Dale cannot affect the Boy Scouts' ability to carry out its mission. That the Boy Scouts' position on sexual morality is not the centerpiece of its mission does not in the least affect the First Amendment protection the Boy Scouts' position deserves. Taking the New Jersey Supreme Court's view to its logical extreme, no expressive organization can impose moral standards on its leadership unless it makes those moral standards the focus of its mission. Nothing in this Court's First Amendment jurisprudence supports the New Jersey Supreme Court's cramped view of the right to expressive association.

Contrary to the New Jersey Supreme Court's holding, the Boy Scouts' First Amendment rights of free speech and expressive association trump any conceivable state interest in this case. *Hurley* firmly establishes this point. As in *Hurley*, New Jersey's interest here is to require the Boy Scouts to modify their views and the content of their expression on the subject of homosexuality. New Jersey wants the Boy Scouts to share its belief that Dale's avowed homosexuality is irrelevant to his suitability as a role model for young boys. Under *Hurley*, such a goal is invalid.

Finally, eliminating discrimination against homosexuals is not a compelling state interest. *Hurley* itself explicitly rejected the contention. Moreover, this Court has never held that homosexuals need the special protections given women and racial minorities in this country. Indeed, states remain free to criminalize the conduct that defines the class of homosexuals. While New Jersey may have a legitimate interest in protecting homosexuals from certain kinds of discrimination, there is no basis in federal constitutional law to hold that such an interest qualifies as a paramount interest of the highest order, subjugating even First Amendment values.

ARGUMENT

I. FORCING THE BOY SCOUTS TO APPOINT HOMOSEXUAL ADVOCATES TO LEADERSHIP POSITIONS VIOLATES ITS FIRST AMENDMENT RIGHTS OF FREE SPEECH AND EXPRESSIVE ASSOCIATION.

The New Jersey Supreme Court's decision betrays a stunted understanding of this Court's decisions establishing the interdependence of the right of free speech and the right of expressive association. This Court has long recognized the interdependence of the First Amendment right of free thought and speech with the right to associate with others who share similar views. Those rights necessarily include the right to hold and express views different from what others might consider culturally orthodox:

> Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments.
>
> . . . .
>
> At the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and conscience rather than coerced by the State. . . . *"If there is any fixed star in our constitutional constellation it is that no official, high or petty, can*

> *prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act therein."*

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-35 (1977) (emphasis added) (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). The New Jersey Supreme Court did precisely what *Abood* and *Barnette* forbid. In dictating that the Boy Scouts must subscribe to the currently fashionable view that sexual morality is irrelevant to a person's character, it "prescribed what shall be orthodox in politics and . . . matters of opinion."

Protecting expressive associational rights under the First Amendment is a paramount concern essential to "preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *see also id.* at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice"). As Justice Brennan observed in *Roberts*, "there can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." 468 U.S. at 623. That intrusion is even more constitutionally infirm when its only goal is to promote conformity in opinions on morally controversial matters. This Court has called such a goal "decidedly fatal" under the First Amendment. *Hurley v. Irish American Gay, Lesbian and Bi-Sexual Group of Boston, Inc.*, 515 U.S. 557, 579 (1995).

A. This Court's Decision in *Hurley v. Irish American Gay, Lesbian and Bi-Sexual Group of Boston, Inc.* Establishes that Private Associations Cannot Be Coerced Into Endorsing the View that Homosexuality Is a Morally Neutral Lifestyle.

New Jersey's LAD cannot be used to compel the Boy Scouts to endorse the message that an avowed homosexual is an appropriate role model for young boys. In *Hurley*, this Court unanimously held that Massachusetts' anti-discrimination law could not be applied to force the organizers of a St. Patrick's Day parade to allow a gay, lesbian, and bisexual group ("GLIB") to march. GLIB wanted to march in the parade to celebrate its members' heritage as Irish gays, lesbians, and bisexuals. *Id.* at 570. Even though the parade organizers had no specific articulable message, this Court held that requiring them to include GLIB forced them to convey a message about the acceptability of homosexuality that they did not wish to convey. *Id.* at 572-73. Massachusetts' attempted use of its public accommodation law to coerce a private organization into endorsing GLIB

> violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message. . . . [T]his general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion or endorsement, but equally to statements of fact the speaker would rather avoid.

. . . .

> While the law is free to promote all sorts of conduct in place of harmful behavior, *it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.*

Id. at 578-79 (emphasis added).

This Court also stated that forcing parade organizers to admit GLIB would violate the parade organizer's expressive associational rights. Distinguishing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and its progeny as cases in which "compelled access to the benefit did not trespass on the organization's message," the Court observed that GLIB "could be refused admission [to the parade] just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.* at 581.

Hurley controls this case. The Boy Scouts is an expressive association that exists to foster the moral development of young males. Its "protected expression... take[s] the form of quiet persuasion, including the inculcation of traditional values in the young." *Roberts v. United States Jaycees,* 468 U.S. at 636 & n.* (O'Connor, J., concurring) (citing Boy Scouts as an example of an expressive organization); *see also Curran v. Mount Diablo Council of Boy Scouts*, 952 P.2d 218, 236 (Cal. 1998) (the primary function of the Boy Scouts is the inculcation of traditional moral values); *id.* at 253 (Kennard, J., concurring) (because the Boy Scouts is an organization whose activities are "overwhelmingly expressive" under *Hurley,* applying California's anti-discrimination law to the Boy Scouts would

violate their First Amendment rights); *Welsh v. Boy Scouts,* 993 F.2d 1267, 1274 (7th Cir.), *cert. denied,* 510 U.S. 1012 (1993) (Boy Scouts' purpose is to train young boys to respect God, their country, and their fellow man, while developing a good moral character).

To avoid *Hurley*, the New Jersey Supreme Court trivialized the critical fact that the Boy Scouts' expressive activity consists largely of adult men acting as role models for boys. *See Dale v. Boy Scouts of America,* 734 A.2d 1196, 1229 (N.J. 1999). The 1972 Scoutmasters' Handbook highlights the Scoutmaster's duty to be a good role model:

> You are providing a good example of what a man should be like. What you do and what you are may be worth a thousand lectures and sermons. . . . *What you are speaks louder than what you say. This ranges from simple things like wearing the uniform to the matter of your behavior as an individual. Boys need a model to copy and you might be the only good example they know.* (emphasis added). Pet. A. 2652.

Thus, how a man behaves is even more important than what he says. The Boy Scouts' official policy is that homosexual behavior is not morally "straight" or "clean." Pet. A. 3241-3247, 3238-3247. Men who by word or deed condone homosexual behavior cannot, therefore, be good Scouting role models.

The Scoutmasters' Handbook also admonishes Scout leaders to "practice what you preach. . . . The most destructive

influence on boys is adult inconsistency and hypocrisy." Pet. A. 2695.

Dale's views on homosexuality are clearly at odds with those of the Boy Scouts. Dale has stated openly that homosexual conduct is acceptable. Dale expressly declared that he wants to "correct" the Boy Scouts' policy against appointing avowed homosexuals to leadership positions in the Boy Scouts: "I owe it to the organization to point out to them how bad and how wrong this policy is. . . . Being proud of who I am is something the Boy Scouts taught me. They taught me to stand up for what I believe in." Pet. A. 3366-3367, 3548. Dale does not share the Boy Scouts' views on the proper male sexual identity, or the proper means of sexual expression. The Boy Scouts has long taught that a Scout leader should embody traditional sexual morality, *i.e.*, sexual expression is reserved for marriage between a man and a woman. See Pet. A. 2531-2532, 4395.

The New Jersey Supreme Court expressed the hope that Dale will "refer boys to their parents on matters of religion and sex." 734 A.2d at 1229. While Dale may well do so, that does not change the fact that Dale is an advocate for homosexual rights. According to the Scoutmasters' Handbook, Dale's identity as a homosexual advocate is more significant than what he says or does not say to individual boys. While Dale certainly has the right to be a homosexual advocate, the Boy Scouts has an equivalent right not to hold Dale out as an example for male youth.

In ignoring the essential part that role modeling plays in communicating the Boy Scouts' message, the lower court's

decision also conflicts with this Court's definition of symbolic speech. Expressive conduct is entitled to First Amendment protection if the activity is intended to convey a message likely to be understood by a particular audience. *See, e.g., Texas v. Johnson,* 491 U.S. 397, 404 (1989) (burning of American flag is protected speech); *see also Roberts v. United States Jaycees,* 468 U.S. 609, 636 (1984) (O'Connor, J., concurring) ("even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and desire for self-improvement"). It is undisputed that the Scout Oath, the Scout Law, and all Scouting activities are designed to convey a message about what is ideal manhood, including an ideal man's sexual identity (husband and father). Pet. A. 2531-2532, 4395. Scouting's values are to be exemplified in its adult volunteer leaders. Because Scouting's message is much more articulate than the parade's message in *Hurley* and the flag burning in *Johnson*, it is much more likely to be understood and therefore much more entitled to protection.

B. Nothing in this Court's Expressive Association Cases Supports the New Jersey Supreme Court's Holding that the First Amendment Does Not Protect an Organization's Decision to Require Certain Moral Standards as Part of its Leadership Criteria Unless those Moral Standards are the Centerpiece of its Mission.

The New Jersey Supreme Court held that because the Boy Scouts does not teach specific sexual ethics to its members, it cannot exclude from leadership a man whose sexual morality it disapproves. 734 A.2d at 1224-25. The court's holding is

inconsistent with *Hurley*. That the Boy Scouts' message is communicated primarily through role modeling, and that it does not *focus* on the subject of sexuality, makes it no less worthy of First Amendment protection than the parade in *Hurley*. The parade organizers in *Hurley* had no previously articulated views on homosexuality. Moreover, they had no written rules about who could participate in the parade, and they made *ad hoc* determinations about group participation. Observing the lack of any coherent message in the parade, this Court nonetheless held that the parade organizers could not be forced to endorse GLIB's message by allowing them to march: "A narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley*, 515 U.S. at 569. In contrast to the parade organizers in *Hurley*, the Boy Scouts have a coherent message, and the Boy Scouts' views on homosexuality have been articulated clearly. Pet. A. 3241-3247.

In addition to dismissing *Hurley*, the New Jersey Supreme Court ignored altogether *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 233 (1988), and *Democratic Party v. Wisconsin,* 450 U.S. 107, 122 (1981). These cases held that in the context of group expression, an association's ability to select the content of its message is inextricably woven with its freedom to select its leaders and members.

In *Democratic Party v. Wisconsin,* 450 U.S. 107, 122 (1981), this Court held that forcing the national Democratic party to alter its delegate selection criteria would violate the party's First Amendment right to expressive association. Specifically, the Court stated that freedom to associate to promote shared values includes "freedom to identify the people

who constitute the association, and to limit the association to those people only. . . . 'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'" *Id.* at 122 & n.22 (quoting L. Tribe, *American Constitutional Law* 791 (1st ed. 1978)).

More significantly, this Court warned lower courts against exactly the sort of presumption the New Jersey Supreme Court exercised in this case. Rejecting the argument that the national Democratic Party delegate selection procedures were ineffective or unnecessary to the goal of achieving ideological purity, the Court stated:

> [A] State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution. *And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.*

450 U.S. at 123 (emphasis added).

Similarly, in *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 233 (1988), this Court held that "a state cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure, any more than it can tell a party that its proposed communication to party members is unwise." *Id.* at 233. Again in that case, the Court chided the lower court for "impos[ing] its views about

membership and leadership criteria" on the local Democratic Party. *Id.* at 233.

The New Jersey Supreme Court violated the dictates of *Eu* and *Democratic Party* by improperly substituting its own interpretation of the Boy Scouts' views and policies. Specifically, the court declared by *ipse dixit* that the Boy Scouts' position on homosexuality is: 1) inconsistent with other Scouting values; 2) disingenuously taken up in response to litigation; and 3) insignificant because it is not "central" to Scouting's mission. *See* 734 A.2d at 1223-25. Both *Eu* and *Democratic Party* contradict the court's holding that the Boy Scouts can only exclude from its leadership those who oppose what the court considers to be the Boy Scouts' "central" mission. Those two cases establish that it is not the business of the judiciary to second-guess an expressive organization's leadership and membership criteria.

The New Jersey Supreme Court also distorted this Court's decisions in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987), and *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988) (collectively, the *Roberts* trilogy). The court relied on the *Roberts* trilogy, as it relied on *Hurley*, to support its holding that the Boy Scouts' right of expressive association was not violated because the Boy Scouts was not formed to oppose homosexuality. The court twisted language from those cases into the proposition that an expressive association can only exclude from its leadership those whose views differ on key matters, as that term is defined by the reviewing court. 734 A.2d at 1224-25.

In *Roberts* and *Rotary Club*, the Jaycees and the Rotary Club invited women to participate on some level, but excluded them from full membership privileges. In both cases, this Court recognized the organization's expressive associational rights but held that the state's compelling interest in eradicating sex discrimination outweighed the minimal burden placed on those rights. 468 U.S. at 623; 481 U.S. at 549. *Cf. New York State Club Ass'n,* 487 U.S. at 13 (affirming constitutionality of New York City's anti-discrimination ordinance against facial challenge). In the *Roberts* trilogy, this Court also held that a limitation on an expressive association's right to select its members according to its own criteria must be unrelated to the expression of ideas. *See, e.g., Roberts*, 468 U.S. at 623. Because the private associations at issue admitted women as members but denied them full privileges, this Court held that applying the anti-discrimination law "impose[d] no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Roberts*, 468 U.S. at 627; *Rotary Club*, 481 U.S. at 548 (application of law did "not require the clubs to abandon or alter" any of their views); *see also New York State Club Association*, 487 U.S. at 13 (law did not prevent a "club from seek[ing] to exclude individuals who do not share the views that the club's members wish to promote.").

This case is a prototype of the sort of case anticipated in the *Roberts* trilogy. New Jersey may not violate the Boy Scouts' First Amendment rights of free speech and expressive association unless a compelling state interest so requires, *and* application of the law in question is unrelated to the expression of ideas. *See Roberts*, 468 U.S. at 623. Whatever ambiguity existed in the *Roberts* trilogy about the extent to which a

private association can exclude persons with different ideologies was eliminated in *Hurley*. The ideology upon which exclusion is based need not be central to the group's mission. Indeed, it need not be about any subject the group has ever even addressed before. 515 U.S. at 581. Here, the Boy Scouts' exclusion of Dale is based purely on ideological grounds, and it is therefore protected by the First Amendment.

The New Jersey Supreme Court's reading of the *Roberts* trilogy would virtually emasculate the right of expressive association. Reserving the freedom to exclude based on ideology only to those groups that are formed for the primary purpose of discriminating against a certain class of persons means that few associations would be protected. Many established religions teach that homosexuality is immoral, but their position on homosexuality cannot be regarded as their primary reason for being. Nobody would seriously contend that the First Amendment does not protect these organizations' right to exclude avowed practicing homosexuals from their leadership. Whatever one's views about sexual morality may be, the legitimacy *vel non* of homosexual conduct is a matter of moral philosophy and conscience. As such, an organization's views about sexual morality are "related to the expression of ideas," *see Roberts*, 468 U.S. at 623, and are therefore protected by the First Amendment from state attempts to impose a contrary view. To echo this Court's language in *Hurley*, the New Jersey Supreme Court's objective in enforcing the LAD against the Boy Scouts is nothing short of an attempt to "free" the Boy Scouts of its "biases" toward homosexuals and change its expressive conduct so that "it is at least neutral toward" homosexuals. *See* 515 U.S. at 579. The First Amendment forbids such ideological coercion. *See id.*

II. PROTECTING HOMOSEXUALS FROM DISCRIMINATION IS NOT A COMPELLING STATE INTEREST THAT TRUMPS THE BOY SCOUTS' FIRST AMENDMENT RIGHTS.

Ostensibly, relying on this Court's decisions in *Roberts* and *Rotary Club*, the New Jersey Supreme Court held that New Jersey's interest in protecting homosexuals from discrimination is compelling and outweighs the Boy Scouts' First Amendment rights. 734 A.2d at 1224. The court quoted from *Roberts* and a number of other cases to support its conclusion that discrimination against homosexuals is morally equivalent to sex or race discrimination and therefore equally deserving of government proscription. *See* 734 A.2d at 1225-1228.

The court's holding that protecting homosexuals from discrimination is a compelling state interest sufficient to trump the Boy Scouts' First Amendment rights conflicts with *Hurley*. In response to the same assertion, this Court held that eliminating discrimination against homosexuals did not trump the First Amendment right of speaker autonomy:

> [No] legitimate interest has been identified in support of applying the Massachusetts statute in this way to expressive activity like the parade.
>
> . . . .
>
> On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of

> personal preference. *When the law is applied to expressive activity the way it was here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.*

515 U.S. at 578 (emphasis added). Thus, the Boy Scouts' right of speaker autonomy is supreme over any interest New Jersey has in protecting those who engage in homosexual conduct from discrimination.

The New Jersey Supreme Court's reliance on *Roberts* and *Rotary Club* for the proposition that protecting those who engage in homosexual conduct from discrimination is a compelling state interest is misplaced. The compelling state interest against sex discrimination identified in *Roberts* and *Rotary Club* has a substantial jurisprudential pedigree. Women comprise a quasi-suspect class under federal equal protection clause jurisprudence. *See Roberts*, 468 U.S. at 615; *Rotary Club*, 481 U.S. at 541. Sex discrimination is permissible only where an "exceedingly persuasive justification" exists. *United States v. Virginia*, 518 U.S. 515 (1996). This Court has struck down almost every sex-based classification allocating economic benefits or opportunity. *See, e.g., Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (invalidating Louisiana statute which gave a husband, as "head and master" of the family, the unilateral right to dispose of property jointly owned with his wife without her consent); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980) (striking down statutory provision entitling women workers to fewer benefits for their family than male counterparts).

By contrast, no federal court has ever held that homosexuals share the same protected status as women or ethnic and racial minorities. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), this Court upheld the constitutionality of Georgia's statute criminalizing sodomy. If, as *Bowers* establishes, states are free to criminalize homosexual conduct, then protecting homosexuals from discrimination cannot be a compelling state interest. "There can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal." *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987).

Since *Bowers*, every federal court of appeals addressing the issue has rejected the notion that homosexuals constitute a suspect or quasi-suspect class. *See Equality Foundation v. City of Cincinnati*, 128 F.3d 289, 292, (6th Cir. 1997) (homosexuals are not a suspect or quasi-suspect class); *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) ("It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause"); *High Tech Gays v. Defense Ind. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) ("Homosexuality is. . .behavioral and hence is fundamentally different from traits such as race, gender, or alienage"); *Ben Shalom v. Marsh*, 881 F.2d 454, 464 (7th cir. 1989) (same); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990) (members of recognized suspect or quasi-suspect classes, *e.g.*, blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature). *Cf. Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc) (same but decided before *Bowers*); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984) (same).

Until less than 20 years ago, New Jersey criminalized homosexual conduct. N.J. Stat. Ann. § 2A: 143-1 (West 1985) (formerly N.J. Stat. Ann.§ 2:168-1), *repealed by* L. 1978 c95, § 2C: 98-2. It is absurd to suggest that homosexual conduct can go from being a crime to a compelling state interest in less than 20 years. *Cf.* Douglas Laycock & Oliver Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 223-24 (1994) (fornication cannot go from misdemeanor to compelling state interest in one generation). While New Jersey may choose to protect homosexuals from discrimination, nothing in federal constitutional law licenses the state to exalt that interest above every other value, including core First Amendment freedoms.

Finally, the New Jersey Supreme Court's decree that protecting homosexuals from discrimination is a compelling state interest also disregards this Court's multiple pronouncements about the rigor of strict scrutiny. "First Amendment rights are entitled to special constitutional solicitude," and this Court has "required the most exacting scrutiny" in cases where state action burdens free speech. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Strict scrutiny is not "watered . . . down but really means what it says." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 545 (1992) (quotations omitted). Given that the conduct that defines homosexuals as a class may be constitutionally criminalized and indeed was, until recently, a crime in New Jersey, to hold that the state has a compelling interest in protecting the privilege of avowed homosexuals to be Scout leaders would certainly water down strict scrutiny.

CONCLUSION

If Dale and others wish to form alternative Scouting organizations that espouse the moral neutrality or even desirability of homosexuality, they are free to do so. Moreover, the First Amendment guarantees their right to speak out against the Boy Scouts' policies. The First Amendment prevents them, however, from using the state's coercive power to remake the Boy Scouts into what they and the state consider a proper Scouting association. Requiring the Boy Scouts to accept Dale as an assistant Scoutmaster is nothing less than an effort to change the Boy Scouts' views and message on homosexuality. As such, it is a severe intrusion on the Boy Scouts' First Amendment rights of free speech and expressive association. The New Jersey Supreme Court's decision applying New Jersey's Law Against Discrimination to the Boy Scouts should be reversed.

Respectfully submitted,

JAY ALAN SEKULOW
Counsel of Record

VINCENT MCCARTHY
THE AMERICAN CENTER
FOR LAW AND JUSTICE
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

JOHN P. TUSKEY
LAURA B. HERNANDEZ
THE AMERICAN CENTER
FOR LAW AND JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 226-2489

Attorneys for Amici Curiae for the American Center for Law and Justice, The Ethics & Liberty Commission of the Southern Baptist Convention, and Focus on the Family

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On Writ of Certiorari To The Supreme Court of the State of New Jersey

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KEVIN J. HASSON*
ERIC W. TREENE
ROMAN P. STORZER
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1350 Connecticut Avenue
Suite 605
Washington, D.C. 20036
(202) 955-0095

*Counsel of Record

2098

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE LOWER COURT'S DECISION THREATENS THE FREE ASSOCIATION RIGHTS OF RELIGIOUS ORGANIZATIONS.	4
II. THE LOWER COURT'S DECISION THREATENS THE FREE SPEECH RIGHTS OF RELIGIOUS ORGANIZATIONS.	10
CONCLUSION	14

TABLE OF AUTHORITIES

CASES

Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126 (4th Cir. 1995) 11
Brown Transport v. Human Rel. Com'n, 578 A.2d 555 (Pa. Common. 1990) 12
Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) 11
Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999) 4, 10
Diamond v. Congregation Kol Ami, 1996 WL 942039 (Chi. Com. Hum. Rel.) 10
Diamond v. Congregation Kol Ami, 1996 WL 942039 (Chi. Com. Hum. Rel.) 7
D'Amico v. Commodities Exchange Inc., 652 N.Y.S.2d 294 (App. Div. 1st Dept. 1997) 12
E.E.O.C. v. Pacific Press Publishing, 676 F.2d 1272 (9th Cir. 1982) 10
Featherstone v. United Parcel Servs., 56 F.3d 61 (4th Cir. 1995) 11
Higgins v. New Balance Ath. Shoe, Inc., 194 F.3d 252 (1st Cir. 1999) 11
Hodges v. Washington Tennis Service Intern. Inc., 870 F. Supp. 386 (D.D.C. 1994) 13
In re Haney, 1994 WL 880339 (Ill. Hum. Rts. Com. 1994) 13
Jackson v. Quanex Corp., 191 F.3d 647 (6th Cir. 1999) .. 11
Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir. 1987) 11
McClure v. Sports & Health Club, Inc., 370 N.W.2d 844 (Minn. 1985), *appeal dismissed*, 478 U.S. 1015 (1986) 13
Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) 11

Mitchell v. Fab Industries, Inc., 990 F. Supp. 285 (1998) . 12
Pakizegi v First National Bank of Boston, 831 F. Supp. 901 (D. Mass. 1993), *aff'd without opinion*, 56 F.3d 59 (1st Cir. 1995) 12
Pines v. Tomson, 206 Cal Rptr. 866 (Cal. App. 2 Dist. 1984) 8-10
Roberts v. United States Jaycees, 468 U.S. 609 (1984) 9
Romer v. Evans, 517 U.S. 620 (1996) 9
Sanders v. Women's Treatment Ctrs, 9 F. Supp. 2d 929 (N.D. Ill. 1996) 11
Shiflett v. GE Fanuc Automation Corp., 151 F.3d 1030 (4th Cir. 1998) 11
State v. McHarris Gift Ctr., 418 N.E.2d 393 (N.Y. 1980) 13
United States v. Columbus Country Club, 915 F.2d 877 (3d Cir. 1990), *cert. denied*, 501 U.S. 1205 (1991) ... 8
Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982) 11
Vigars v. Valley Christian Center, 805 F. Supp. 802 (1992) 10
Ward v. Hengle, 76 Fair Empl. Prac. Cases 36 (Ohio App. 1997), *appeal den.*, 692 N.E.2d 617 (Ohio), *cert. denied*, 525 U.S. 878 (1998) 8
Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993). 4

STATUTORY PROVISIONS

ALASKA STAT. § 18.80.200 *et seq.* (Michie 1999) 4, 7
ARIZ. REV. STAT. § 41-1412 *et seq.* (1999) 4, 5
ASPEN MUNICIPAL CODE § 13-98(a)(1) (1977) 9
BOULDER REV. CODE §§ 12-1-1 to 12-1-4 (1987) 9
CAL. CIVIL CODE § 51 (Deering 1999) 4, 7

COLO. REV. STAT. § 24-34-601 (1999) 4, 7
CONN. GEN. STAT. § 46a-63 *et seq.* (1999) 4, 5
D.C. CODE ANN. § 1-2519 *et seq.* (1999) 4, 7, 9
DEL. CODE ANN. tit. 6, § 4500 *et seq.* (1999) 4, 7
DENVER REV. MUNICIPAL CODE, Art. IV, §§ 28-92 to 28-119 (1991) 9
FLA. STAT. Ch. 760 *et seq.* (1999) 4, 7
HAW. REV. STAT. ANN. § 489-1 *et seq.* (Michie 1999) .. 4, 7
IDAHO CODE § 67-5901 *et seq.* (1999) 4, 5
ILL. COMP. STAT. ANN. Ch. 775 5/5-101 *et seq.* (1999) .. 4, 7
IND. CODE ANN. § 22-9-1-1 *et seq.* (Michie 1999) 4, 6
IOWA CODE § 216 *et seq.* (1997) 4-6
KAN. STAT. ANN. § 44-1001 *et seq.* (1998) 4, 5
KY. REV. STAT. ANN. § 344.110 *et seq.* (Michie 1998) .. 4, 7
LA. REV. STAT. ANN. § 49:146 (West 1999) 5, 6
MASS. ANN. LAWS ch. 272, § 92(A) (Law. Co-op. 1999) 5, 7
MD. CODE ANN., Discrimination in Public Accommodations § 5 (1999) 5, 7
ME. REV. STAT. ANN. tit. 5, § 4552 (West 1998) 5, 6
MICH. S.A. § 3.548 (1999) 5
MINN. STAT. § 363.01 *et seq.* (1999) 5, 6
MO. R. STAT. § 213.010 *et seq.* (1999) 5
MONT. CODE ANN. § 49-2-101 *et seq.* (1999) 5, 7
N.D. CENTURY CODE § 14-02.4 (2000) 5, 7
N.H. REV. STAT. ANN. § 354-A:1 *et seq.* (1999) 5, 6
N.J. STAT. ANN. § 10:5-1 *et seq.* (West 1999) 5
N.M. STAT. ANN. § 28-1-1 *et seq.* (Michie 2000) 5, 7
N.Y. EXECUTIVE LAW § 291 *et seq.* (1999) 5
N.Y.C. ADMIN. CODE § 8-107(4) (2000) 5
NEB. R. STAT. § 20-132 (1999) 5, 6
NEV. REV. STAT. ANN. § 651.050 *et seq.* (Michie 2000) . 5, 7
OHIO REV. CODE ANN. § 4112.01 *et seq.* (Anderson 1999) 5, 7
OKLA. STAT. tit. 25, § 1401 *et seq.* (1999) 5, 7

OR. REV. STAT. § 30.670 *et seq.* (1997) 5, 7
PA. CONS. STAT. ti. 43 § 952 *et seq.* (1999) 5, 7
R.I. GEN. LAWS § 11-24-1 *et seq.* (1999) 5, 7
S.C. CODE ANN. § 45-9-10 *et seq.* (1998) 5, 7
S.D. CODIFIED LAWS § 20-13-1 *et seq.* (Michie 2000) ... 5, 7
SEATTLE MUNICIPAL CODE § 14.08.040(D) 5
TENN. CODE ANN. § 4-21-102 *et seq.* (1999) 5, 7
UTAH CODE ANN. § 13-7-1 *et seq.* (1999) 5
VA. CODE ANN. § 2.1-715 *et seq.* (1999) 5
VT. STAT. ANN. tit. 9, § 4501 *et seq.* (2000) 5, 7
W. VA. CODE § 5-11-1 *et seq.* (2000) 5, 7
WASH. REV. CODE § 49.60.010 *et seq.* (1999) 5
WYO. STAT. ANN. § 6-9-101 (Michie 1999) 5, 7

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BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS*

Pursuant to Rule 37.3 of this Court, the Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioners.[1] The Becket Fund is a bipartisan and interfaith public interest law firm that protects the free expression of all religious traditions. *Amicus* is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of churches, temples and other religiously affiliated organizations to pursue their

[1] All parties have consented to the filing of this brief. Letters of consent from the Petitioners and Respondent have been filed simultaneously with this brief.

missions without excessive government regulation and entanglement.

Our present brief addresses the impact of extending public accommodation laws to encompass religiously affiliated organizations. In particular, this brief focuses on how such a result, coupled with the growing trend toward hostile environment causes of action in public accommodation law, would create an unprecedented intrusion by the government into the doctrines of religious organizations.[2]

SUMMARY OF ARGUMENT

The Boy Scouts of America are a private group that includes religious belief among its membership requirements and has as its basic purpose the conveyance and inculcation in young men of a specific vision of morals and character. The Supreme Court of New Jersey found the Boy Scouts to be a public accommodation subject to that state's Law Against Discrimination. The Court further held that the First Amendment did not give the Boy Scouts any right to apply its particular understanding of morals and character in filling leadership positions when the Boy Scouts' beliefs conflict with the state's values expressed in its Law Against Discrimination.

Denying voluntary private associations with a religious character, such as the Boy Scouts, the First Amendment right to determine the standards to which their members should adhere–and thus who may and may not be a member–threatens the integrity of such organizations' religious identities. At least 43 states, as well as many municipalities, have public

[2]Counsel wishes to acknowledge Carmen Guerricagoitia, Class of 2001 at Georgetown University Law Center, who provided invaluable assistance in the preparation of this brief.

accommodation laws similar to New Jersey's. Some of these have exemptions for certain types of discrimination by religious organizations, such as discrimination based on religion, but many provide no statutory exemption whatsoever for religious groups. Thus without the protection of the First Amendment, which the New Jersey Supreme Court denied to the Boy Scouts below, religious organizations–ranging from churches and temples to religiously affiliated clubs and fraternal organizations–will be denied their freedom of association and be compelled to accept dissident members.

Thus permitting the government freely to intrude upon the doctrines and leadership choices of religious organizations will have a profound effect on their institutional integrity. But this effect will be greatly compounded by another development in public accommodations law: the growth of hostile environment causes of action. Liability based on a defendant's creation of an environment that would be perceived as hostile to members of a protected class, which originated in the employment discrimination context, has been expanded into state and local public accommodation law. Moreover, an environment may be found to be hostile based on speech alone. Arguably, therefore, the constitutional harm does not end when a dissident member is forced on an unwilling religious group. Once admitted to membership in this "public accommodation" he or she will be entitled to be free from a hostile environment–*i.e.*, one characterized by a message of disapproval of his or her dissidence. The specter of a private religious organization first being required to admit members conflicting with the groups' doctrines, and then being required to alter its expression of doctrine to avoid making such members feel unwanted, is a grave threat to the integrity of religious organizations.

ARGUMENT

The New Jersey Supreme Court has held the Boy Scouts of America, a private association with a membership requirement of religious belief,[3] to be a public accommodation for purposes of that State's Law Against Discrimination. *Dale*, 734 A.2d at 1218. The Court has further held that the Free Speech Clause and Freedom of Association affords the Boy Scouts no protection against application of that law. *Id.* at 1229. This holding, if allowed to stand, threatens the integrity of religiously affiliated organizations across the country.

II. THE LOWER COURT'S DECISION THREATENS THE FREE ASSOCIATION RIGHTS OF RELIGIOUS ORGANIZATIONS.

At least 43 states have laws banning discrimination in public accommodations.[4] Many municipalities do as

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[3]*See Dale v. Boy Scouts of America*, 734 A.2d 1196, 1202 (N.J. 1999) (the Scout Law requires that "A Scout is reverent toward God. He is faithful in his religious duties. He respects the beliefs of others."); *Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1275 (7th Cir.) (the purpose of the Boy Scouts "is to train young boys to respect God, their country and their fellow man, while developing a good moral character."), *cert. denied*, 510 U.S. 1012 (1993).

[4]ALASKA STAT. § 18.80.200 *et seq.* (Michie 1999); ARIZ. REV. STAT. § 41-1412 *et seq.* (1999); CAL. CIVIL CODE § 51 (Deering 1999); COLO. REV. STAT. § 24-34-601 (1999); CONN. GEN. STAT. § 46a-63 *et seq.* (1999); DEL. CODE ANN. tit. 6, § 4500 *et seq.* (1999); D.C. CODE ANN. § 1-2519 *et seq.* (1999); FLA. STAT. Ch. 760 *et seq.* (1999); HAW. REV. STAT. ANN. § 489-1 *et seq.* (Michie 1999); IDAHO CODE § 67-5901 *et seq.* (1999); ILL. COMP. STAT. ANN. Ch. 775 5/5-101 *et seq.* (1999); IND. CODE ANN. § 22-9-1-1 *et seq.* (Michie 1999); IOWA CODE § 216 *et seq.* (1997); KAN. STAT. ANN. § 44-1001 *et seq.* (1998); KY. REV. STAT. ANN.

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well.[5] And while some exempt religious organizations generally from their public accommodation laws,[6] more limit that exemption only to certain kinds of accommodations,[7] or

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[4](...continued)
§ 344.110 *et seq.* (Michie 1998); LA. REV. STAT. ANN. § 49:146 (West 1999); ME. REV. STAT. ANN. tit. 5, § 4552 *et seq.* (West 1998); MD. CODE ANN., Discrimination in Public Accommodations § 5 (1999); MASS. ANN. LAWS ch. 272, § 92(A) (Law. Co-op. 1999); MICH. S.A. § 3.548 (1999); MINN. STAT. § 363.01 *et seq.* (1999); MO. R. STAT. § 213.010 *et seq.* (1999); MONT. CODE ANN. § 49-2-101 *et seq.* (1999); NEB. R. STAT. § 20-132 (1999); NEV. REV. STAT. ANN. § 651.050 *et seq.* (Michie 2000); N.H. REV. STAT. ANN. § 354-A:1 *et seq.* (1999); N.J. STAT. ANN. § 10:5-1 *et seq.* (West 1999); N.M. STAT. ANN. § 28-1-1 *et seq.* (Michie 2000); N.Y. EXECUTIVE LAW § 291 *et seq.* (1999); N.D. CENTURY CODE § 14-02.4 (2000); OHIO REV. CODE ANN. § 4112.01 *et seq.* (Anderson 1999); OKLA. STAT. tit. 25, § 1401 *et seq.* (1999); OR. REV. STAT. § 30.670 *et seq.* (1997); PA. CONS. STAT. ti. 43 § 952 *et seq.* (1999); R.I. GEN. LAWS § 11-24-1 *et seq.* (1999); S.C. CODE ANN. § 45-9-10 *et seq.* (1998); S.D. CODIFIED LAWS § 20-13-1 *et seq.* (Michie 2000); TENN. CODE ANN. § 4-21-102 *et seq.* (1999); UTAH CODE ANN. § 13-7-1 *et seq.* (1999); VT. STAT. ANN. tit. 9, § 4501 *et seq.* (2000); VA. CODE ANN. § 2.1-715 *et seq.* (1999); WASH. REV. CODE § 49.60.010 *et seq.* (1999); W. VA. CODE § 5-11-1 *et seq.* (2000); WYO. STAT. ANN. § 6-9-101 (Michie 1999).

[5]*See, e.g.*, N.Y.C. ADMIN. CODE § 8-107(4) (2000); SEATTLE MUNICIPAL CODE § 14.08.040(D).

[6]*See* ARIZ. REV. STAT. § 41-1492.07 (1999); IDAHO CODE § 67-5910(1) (1999); KAN. STAT. ANN. § 44-1002(h) (1998); N.Y. Executive Law § 292(9) (1999).

[7]*See* CONN. GEN. STAT. § 46a-64(b)(4) (1999) (exempting nursing homes "owned, operated by or affiliated with a religious organization"); IOWA CODE § 216.12(1) (1997) (exempts housing); N.J. STAT. ANN. § 10:5-5(l) (West 1999) (exempting "any educational facility operated or maintained by a bona fide religious or sectarian institution"); UTAH CODE ANN. § 13-7-2 (1999) (exempting "any institution, church, any apartment house, club, or place of accommodation which is in its nature distinctly private except to the extent that it is open to the public."); WASH. REV.

(continued...)

only to certain categories of discrimination.[8] Many states have

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[7](...continued)
CODE § 49.60.040(10) (1999) (exempting "any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution . . . .").

[8] *See* IND. CODE ANN. § 22-9-1-3(q)(3) (Michie 1999) ("it shall not be a discriminatory practice for a private or religious educational institution to continue to maintain and enforce a policy of admitting students of one (1) sex only."); IOWA CODE § 216.7(2) (1997) ("This section shall not apply to (A) Any bona fide religious institution with respect to any qualifications the institution may impose based on religion . . . ."); LA. REV. STAT. ANN. § 49:146(A)(5) (West 1999) ("The provisions of this Section shall not prohibit any religious or private institution of elementary, secondary, or higher education from denying access to any area, accommodation, or facility on the basis of religion or sex."); ME. REV. STAT. ANN. tit. 5, § 4553(10)(G) (West 1998) ("Discrimination in employment, housing, public accommodations and credit on the basis of sexual orientation, except that a religious corporation, association or organization is exempt from these provisions."); MINN. STAT. § 363.02 Subd. 8 (1999) ("Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or controlled by a religious association, religious corporation, or religious society that is not organized for private profit, from: (1) limiting admission to or giving preference to persons of the same religion or denomination; or (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities."); NEB. REV. STAT. ANN. § 20-137 (Michie 1999) ("Any place of public accommodation owned by or operated on behalf of a religious corporation, association, or society which gives preference in the use of such place to members of the same faith as that of the administering body shall not be guilty of discriminatory practice."); N.H. REV. STAT. ANN. § 354-A:18 (1999) ("Nothing in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or education purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons

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no religious exemptions at all.[9] Thus, if in New Jersey the Boy Scouts, despite their confessional requirement for membership, are a public accommodation, so may be any number of religiously affiliated organizations throughout the country. But for the First Amendment, therefore, there is little to protect their institutional integrity.

Religious institutions are already liable under state law for discrimination in employment, at least on grounds other than religion. This can be so, moreover, even when the position is one of religious significance. *See Diamond v. Congregation Kol Ami*, 1996 WL 942039 (Chi. Com. Hum. Rel.) (Commission may hear sex discrimination case involving the termination of a Jewish Congregation's cantor); *cf. Weissman*

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[8](...continued)
of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained."); N.M. STAT. ANN. § 28-1-9(B) (Michie 2000) ("any religious or denominational institution . . . limiting admission to or giving preference to persons of the same religion or denomination . . . .").

[9] *See* ALASKA STAT. § 18.80.230 (Michie 1999); CAL. CIVIL CODE § 51 (Deering 1999); COLO. REV. STAT. § 24-34-601 (1999); DEL. CODE ANN. tit. 6, § 4502(1) (1999); D.C. CODE ANN. § 1-2519 (1999); FLA. STAT. Ch. 760.07 (1999); HAW. REV. STAT. ANN. § 489-2 (Michie 1999); 775 ILL. COMP. STAT. ANN. 5/5-103 (1999); KY. REV. STAT. ANN. § 344.130 (Michie 1998); MD. CODE ANN., Discrimination in Public Accommodations § 5 (1999); MASS. ANN. LAWS ch. 272, § 92(A) (Law. Co-op. 1999); MONT. CODE ANN. § 49-2-101(20) (1999); NEV. REV. STAT. ANN. § 651.050(2) (Michie 2000); N.D. CENTURY CODE § 14-02.4.02(12) (2000); OHIO REV. CODE ANN. § 4112.02(G) (Anderson 1999); OKLA. STAT. tit. 25, § 1401 (1999); OR. REV. STAT. § 30.675 (1997); 43 PA. CONS. STAT. § 954(l) (1999); R.I. GEN. LAWS § 11-24-3 (1999); S.C. CODE ANN. § 45-9-10 (1998); S.D. CODIFIED LAWS § 20-13-1(12) (Michie 2000); TENN. CODE ANN. § 4-21-102(15) (1999); VT. STAT. ANN. tit. 9, § 4501(8) (2000); W. VA. CODE § 5-11-3(J) (2000); WYO. STAT. ANN. § 6-9-101 (Michie 1999).

v. Congregation Shaare Emeth, 38 F.3d 1038 (8th Cir. 1994) (holding that Reform Jewish Temple could be sued under the Age Discrimination in Employment Act for discharge of temple administrator who was the first contact of the congregation with potential new members). In fact, some states do not exempt churches from liability even for religious discrimination. In *Ward v. Hengle*, 706 N.E.2d 392 (Ohio Ct. App., Summit Cy. 1997), *appeal den.*, 692 N.E.2d 617 (Ohio), *cert. denied*, 525 U.S. 878 (1998), an Ohio Court of Appeals upheld a church's liability under state law for firing a clerical worker because he refused to stop impersonating a monk.

Extending the reach of such anti-discrimination laws into the membership decisions of such organizations would have disastrous consequences for the integrity of their religious identity. The Women's Christian Temperance Union could be forced to admit alcoholics, who are considered disabled, into their meetings. Orthodox Jewish organizations could be required to integrate men with women. Groups dedicated to chastity could not refuse pregnant single women and many groups that believe homosexual activity to be sinful could have to accept gay members. Indeed, religiously affiliated organizations might even have to accept non-adherents as members, *cf. United States v. Columbus Country Club*, 915 F.2d 877 (3d Cir. 1990) (Knights of Columbus country club subject to Fair Housing Act despite conducting religious exercises, displaying a statue of the Virgin Mary, and requiring a recommendation from applicants' parish priests in order to join), *cert. denied*, 501 U.S. 1205 (1991), or include unwelcome material in their publications. At least one religious publication has already been held to be a "public accommodation." In *Pines v. Tomson*, 206 Cal Rptr. 866 (Cal. App. 2 Dist. 1984), the California Unruh Civil Rights Act was successfully employed to force a Christian publisher to include unwanted advertisements in its publication. The non-profit "Family of

Faith Foundation" which operated a telephone directory called the "Christian Yellow Pages," was successfully sued for its policy of "only accept[ing] advertisements placed by a person who affirms orally and in writing that he has accepted Jesus Christ as his personal savior and is a 'born-again' Christian." *Id.* at 868.[10]

The right to associate freely for the purpose of religious expression is essential:

> An individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)

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[10]The ever-expanding list of protected classifications only heightens the threat. *See, e.g.*, D.C. CODE. ANN. § 1-2519 (a) ("It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based on the race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business of any individual"); *Romer v. Evans*, 517 U.S. 620, 629 (1996) (noting that Colorado municipal discrimination laws protect traits including, *inter alia*, "age, military status, marital status, pregnancy, parenthood, custody of a minor child [and] political affiliation," citing ASPEN MUNICIPAL CODE § 13-98(a)(1) (1977); BOULDER REV. CODE §§ 12-1-1 to 12-1-4 (1987); DENVER REV. MUNICIPAL CODE, Art. IV, §§ 28-92 to 28-119 (1991)).

(emphasis added). This is particularly true in the application of anti-discrimination provisions to religious organizations. But for the protection of the First Amendment, public accommodation laws could singlehandedly hijack a wide variety of such groups.[11]

II. THE LOWER COURT'S DECISION THREATENS THE FREE SPEECH RIGHTS OF RELIGIOUS ORGANIZATIONS.

Applying public accommodation laws to religiously affiliated organizations threatens not only their freedom of association but freedom of speech as well. The constitutional harm is not limited to the fact that individuals inimical to an

[11]A particularly chilling result of applying anti-discrimination laws to institutions that espouse religious beliefs is that courts have put themselves into the position of independently evaluating whether the organization's beliefs are truly being violated by such application. *See Dale*, 734 A.2d at 1228 ("Nothing before us, however, suggests that one of Boy Scouts' purposes is to promote the view that homosexuality is immoral."); *Pines*, 206 Cal. Rptr at 877 ("Paragraph 1 simply enjoins appellants from refusing advertisements on the ground the person attempting to place an advertisement is not, or will not affirm that he is, a 'born-again' Christian. Thus, the religious purposes appellants have asserted for publishing the CYP are not impaired."); *E.E.O.C. v. Pacific Press Publishing*, 676 F.2d 1272, 1279 (9th Cir. 1982) ("Preventing discrimination can have no significant impact upon the exercise of Adventist beliefs because the Church proclaims that it does not believe in discriminating against women"); *Vigars v. Valley Christian Center*, 805 F. Supp. 802, 808 (1992) (questioning whether being a pregnant single woman made an unfit role model at a religious school); *Diamond v. Congregation Kol Ami*, 1996 WL 942039 *6 (Chi. Com. Hum. Rel.) ("Kol Ami invites the Administrative Hearing Officer and this Commission to dismiss this case . . . when it made no effort to respect its own religious doctrine by ignoring the minimal qualifications for persons chosen to serve in positions of religious leadership.").

organization's purpose are licensed by the State to intrude into that organization. Once they are hired, housed, or made members, they are then protected from having to be in a "hostile environment"–*i.e.*, one characterized by a message that disapproves of them. Public accommodation laws could thus give them the right not only to associate with the organization but to demand that it alter its basic message.

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), this Court held that Title VII of the Civil Rights Act of 1964 allows a claim of sex discrimination in employment based on the existence of a hostile environment. Hostile environment claims have also been extended to claims of discrimination based on race,[12] disability (under the ADA),[13] religion,[14] and national origin.[15]

Moreover, the theory of a hostile environment constituting illegal discrimination has also expanded into state and local public accommodation laws. *See, e.g., In re Ross*, 1995 WL 907568 (Chi. Comm'n Hum. Rel.) (sex); *Totem Taxi v. N.Y. State Human Rights Appeal Bd.*, 480 N.E.2d 1075 (N.Y. 1985) (race). *See also* MICH. STAT. ANN. § 3.548(103)(i)(iii) (1999) ("Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or

[12]*See, e.g., Jackson v. Quanex Corp.*, 191 F.3d 647 (6th Cir. 1999); *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 924 (5th Cir. 1982).

[13]*See , e.g., Walton v. Mental Health Ass'n*, 168 F.3d 661 (3rd Cir. 1999); *Shiflett v. GE Fanuc Automation Corp.*, 151 F.3d 1030 (4th Cir. 1998).

[14]*See, e.g., Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997); *Sanders v. Women's Treatment Ctrs*, 9 F. Supp. 2d 929 (N.D. Ill. 1996); *Compston v. Borden, Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976).

[15]*See, e.g., Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184 (2d Cir. 1987); *Amirmokri v. Baltimore Gas & Elec. Co.*, 60 F.3d 1126 (4th Cir. 1995).

housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.").[16]

What is more, a hostile environment may be created by speech alone. In *Hendler v. Intelecom USA, Inc.*, 963 F. Supp. 200 (E.D.N.Y. 1997), a district court held that a reasonable juror could conclude that jokes concerning a plaintiff's status as a nonsmoker created a hostile working environment under the Americans With Disabilities Act, since the plaintiff was asthmatic. *Id.* at 209. Two photographs depicting the Ayatollah Khomeni and a burning American flag in Iran, hung by a co-employee in her own cubicle, were offered as proof that a bank permitted an environment hostile to an employee of Iranian descent. *Pakizegi v First National Bank of Boston*, 831 F. Supp. 901, 908-09 (D. Mass. 1993) (ruling against plaintiff because employer took steps to eliminate, in the court's terms, the "discriminatory, anti-Iranian conduct"), *aff'd without opinion*, 56 F.3d 59 (1st Cir. 1995). In *Brown Transport v. Human Rel. Com'n*, 578 A.2d 555 (Pa. Common. 1990), a court held an employer liable under the Pennsylvania Human Relations Act for "religious harassment" by including biblical quotations on paychecks and distributing a newsletter with religious content. *See also Mitchell v. Fab Industries, Inc.*, 990 F. Supp. 285, 293 (1998) (holding that "a reasonable Pentecostal missionary could find a workplace," in which derogatory religious comments were made by her superior, "a hostile environment.").

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[16]In a public accommodation, a hostile environment may be created by the actions of not only employees, but also of other customers or members of the "public accommodation." *See D'Amico v. Commodities Exchange Inc.*, 652 N.Y.S. 2d 294 (App. Div. 1st Dept. 1997), (commodity exchange may be liable as a public accommodation to female member for harassing actions of other members).

The same is true in public accommodations law: Speech alone may create a "hostile environment." Thus the Minnesota Supreme Court upheld a finding that owners of a health club violated the state Human Rights Act by, *inter alia*, "displaying fundamentalist Christian religious literature in the literature racks and on the walls of the sports club." *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 848-49 (Minn. 1985), *appeal dismissed*, 478 U.S. 1015 (1986). *See also Hodges v. Washington Tennis Service Intern. Inc.*, 870 F. Supp. 386 (D.D.C. 1994) (racial slur uttered by employee created a hostile environment for club member; claim dismissed because employer took appropriate remedial action).

Even quite attenuated claims of hostile speech-created environments can be taken seriously. *See In re Haney*, 1994 WL 880339 (Ill. Hum. Rts. Com. 1994) (challenge to University sports mascot, "Chief Illiniwek," who was alleged to be hostile to plaintiff's religious beliefs); *State v. McHarris Gift Ctr.*, 418 N.E.2d 393 (N.Y. 1980) (rejecting 4-3 the claim that a gift shop created a discriminatory environment in a public accommodation by selling Polish "joke novelty items.").

It goes without saying that the beliefs of many religious organizations are contrary to those of their competitors in the marketplace of ideas. This has never been thought to be anything but perfectly natural. However, once religious organizations are transformed by state law into public accommodations, a serious problem arises. If they are now public accommodations that may not discriminate, and if their speech alone creates a discriminatory hostile environment, then it follows that they may no longer speak freely.

If the First Amendment truly affords no protection to private associations with confessional requirements for membership, such as the Boy Scouts, it is not too much to say

that these organizations are now subject to state censorship. They will have to admit ideologically dissident members and then not subject them to the "hostile environment" of the organization's basic views. Mr. Dale, for example, will not only have the right to be a Scoutmaster, but may also acquire the "right" to prevent the Boy Scouts from espousing the view that homosexuality is immoral, lest they create an environment hostile to him. This is an absurd result that the Constitution cannot countenance.

CONCLUSION

For the foregoing reasons the judgment of the New Jersey Supreme Court should be reversed.

Respectfully submitted,

KEVIN J. HASSON*
ERIC W. TREENE
ROMAN P. STORZER
THE BECKET FUND
FOR RELIGIOUS LIBERTY
1350 Connecticut Avenue
Suite 605
Washington, D.C. 20036
(202) 955-0095

Counsel for *Amicus Curiae*

*Counsel of Record

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In the Supreme Court of the United States

OCTOBER TERM, 1999

BOY SCOUTS OF AMERICA, *et al.*,

Petitioners,

---- v. ----

JAMES DALE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF OF *AMICI CURIAE* FAMILY DEFENSE COUNCIL AND MARY CUMMINS IN SUPPORT OF PETITIONERS

William E. Fay III
25 Broadway (7th Floor)
New York, New York 10004
(212) 509-8999

17pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... *iii*

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. DALE'S HOMOSEXUAL ACTIVITY WAS AN OBVIOUS VIOLATION OF THE BOY SCOUT MORAL CODE. 3

II. GIVEN DALE'S DEFIANCE OF THEIR MORAL CODE, PETITIONERS HAD A CLEAR CONSTITUTIONAL RIGHT TO DISMISS HIM AS AN ASSISTANT SCOUTMASTER. 5

A. The First and Fourteenth Amendments guarantee the Scouts the right to limit their membership to persons who are truly loyal to their principles. 5

B. The First and Fourteenth Amendments also grant the Scouts the right to shun any entanglement that would hinder their efforts to persuade boys to comply with their moral code. 6

Page

III. GIVEN THE GRAVE MEDICAL DANGERS INVOLVED IN SEX BETWEEN MALES, THERE IS NO COMPELLING INTEREST THAT WOULD JUSTIFY A LAW REQUIRING THE SCOUTS TO LET ACTIVE HOMOSEXUALS SERVE AS TROOP LEADERS. 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Bates v. Little Rock,
361 U.S. 516 (1960) 5

Board of Dirs. of Rotary Int'l v. Rotary Club,
481 U.S. 537 (1987) 7

Dale v. Boy Scouts of America and Monmouth Council, Boy Scouts of America,
160 N.J. 562, 734 A.2d 1196 (Sup. Ct. 1999) ..... *passim*

Democratic Party of U.S. v. Wisconsin,
450 U.S. 107 (1981) 2, 5, 10

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,
515 U.S. 557 (1995) 2, 6, 7, 10

Mount Diablo Council of Boy Scouts of America v. Curran,
468 U.S. 1205 (1984) 4

NAACP v. Alabama,
357 U.S. 449 (1958) 5

NAACP v. Button,
371 U.S. 415 (1963) 5

Page

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 7

Ratchford v. Gay Lib, 434 U.S. 1080 (1978) 4

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 5, 7

Constitutional Provisions and Statutes

U.S. Constitution, First Amendment ..... *passim*

U.S. Constitution, Fourteenth Amendment ..... *passim*

N.J.S.A. 10:5-1 to 10:5-49 2

Other Authorities

AMA Council on Scientific Affairs, "Health care needs of gay men and lesbians in the United States", *Journal of the American Medical Association*, May 1, 1996 10

Condoms and Sexually Transmitted Diseases ... Especially AIDS, U.S. Food and Drug Administration, Publication FDA 90-4239, November 1999 8-9

Page

Scott D. Holmberg, MD, MPH, "The Estimated Prevalence and Incidence of HIV in 96 Large US Metropolitan Areas", *American Journal of Public Health*, May 1996 9

Merriam-Webster's Collegiate Dictionary, Tenth Edition (1999) 4

John M. Karon, Ph.D., et al., "Prevalence of HIV Infection in the United States, 1984 to 1992", *Journal of the American Medical Association*, July 10, 1996 9

New York State Department of Health HIV/AIDS Quarterly Update, September 30, 1999 9

Gary Remafedi, MD, MPH, et al., "Demography of Sexual Orientation Among Adolescents", *Pediatrics*, April 1992 9

Roget's International Thesaurus, Fifth Edition (1992) 4

INTEREST OF *AMICI CURIAE**

The Family Defense Council ("FDC") is a nonsectarian, not-for-profit organization dedicated to protecting the rights of parents to bring up their children in accordance with traditional moral principles.

Mrs. Mary Cummins is an FDC director who won a notable victory for those rights back in 1992, when she led a successful fight to prevent New York City's Public Schools Chancellor from forcing local elementary schools to use a so-called "Rainbow Curriculum" that insisted that first grade students "must be taught to acknowledge" that homosexual and lesbian relationships have "positive aspects".

FDC and Mrs. Cummins view the New Jersey Supreme Court's decision in this case with grave concern because they believe it deprives Petitioners of their constitutional right to carry out their Boy Scout programs in accordance with their own convictions as to the best way to promote their members' moral and physical well-being. Not only that, it also defeats the expectations of literally millions of parents who have encouraged their sons to become Scouts because they share those convictions.

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* Consents by all parties to the filing of this brief have been filed with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief Citations to the opinion below will consist of the prefix "Op." followed by page numbers keyed to the official report, *Dale v. Boy Scouts of America and Monmouth Council,Boy Scouts of America*, 160 N.J. 562 (Sup. Ct. 1999).

SUMMARY OF ARGUMENT

For purposes of this proceeding, FDC and Mrs. Cummins do not deem it worthwhile to debate the lower court's interpretation of the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 to 10:5-49). However, they do challenge the lower court's ruling that the First and Fourteenth Amendments allow New Jersey to use that statute to compel Petitioners to reinstate an Assistant Scoutmaster named James Dale, who was expelled from the Boy Scouts because he was an avowed homosexual.

The court below found that Dale's decision to engage in homosexual activity and eventually tell a newspaper reporter about it did not clash with any settled Boy Scout policy (Op. 612-615). However, that finding stands reality on its head. The fact is that what Dale did and said put him in defiance of the long-established Boy Scout principle that every Scout must keep himself "morally straight".

Thus, compelling Dale's reinstatement would violate the Boy Scouts' right to limit their membership to persons who truly share Boy Scout principles, *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107 (1981), and to shun any entanglement that would undercut their efforts to promote those principles. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

Moreover, it is incontrovertible that sex between males involves extremely serious medical dangers. Given those dangers, there is clearly no compelling government interest that would justify forcing Petitioners to let an active homosexual like Dale serve as a role model for young Scouts.

ARGUMENT

I. DALE'S HOMOSEXUAL ACTIVITY WAS AN OBVIOUS VIOLATION OF THE BOY SCOUT MORAL CODE.

It is undisputed that the "guiding principles" of Boy Scouting are set forth in a Scout Oath which requires every Scout to keep himself "physically strong ... and morally straight" and a Scout Law which requires every Scout to keep himself "clean" by keeping "his body and mind fit and clean" (Op. 574). It is likewise undisputed that these guiding principles apply to adults who serve in Boy Scout leadership roles (Op. 577).

However, the court below concluded that Dale's avowed homosexual activity did not actually violate these guiding principles because they supposedly "do not ... express anything about sexuality, much less that homosexuality, in particular, is immoral." (Op. 614). Indeed, it then went on to suggest that the Scout Oath and Scout Law merely call on each Scout to make up his own mind about how he should live his life (Op. 612-615). It is respectfully submitted that this "anything goes" reading of the Boy Scout code of conduct is absolute nonsense.

The short answer to the lower court's contention that the Boy Scout Oath does not imply any disapproval or prohibition of homosexual activity is that that interpretation of the oath completely disregards the plain dictionary meaning and conventional understanding of the term "morally straight". In

line with firmly-established usage in literature, the media, everyday conversation, and even litigation in this Court,* *Merriam-Webster's Collegiate Dictionary, Tenth Edition (1999)* defines "straight" in its moral or behavioral sense as meaning "heterosexual", and so does *Roget's International Thesaurus, Fifth Edition* (1992) ¶ 75.13.

Moreover, Petitioners have repeatedly made it clear that their requirement that Scouts must keep themselves "morally straight" means that Scouts must not engage in homosexual activity (Op. 579, note 4; 600; 614, note 12; and 643, note 5). Indeed, the Boy Scouts' stance on this issue has been so forthright and so unambiguous that they have been subjected to a barrage of denunciation and litigation by homosexual activists dating all the way back to the 1980's. See, *e.g.*, *Mount Diablo Council of Boy Scouts of America v. Curran*, 468 U.S. 1205 (1984).

Thus, when Dale engaged in sex with other males, he not only violated his Boy Scout Oath, but demonstrated his opposition to a fundamental Boy Scout moral principle. In short, the lower court's "finding" that Dale's homosexual activity was perfectly compatible with Boy Scout moral standards is an obvious absurdity. No matter how strongly the lower court may have felt that the Boy Scouts should adopt moral agnosticism as a guiding principle, it had no right to impose that philosophy on the Boy Scouts by pretending that that's the philosophy they had chosen for themselves.

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* See *Ratchford v. Gay Lib*, 434 U.S. 1080, 1083 (1978) where the respondent's own Gay Lib manifesto used the word "straight" as a well understood synonym for " heterosexual".

II. GIVEN DALE'S DEFIANCE OF THEIR MORAL CODE, PETITIONERS HAD A CLEAR CONSTITUTIONAL RIGHT TO DISMISS HIM AS AN ASSISTANT SCOUTMASTER.

A. The First and Fourteenth Amendments guarantee the Scouts the right to limit their membership to persons who are truly loyal to their principles.

As this Court has repeatedly recognized, the First and Fourteenth Amendments not only protect the rights of individuals to express themselves freely as individuals, but also protect the rights of like-minded individuals to join together to pursue common goals based on their common convictions. *NAACP v. Button*, 371 U.S. 415, 430 (1963); *Bates v. Little Rock*, 361 U.S. 516, 522-523 (1960); *NAACP v. Alabama*, 357 U.S. 449, 460-461(1958). Moreover, the freedom to form an association carries with it the freedom to limit membership in the association to individuals who truly share its principles.

Accordingly, this Court has held that national political parties have a constitutionally protected right to adopt and enforce rules designed to screen out would-be nominating convention delegates whose dedication to party principles is "slight, tenuous, or fleeting". *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 123 (1981).

In the case at bar, the record establishes that Dale is not merely lukewarm about complying with the Boy Scouts' moral standards, but is deliberately flouting them. This key fact clearly distinguishes this case from *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), where it was held that a

state could require a previously all-male national organization to accept women as members because there was no perceptible clash between the views or conduct of the prospective women members and the goals or principles of the organization.

That being so, Petitioners had a clear constitutional right to expel Dale from the Scouts and dismiss him as an Assistant Scoutmaster, and the lower court's decision requiring Dale's reinstatement should therefore be reversed.

B. The First and Fourteenth Amendments also grant the Scouts the right to shun any entanglement that would hinder their efforts to persuade boys to comply with their moral code.

Requiring Petitioners to reinstate Dale despite his avowed homosexual activity would violate Petitioners' First and Fourteenth Amendment free speech rights under the principles laid down in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that Massachusetts law may not compel the sponsors of Boston's annual St. Patrick's Day Parade to let homosexuals and lesbians march in the parade under their own banner because this would deprive the sponsors of their right to select the messages to be conveyed by their parade).

Indeed, compelling Dale's reinstatement would be an even graver free speech infringement than the one condemned in *Hurley* because it would make an absolute mockery of one of Petitioners' most solemn statements of principle, namely, the Scout Oath requiring every Scout to keep himself "morally straight".

Given Dale's violation of his Scout Oath by engaging in sex with males, who would take that guiding Boy Scout moral principle seriously if Dale were not only reinstated as a Scout but also reinstated as an Assistant Scoutmaster? The question answers itself. Petitioners could take out daily full page newspaper ads proclaiming that the Boy Scouts disapprove of homosexual activity, but no one would give those ads the slightest credence. The fact that would speak most loudly to young Scouts and the public at large would be that Dale's reinstatement demonstrated that there is no real Boy Scout taboo against homosexual activity.

Thus, the case at bar bears no resemblance to the three "expressive association" cases relied on by the court below, *i.e.*, *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); and *Roberts v. United States Jaycees, supra*. Unlike Petitioners, none of the organizations involved in those cases made any showing that an anti-discrimination law was being used to force it to grant membership to persons whose presence within the organization would undercut its ability to get its message across to its desired audience.

Here, reinstatement of Dale would cripple Petitioners' efforts to communicate their guiding principles in a manner that would be persuasive to existing or prospective Scouts or the general public. Moreover, Petitioners would have to endure this burden day in and day out for as long as Dale chose to inflict himself on them, a much more devastating free speech infringement than the one day a year imposition struck down in *Hurley*. Accordingly, the lower court's decision requiring Dale's reinstatement violates Petitioners' First and Fourteenth Amendment rights to freedom of speech and should therefore be reversed.

III. GIVEN THE GRAVE MEDICAL DANGERS INVOLVED IN SEX BETWEEN MALES, THERE IS NO COMPELLING INTEREST THAT WOULD JUSTIFY A LAW REQUIRING THE SCOUTS TO LET ACTIVE HOMOSEXUALS SERVE AS TROOP LEADERS.

Although the lower court appears to have recognized that it had no right to mandate Dale's reinstatement in the absence of some compelling government interest that would justify that sort of intrusion on Petitioners' freedom to select their own troop leaders (Op. 612, citing *Roberts, supra*), it never bothered to demonstrate the existence of such a compelling interest. Instead, it simply assumed that a generalized legislative desire to protect homosexuals against discrimination provided a sufficient justification for ordering Petitioners to let an active homosexual serve as a role model for young Scouts.

In so doing, it not only gave short shrift to the provisions of Petitioners' code of conduct aimed at keeping Scouts "physically strong" and bodily "fit", but also turned a blind eye to a mountain of scientific evidence that the type of sexual activity engaged in and defended by would-be role models such as Dale involves medical dangers every bit as serious as those involved in drug abuse.

Specifically, study after study shows that "Anal intercourse is very risky because it can cause tissue in the rectum to tear and bleed. These tears allow disease germs to pass more easily from one partner to another." *Condoms and Sexually Transmitted Diseases ... Especially AIDS*, U.S. Food and Drug Administration, Publication FDA 90-4239, November 1999, page 7. In addition, anal intercourse

is so stressful that it produces a great many more condom failures than vaginal intercourse. Accordingly, the U.S. Surgeon General has warned that "anal intercourse is simply too dangerous to practice" even with a condom. *Ibid.* Despite this warning, most homosexuals still engage in anal intercourse with the following appalling results.

Males who have sex with males account for over half of all HIV infections in the United States, the mid-range estimate being approximately 450,000 cases out of a total of 750,000. John M. Karon, Ph.D., et al., "Prevalence of HIV Infection in the United States, 1984 to 1992", *Journal of the American Medical Association*, July 10, 1996, Table 4.

Estimated HIV infection rates for homosexuals in large U.S. cities range from 11.9% in Baltimore to 13.8% in Detroit, 14.1% in Seattle, 16.3% in Chicago, 17.9% in Newark, 21% in Philadelphia, 22.6% in Los Angeles, 24.2% in the District of Columbia, 26.6% in Dallas, 27.1% in Houston, 28.6% in Atlanta, 29.2% in New York, 31.4% in Miami and 40.7% in San Francisco. Scott D. Holmberg, MD, MPH, "The Estimated Prevalence and Incidence of HIV in 96 Large US Metropolitan Areas", *American Journal of Public Health*, May 1996, Table 1, pages 646-647.

Even though fewer than 2% of 12 to 18 year old boys have engaged in any form of homosexual activity (Gary Remafedi, MD, MPH, et al., "Demography of Sexual Orientation Among Adolescents", *Pediatrics*, April 1992, p. 719), sex between males accounts for over one third of all AIDS cases diagnosed in teenage New York City boys since 1981. New York State Department of Health HIV/AIDS Quarterly Update, September 30, 1999, Table 4B.

To make matters worse, males who have sex with males are also at extremely high risk for hepatitis B, proctitis, enteritis, colitis and anal syphilis. AMA Council on Scientific Affairs, "Health care needs of gay men and lesbians in the United States", *Journal of the American Medical Association*, May 1, 1996, pages 1356-1357.

Given these grim medical realities, it has to be concluded that there cannot possibly be any compelling government interest that would justify forcing the Boy Scouts to provide role model opportunities for men like Dale who engage in or defend high risk homosexual activity.

CONCLUSION

The central fact in this case is that the Boy Scouts' guiding principles require every Boy Scout to keep himself "morally straight" and "clean". Contrary to the view taken by the court below, these requirements are not mere empty abstractions that permit every Scout to make up his own mind about how to live his life. Quite clearly, they put the Boy Scouts on record as disapproving homosexual activity because it is just as immoral as drug abuse.

That being so, Dale's avowed homosexual activity fully justified Petitioners' decision to expel him from the Scouts and remove him from his position as an Assistant Scoutmaster.

Under this Court's holdings in *Hurley* and *Democratic Party of U.S. v. Wisconsin*, *supra*, the lower court's decision requiring Petitioners to reinstate Dale despite his defiance of the Boy Scouts' code of conduct plainly violated Petitioners'

First and Fourteenth Amendment rights to free speech and freedom of association. Not only that, it also violated the constitutional principle that legislatures and courts have no authority to interfere with a non-governmental organization's right to select its own members and leaders unless such interference serves a compelling government interest.

Accordingly, the decision should be reversed so that Petitioners and similar youth groups will be free to carry out their programs in accordance with their own convictions as to the best way to promote the moral and physical well-being of their members. No matter how strongly some courts or legislatures may disagree with such convictions, they have no right to use anti-discrimination laws as a way to subvert them.

Respectfully submitted,

William E. Fay III
Attorney for *Amici*
Family Defense Council
and Mary Cummins
25 Broadway (7th Floor)
New York, New York 10004
(212) 509-8999

Of counsel: John D. Hartigan
165 East 66th Street #3D
New York, New York 10021
(212) 737-0187

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Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE, THE INDIVIDUAL RIGHTS FOUNDATION, IN SUPPORT OF PETITIONERS

PAUL A. HOFFMAN
Counsel of Record
DRACUP & PATTERSON
505 N. Tustin Avenue, Suite 282
Santa Ana, California 92705
(714) 542-3500

MANUEL S. KLAUSNER
PATRICK J. MANSHARDT
One Bunker Hill Building
601 W. 5th Street, 8th Floor
Los Angeles, California 90071

Attorneys for Amicus Curiae
The Individual Rights Foundation

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OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE..... 1

STATEMENT OF THE CASE..... 1

The Record Below..... 2

Ruling of Appellate Courts Below 3

SUMMARY OF ARGUMENT..... 4

ARGUMENT 5

I. THE NJSC'S JUDGMENT MUST BE REVERSED BECAUSE IT FAILS TO PROTECT THE BOY SCOUTS' FIRST AMENDMENT RIGHT OF SPEAKER'S AUTONOMY AND ERRONEOUSLY CONCLUDES THAT BOY SCOUTS' IDEOLOGICALLY-RELATED REJECTION OF RESPONDENT DALE BASED ON DALE'S PUBLIC SELF-IDENTIFYING SPEECH WAS MERE DISCRIMINATORY CONDUCT BASED ON DALE'S STATUS..... 5

II. BOY SCOUTS' UNIQUE EMPHASIS ON TEACHING BY EXAMPLE AND BY ROLE MODELING IS ITSELF A FORM OF SYMBOLIC SPEECH OR EXPRESSIVE CONDUCT PROTECTED BY THE FIRST AMENDMENT..... 11

III. THE NJSC'S JUDGMENT MUST BE REVERSED BECAUSE IT ASSUMES THAT THE RIGHT OF EXPRESSIVE ASSOCIATION ONLY APPLIES TO VIEWPOINTS WHICH ARE SHARED UNIVERSALLY BY THE ASSOCIATION'S MEMBERS AND IT FAILS TO RECOGNIZE THAT THE RIGHT OF SPEAKER'S AUTONOMY IS NOT LIMITED TO CONSISTENT, DISTINCT OR ARTICULATE MESSAGES 18

TABLE OF CONTENTS – Continued

Page

IV. THIS COURT SHOULD RESIST THE TEMPTATION TO RESTRICT RIGHTS OF SPEECH OR EXPRESSIVE ASSOCIATION IN THIS CASE BECAUSE SUCH RESTRICTIONS WILL ULTIMATELY WEAKEN THE RIGHT OF ALL PERSONS TO SPEAK OR ASSOCIATE FOR EXPRESSIVE PURPOSES, ESPECIALLY THE RIGHTS OF GAY AND LESBIAN GROUPS AND INDIVIDUALS..... 20

V. THIS COURT SHOULD ENSURE THAT THE SCOPE OF EXPRESSIVE ASSOCIATION RIGHTS ARE NOT INTERPRETED TOO NARROWLY SO THAT STATE AND LOCAL LAWMAKERS ARE NOT DISCOURAGED FROM PASSING NEEDED LEGISLATION TO PROTECT MINORITIES SUCH AS GAYS AND LESBIANS..... 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987)..... 27-29

Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (CA8 1987)..... 17

Dale v. Boy Scouts of America and Monmouth Council, Boy Scouts of America, 160 N.J. 562, 734 A.2d 1196 (1999)..... 4, 6, 9, 10, 18

Gay Students Organization of the University of New Hampshire v. Bonner, 509 F.2d 652 (CA1 1974) 24

Fricke v. Lynch, 491 F.Supp. 381 (D.R.I. 1980) 17, 23

Harvey v. YWCA, 533 F.Supp. 949 (W.D.N.C. 1982) 17

High Tech Gays v. Defense Ind. Sec. Clearance Office, 895 F.2d 563 (CA9 1990)..... 6

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995)..... *passim*

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)..... 15

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) 15

Roberts v. United States Jaycees, 468 U.S. 609 (1984) ...26-29

Spence v. Washington, 418 U.S. 405 (1974)..... 12

Texas v. Johnson, 491 U.S. 397 (1989).....11-16, 28

United States v. O'Brien, 391 U.S. 367 (1968)..... 14

STATUTES AND RULES OF COURT:

New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq..... 3

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. Det. Mercy L.Rev. 189 (1999) 7

David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 Univ. Chi. Legal Forum 133...26, 30

Andrew J. Breuner, *Expression By Association: Towards Defining An Expressive Association Defense In Unruh-Based Sexual Orientation Discrimination Actions*, 33 Santa Clara L.Rev. 467 (1993) 7

William David Cole & William N. Eskridge, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L.Rev. 319 (1993).....7, 25

Comment, *Civil Rights – Public Accommodation Statutes – New Jersey Supreme Court Holds That Boy Scouts May Not Deny Membership To Homosexuals – Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999), Petition for Cert. Filed, 68 U.S.L.W. 1083 (U.S. Oct. 25, 1999) (No. 99-699)*, 113 Harv. L.Rev. 621 (1999) 26

William N. Eskridge, *Gaylegal Narratives*, 46 Stan. L.Rev. 607 (1994) 7

Jose Gomez, *The Public Expression of Lesbian/Gay Personhood As Protected Speech*, 1 Law & Ineq. J. 121 (1983) 7

TABLE OF AUTHORITIES – Continued

Page

Nan D. Hunter, et al., *The Rights of Lesbians and Gay Men: The Basic ACLU Guide to a Gay Person's Rights* (3d ed. 1992) 6-7

William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route To Equality? Some Reflections on the Construction of the 'Hate-Speech' Debate from a Lesbian/Gay Perspective*, in *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, And Civil Liberties* (1994).....6, 21-23

The Guide to Gifts and Bequests, 1995-1997: A Directory of Philanthropically Supported Institutions (1995) 19

Evan Wolfson & Robert S. Mower, *When the Police Are In Our Bedrooms, Shouldn't The Courts Go In After Them?: An Update On The Fight Against "Sodomy" Laws*, 21 Fordham Urb.L.J. 997 (1994) 7

INTEREST OF AMICUS CURIAE

Petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America ("Petitioners" or "Boy Scouts") and Respondent James Dale ("Respondent" or "Dale") have each consented to the filing of this amicus curiae brief[1] by the Individual Rights Foundation ("IRF").

The IRF was founded in 1993 and is dedicated to educating the public about the importance of the First Amendment's free speech and associational guarantees. To further its educational goals, the IRF conducts seminars and other public events, publishes newsletters, and files amicus curiae briefs in appellate cases involving First Amendment speech and associational rights issues. The IRF seeks to resist attempts from anywhere along the political spectrum to limit public expression because such attempts pose a serious threat both to cultural diversity and to our free form of government.

STATEMENT OF THE CASE

This amicus adopts the Statement of the Case set forth in Petitioners' Brief on the Merits ("Petitioner's Brief").[2] Nonetheless, the IRF wishes to highlight a few points in the record below.

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[1] Counsel of record, Paul A. Hoffman, authored this amicus curiae brief in its entirety. No person or entity, outside of amicus curiae, The Individual Rights Foundation, its members or its counsel of record, has made a monetary contribution to the preparation or submission of the present amicus curiae brief. The written consents of Petitioners and Respondent have been filed with the Clerk of the Court.

[2] Numbers preceded by "JA" refer to the Joint Appendix being filed with the Petitioners' Brief on the Merits; numbers followed by "a" refer to pages in the Appendix submitted with the Petition for Writ of Certiorari; numbers preceded by "R." refer to pages in the record before the New Jersey Supreme

The Record Below

It is important at the outset to focus on what is not contained in the record below. There is no evidence that Boy Scouts bar anyone based on mere status, unannounced and unbroadcasted, as homosexuals. The record below reveals that Boy Scouts are not interested in the *private* sexual status of any of their adult leaders, but only in their *public* expressions regarding sexuality, which may affect their ability to effectively teach or role model *Scouting's* beliefs regarding traditional morality. (JA 460) This is shown by Dale's own admission that he is "aware of other homosexuals active in Scouting against whom no adverse action has been taken because they have not 'gone public' with their sexual orientation." (160a) This finding is consistent with Boy Scouts' position that "Boy Scouting makes no effort to investigate the sexual orientation of members or leaders." (P.4 n.2) Nor is there any evidence in the record below that Boy Scouts ever asked Dale or any other applicant about his or her private sexual life.

What the record below does show is that Boy Scouts' membership policies are concerned with *public expression*. Boy Scouts' policy excludes only "avowed homosexuals." (JA 138) Boy Scouts were interested in Dale's *public* statements and conduct only because of the obvious impact such behavior would have on his ability to serve as a role model for Scouting's preferred values. (207a; 223a)

Citing an extensive review of material, the Superior Court of New Jersey, Chancery Division ("Chancery Division"), expressly found that "from its inception Scouting has excluded from membership and adult leadership any person *who openly declares* himself a homosexual and that such policy has continued unchanged, to the present. . . . It is the firm position of BSA that [homosexual] conduct

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Court; numbers preceded by "P." refer to the Petition for Writ of Certiorari.

is not 'morally straight' under the Scout Oath nor is it 'clean' under the Scout Law." (192a (emphasis added))

There is no evidence in the record that anyone in Boy Scouts knew of Dale's homosexuality, or would likely ever have known, but for Dale's extraordinary efforts to *publicly broadcast* his views as a homosexual advocate to a reporter for *The Newark Star-Ledger*, who identified Dale as Co-President of the Rutgers University Lesbian/Gay Alliance. (JA 517) Boy Scouts became aware of Dale's homosexuality solely as a result of his voluntary newspaper interview. (JA 753) Thus, had Dale not taken efforts to *publicize* his views as a homosexual, his membership in Boy Scouts would not have been revoked. Based thereon, the Chancery Division ruled that Boy Scouts could revoke his membership.

Ruling Of Appellate Courts Below

The Superior Court of New Jersey, Appellate Division, reversed in a split decision (Landau, J., dissenting), concluding, among other things, that: (1) Boy Scouts of America is a place of public accommodation within the meaning of the New Jersey Law Against Discrimination ("LAD") (124a); (2) enforcement of the LAD is unrelated to the suppression of ideas because it will not significantly affect Boy Scouts' ability to carry out expressive purposes (136a); and (3) Boy Scouts failed to show that the policy of excluding avowed homosexuals was a collective viewpoint that brought members together. (143a-144a)

The New Jersey Supreme Court ("NJSC") affirmed, by ruling, among other things, as follows:

> We find that the LAD does not violate Boy Scouts' freedom of expressive association because the statute *does not have a significant impact on* Boy Scout members' ability to associate with one another in *pursuit of shared views*. The organization's ability to disseminate its message is not significantly affected by Dale's

> inclusion because: Boy Scouts *members do not associate for the purpose of disseminating the belief that homosexuality is immoral*; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and *Boy Scouts include sponsors and members who subscribe to different views in respect of homosexuality*.

Dale v. Boy Scouts of America, 160 N.J. 562, 612, 734 A.2d 1196 (1999) (emphasis added).

SUMMARY OF ARGUMENT

Your amicus respectfully submits that several constitutional errors by the NJSC require reversal by this Court in order to avoid serious erosion of the freedoms of speech and expressive association:

(1) The NJSC's decision below erroneously concluded that discrimination based on self-identifying *speech* is the same as discrimination based on status. However, under this Court's First Amendment jurisprudence, the fact that homosexual "coming out" speech is "self-identifying speech" does not grant the State of New Jersey a greater right to regulate the content of private speech or diminish the right of expressive associations to exclude those whose self-identifying speech is contrary to their expressive purposes.

(2) Scout leader role modeling constitutes symbolic speech and expressive conduct under *Texas v. Johnson*, 491 U.S. 397 (1989) because the record below shows that Boy Scouting intends to and does effectively convey specific messages and values (i.e., the principles embodied in the Boy Scout Oath and Law) by means of role modeling. Boy Scouts' role modeling is founded on the belief that a Scout leader's example is more effective than the spoken word in transmitting moral values to young Scouts.

Therefore, requiring the appointment of someone whose public example runs counter to the organization's values alters both the form and content of Boy Scouts' intended speech and constitutes state suppression of free expression.

(3) The NJSC mistakenly held that only those messages in which an expressive association shares a "single view" which functions as "a unifying associational goal of the organization" can justify exclusion of those representing contrary viewpoints. Limiting the right of expressive association to only those few viewpoints that bring the entire membership together would not only eviscerate this Court's opinion in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), but would all but destroy the right of expressive association for large associations, including political parties, which cannot meet this test.

(4) A narrow interpretation of the rights of speech and expressive association in this case will adversely affect the right of all Americans, including gays and lesbians, to engage in expressive activities and will actually discourage legislators from expanding civil rights laws for fear of negatively impacting the expressive interests of a whole host of social and cultural associations.

ARGUMENT

I. THE NJSC'S JUDGMENT MUST BE REVERSED BECAUSE IT FAILS TO PROTECT THE BOY SCOUTS' FIRST AMENDMENT RIGHT OF SPEAKER'S AUTONOMY AND ERRONEOUSLY CONCLUDES THAT BOY SCOUTS' IDEOLOGICALLY-RELATED REJECTION OF RESPONDENT DALE BASED ON DALE'S PUBLIC SELF-IDENTIFYING SPEECH WAS MERE DISCRIMINATORY CONDUCT BASED ON DALE'S STATUS

The NJSC's opinion attempts to distinguish the facts presented in this case from this Court's ruling in *Hurley v.*

Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), by stating that "Dale's status as a scout leader is not equivalent to a group marching in a parade" and that Boy Scout leadership is not a "form of 'pure speech' akin to a parade." *Dale, supra*, 160 N.J. at 623. However, the applicability of the speech principles announced in *Hurley* cannot be so easily dismissed.[3]

Since homosexuality is generally a latent characteristic, unlike race and gender[4], homosexuals who wish to openly proclaim their homosexuality must, by definition, *send a message* to others. Such a message constitutes speech and is inherently expressive. *See, e.g.*, Nan D. Hunter, et al., *The Rights of Lesbians and Gay Men: The*

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[3] The NJSC's opinion tries to distinguish *Hurley* because "Dale does not come to Boy Scout meetings 'carrying a banner.' " *Dale, supra*, 160 N.J. at 623. The NJSC's cramped reading of *Hurley leads to a strange anomaly*: Only if Boy Scouts obtain a permit and march in a *parade* may they lawfully exclude leaders, like Dale, who may want to wear a sign in such a parade stating "I am a gay Scoutmaster," but Boy Scouts may not lawfully exclude those same individuals at any other Scouting event, such as a Scout-O-Rama, a Boy Scout Jamboree, or a Scout meeting, who may stand and announce that "I am a gay Scoutmaster." These examples suggest that the speech principles announced in *Hurley* are broad and cannot be limited to just one narrow category of speech (i.e., parades).

[4] "Homosexuality is . . . behavioral and hence is fundamentally different from traits such as race, gender, or alienage. . . . " *High Tech Gays v. Defense Ind. Sec. Clearance Office*, 895 F.2d 563, 573 (CA9 1990). *See also* William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the 'Hate-Speech' Debate from a Lesbian/Gay Perspective*, in *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, And Civil Liberties* 283 (1994) ("sexual orientation is not, like race or gender, visually identifiable: individuals must take on a lesbian/gay identity through some speech or speech act known as 'coming out' ").

Basic ACLU Guide to a Gay Person's Rights 9 (3d ed. 1992) (*"coming out speech ought to be recognized by the courts as political expression"*) (emphasis added); Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. Det. Mercy L.Rev. 189, 326-27 (1999) (" *'Coming out' is* profoundly personal and *highly political.*") (emphasis added); William David Cole & William N. Eskridge, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L.Rev. 319, 325 (1993) ("An *admission of sexual identity is expressive* in the strictest sense of the word.") (emphasis added); Jose Gomez, *The Public Expression of Lesbian/Gay Personhood As Protected Speech*, 1 Law & Ineq. J. 121 (1983).[5]

A variety of messages arise from "coming out" speech, from social defiance to the viewpoint that the homosexual lifestyle is normal and acceptable. *See, e.g.*, Andrew J. Breuner, *Expression By Association: Towards Defining An Expressive Association Defense In Unruh-Based Sexual Orientation Discrimination Actions*, 33 Santa Clara L.Rev. 467, 510 (1993) ("it seems that an individual's decision to publicly express his or her sexuality *is a personal affirmation that such conduct is legitimate or acceptable*") (emphasis added); William N. Eskridge, *Gaylegal Narratives*, 46 Stan. L.Rev. 607, 635-36 (1994) (*"decision to come out is* not merely an individual assertion of identity, but also *a risky act of social defiance"*) (emphasis added).

The issue of whether a direct burden would be placed on Boy Scouts' First Amendment rights by forcing

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[5] Dale's counsel of record, Evan Wolfson, even admits that there are "inherently political dimensions to being *openly* gay or lesbian." (Evan Wolfson & Robert S. Mower, *When the Police Are In Our Bedrooms, Shouldn't The Courts Go In After Them?: An Update On The Fight Against "Sodomy" Laws*, 21 Fordham Urb. L.J. 997, 1025 n.100 (1994) (emphasis added).)

them to accept Dale's speech, not just his status, is most clearly raised in *Hurley*. The parade organizers in *Hurley* represented that they reflected "traditional religious and social values" and wished to exclude "groups with sexual themes." *Hurley*, 515 U.S. at 562. Although participation by the Irish-American Gay, Lesbian & Bisexual Group of Boston ("GLIB") was also expressive in character, *id.* at 570, the only *public* message manifested at the parade by GLIB was its own *self-identifying speech*, when it "marched behind a shamrock-strewn banner with the simple inscription 'Irish American Gay, Lesbian and Bisexual Group of Boston.' " *Id.* Based on these facts, this Court concluded that GLIB had sought to "communicate its ideas as part of the existing parade." *Id.* This alone was enough to find an implied message that conflicted with the wishes of the parade organizers. The same conflict is inherent in the present case.

Openly gay persons who apply to be Scoutmasters when they know that Boy Scouts take a position against alternative sexual lifestyles[6] are, in essence, *requesting that Boy Scouts accept their political message or speech*, not just their sexual orientation status. When public accommodation statutes, however well intentioned, are used to require acceptance, the state is clearly compelling acceptance of private political speech, directly contrary to this Court's holding in *Hurley*. As stated by Judge Landau in his dissent below in the Superior Court, Appellate Division: "This principle is not changed merely because the altered message is implicitly, but no less strongly, conveyed by example rather than by verbal articulation or by

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[6] For example, it is hardly disputable that Boy Scouts have the right to reject other messages or speakers who seek to use Scouting as a vehicle to "legitimize" other sexual lifestyles, such as prostitution, polygamy, adultery or unmarried heterosexual cohabitation.

signs." (153a) Accordingly, the present case plainly raises the issue of whether the rule of "speaker's autonomy" established by this Court in *Hurley* is being threatened by misapplication of state public accommodation laws.

Moreover, the seriousness of the threat to private speech rights in this case is not abated by the counter-argument that, since homosexuals are known almost exclusively by their self-identifying speech, or because homosexual status cannot be separated from homosexual speech, therefore, a homosexual person cannot be excluded based on his or her "coming out" speech. *See, e.g., Dale, supra*, 160 N.J. at 641 (concurring opinion of Justice Handler).[7] This argument only begs the very question at issue in this case: whether Dale's self-identifying *speech* is interfering with Boy Scouts' free speech and association rights.

Speech is speech, whether it is self-identifying speech or some other type of speech. Accordingly, if homosexual status really cannot be separated from homosexual self-identifying speech, then forcing expressive associations opposed to the homosexual lifestyle to accept openly homosexual persons is also, *a priori*, forcing them to accept such persons' speech, thereby violating the association's right of speaker's autonomy. Unless this Court is willing to carve out a new exception to First Amendment jurisprudence for self-identifying speech, it seems self-evident that homosexuals do not have a special right above other Americans to compel private expressive associations to accept their speech.

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[7] This counter-argument clearly fails if carried to its logical conclusion. For example, most Catholics also cannot be identified other than by their self-identifying speech. However, this fact does not give them a right to join a Protestant or Jewish fraternal organization.

By the same token, if homosexual status truly cannot be separated from homosexual speech, then an expressive association's rejection of an openly homosexual person is not necessarily based on a rejection of such person's status. It may be legitimately based on rejection of the message of such person's "coming out" speech. Accordingly, one of the basic assumptions on which rests much of the reasoning of the NJSC's ruling, that Boy Scouts revoked Dale's membership "solely because of his status as a homosexual" (160 N.J. at 624), is very doubtful.

Moreover, the risk that Dale's speech interferes with Boy Scouts' right of speaker's autonomy is especially grave in this case because of the NJSC's conclusion that "Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." (160 N.J. at 613.) Thus, it is undisputed that the NJSC found that Boy Scouts are at least expressive with respect to "moral values" and the "moral development of its members."

Since the issue of the morality of homosexual behavior is highly controversial, the likelihood of interference with Boy Scouts' expressive purposes arising from Dale's public self-identifying speech is extremely high in this case. That likelihood is further increased in this case because of the fact that Dale has actively promoted his message in the media, announcing that he is a "gay activist" and "very active in gay politics" as co-president of the Rutgers University Lesbian and Gay Alliance. (JA 468-469, 511, 513, 515-518) Dale is also openly critical of Boy Scouts' role modeling policy: "I owe it to the organization to point out to them *how bad and wrong this policy is*. . . . " (JA 513) (Emphasis added.)

Accordingly, this Court should exercise its obligation to independently review the record and reverse the judgment of the NJSC based upon the Court's finding that

Boy Scouts' rejection of Dale was not simply an act of prohibited discrimination based on status but is logically related to exclusion of ideological speech which may inherently subvert Boy Scouts' own expression in favor of the moral values they prefer.

II. BOY SCOUTS' UNIQUE EMPHASIS ON TEACHING BY EXAMPLE AND BY ROLE MODELING IS ITSELF A FORM OF SYMBOLIC SPEECH OR EXPRESSIVE CONDUCT PROTECTED BY THE FIRST AMENDMENT

In addition to violating the Boy Scouts' right of speaker's autonomy by requiring Boy Scouts' acceptance of Dale's self-identifying speech, the NJSC's judgment also alters or limits Boy Scouts' own affirmative speech communicated through the medium of role modeling.

In *Hurley, supra*, this Court stated that "the Constitution looks beyond written or spoken words as mediums of expression." 515 U.S. at 569. For example, parading is expressive because it is not simply movement from one place to another but is a form of "making some sort of collective point, not just to each other but to bystanders along the way." *Id.* at 568.

Because expressive *conduct*, and not just words, convey a message which constitutes speech, the First Amendment protects expressive associations which limit the content of their speech by their choice of role models. Common examples of such expressive activity include appointment of church ministers and youth counselors, who often teach more *by their example* than by their preaching.

In *Texas v. Johnson*, 491 U.S. 397, 403-405 (1989), this Court reiterated its two-part test for determining whether a state regulation, as applied to conduct alleged to be expressive, violates the First Amendment: (1) whether the

conduct itself is expressive, as shown by an intent to convey a particularized message which is likely to be understood by those viewing it, and (2) if so, whether the state's interest in regulating such conduct is "related to the suppression of free expression."

With respect to the first prong of *Texas v. Johnson*, the record below reveals a strong case for finding expressive conduct because there can be little doubt that *Boy Scouting intends to convey a particularized message (i.e., the principles embodied in the Boy Scout Oath and Law) through its choice of role models* and that "the likelihood was great that the message would be understood by those who viewed it." *Id.* at 404 (citing *Spence v. Washington*, 418 U.S. 405, 410-411 (1974)). The communicative intent of Boy Scouts is clearly stated in their Mission Statement: "It is the mission of Boy Scouts . . . *to instill* values in young people. . . . The values we strive *to instill* are based on those found in the Scout Oath and Law." (JA 184 (emphasis added))

Boy Scouts control the messages and values instilled in young Scouts, in part, by excluding individuals who would *express views or model behavior contrary to Scouting's views*. The Chancery Division below expressly found that "*Scoutmasters are* teachers and *role models* of 'what a man should be like' *in all aspects* of male adulthood." (207a (emphasis added)) It further found that "[t]o be an adult leader of Scouting one must agree to be bound not only by the Scout Oath or Promise but also by the Declaration of Religious Principles." (206a) Such a leader "must possess the moral, educational, and emotional qualities deemed necessary by BSA for leadership before he will be commissioned." (222a) The Chancery Division concluded that requiring Dale to be admitted as a Scout leader "would be devastating to the essential nature of scouting" partly because a role model's example is "critical" to

Scouting's mission of conveying the values of the Scout Oath and Law. (223a) These facts clearly show that there is an *intent* by Boy Scouts to communicate a *specific message* through role modeling.

The record below also shows a great likelihood that those viewing the conduct would understand the message. Boy Scout literature is replete with statements that boys best *understand* the message of Scouting through role modeling. The Official Scoutmaster Handbook, which Dale had when he registered as a Scout leader, stated:

> In his quest for manhood, every boy needs contact with men *he can copy*. Living, breathing men provide *models* of what manhood is like. *Boys copy whatever models are available to them. . . .* You are providing a good *example* of what a man should be like. What you do and *what you are* may be worth a thousand lectures and sermons.

(JA 543) (Emphasis added.) The Handbook further stated: "*What you are* speaks louder than what you say." (*Id.*) (Emphasis added.) The Scoutmaster Handbook also advises Scout leaders: "When you're on a Scout campout, remember that *boys will look up to you as a role model – someone they want to* respect and *copy*." (R.2685) (emphasis added). "Boys learn from the *example* set by their adult leaders." (JA 244) (emphasis added).

Recognizing the power of example on young Scouts, Dale himself admitted that it was his responsibility "to set an example of living by the Scout oath and law. . . . " (R.3333) He also admitted that, in order to effectively instill Scouting values in youth, it is important for a Scout leader "*never to do or say anything inconsistent* with the values embodied in the Scout Oath or the Scout Law." (JA 120) (emphasis added).

Evidence in the record indicated the drastic effect that admission of known or avowed homosexuals would

have on the communicative aspects of role modeling and on young Scouts' *understanding* of what it means to be morally straight and clean. (JA 447-449) Professor Slavings described the various mechanisms by which adult leaders' role modeling contributes to value transmission and showed how each method would be weakened and disrupted if someone like Dale were placed in the position of adult leader. (*Id.*) These facts show that young Scouts *understand* the messages[8] of Scouting's role models.

Since the record below shows that Boy Scouts' role modeling is clearly expressive in character, the second prong of *Texas v. Johnson* requires a determination "whether the State's regulation is related to the suppression of free expression." 491 U.S. at 403. If the state's interest is related to suppression of ideas, then strict scrutiny is the standard of review. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Even a regulation which is intended to vindicate a compelling state interest must be shown to be "unrelated to the suppression of free expression" and "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Id.*

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[8] Evidence of the fact that Boy Scouts' role modeling sends a message that is understood by those receiving it is virtually admitted in writings posted on the website of Dale's own legal representative, Lambda Legal Defense and Education Fund ("Lambda"). In an article entitled "Ford Foundation Adds to Support for Gay Youth," dated October 1, 1999, Lambda's Executive Director, Kevin Cathcart, states with specific reference to this case: "The outrage of *the Boy Scout policy* is not just that it bars openly gay people from scouting, but also that it *sends a message to all youth. . . . [M]any young people absorb that message. . . .* [W]e must keep fighting to stop these messages. That is Lambda's job." *See* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=492 (emphasis added).

The NJSC's ruling results in the suppression of expression because Dale's forced admission to Boy Scouts would alter both the form and content of Boy Scouts' expressive role modeling. In *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), this Court stated that "[m]andating speech that a speaker would not otherwise make *necessarily alters the content* of the speech." 487 U.S. at 795 (emphasis added). Instead, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say *and how to say it*. . . . To this end, the government, even with the purest of motives, may not substitute its judgment as to *how* best to speak. . . . " *Id.* at 790-791 (emphasis added). Moreover, "[g]overnmental restraint on [speech] need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

In *Texas v. Johnson*, this Court, while recognizing the special place of the flag in our tradition and history, expressly declined to create an exception under the First Amendment that would allow the government to restrict expressive conduct to orthodox viewpoints. 491 U.S. at 418. The Court also suggested that "other concepts virtually sacred to our Nation as a whole," such as the state's interest in preventing discrimination, may be questioned "in the marketplace of ideas" and cannot be used to override the supremacy of the First Amendment. *Id.*

The present case raises serious issues of state-mandated censorship precisely because of the controversial nature of Boy Scouts' definition of what is "morally straight." "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society

finds the idea itself offensive or disagreeable." *Id.* at 414. "[T]hat the government may not prohibit expression simply because it disagrees with its message, is *not dependent on the particular mode in which one chooses to express an idea.*" *Id.* at 416 (emphasis added). Accordingly, the government may not "ensure that a symbol be used to express only one view of that symbol or its referents." *Id.* at 417.

The role of Scoutmaster is clearly symbolic in large measure. Hence, to deny the symbolic nature of Boy Scouts' role modeling arguably limits the number of messages that can be conveyed through Scoutmaster role modeling and amounts to a limitation on speech. "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries." *Id.*

Boy Scouts clearly seek to control the messages they send to youth and the public through their unique emphasis on role modeling. Choosing a role model in such a context is just as vital to Boy Scouts' expressive purposes as choosing their speakers or their speech at a Court of Honor. Thus, when the state seeks, as in this case, to dictate who may occupy role modeling positions, there is a great danger that it may be substantially altering both the *form* and the *content* of such expression.

It is precisely in the area of governmental regulation of expressive conduct through public accommodation statutes that the danger of ideological constraint is high, especially if the nexus between the expressive nature of the activity and the interest being regulated is not well understood. Since Boy Scouts seek to teach their messages and values *by quiet role modeling* and not by boisterous debate, there is a great danger that outsiders (including the state) may interpret such a position as no

position at all, as the NJSC has done in this case. However, this does not mean that such quiet advocacy is not worthy of protection under the First Amendment.

In related contexts involving similar expressive associations, role modeling has already been recognized as a defense to application of state and federal antidiscrimination laws where private youth clubs have terminated adult employees who seek to model alternative sexual lifestyles. *See, e.g., Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 701-702 (CA8 1987) ("to permit single pregnant staff members to work with the girls would convey the impression that the Girls Club condoned pregnancy for the girls in the age group it serves"); *Harvey v. YWCA*, 533 F.Supp. 949, 952 (W.D.N.C. 1982) (rejecting a pregnancy discrimination claim of employee who was fired because she wished to offer herself as role model of the "alternative lifestyle" of unwed pregnancy to young women, which was "contrary to the [YWCA's] purpose"). *Cf. Fricke v. Lynch*, 491 F.Supp. 381 (D.R.I. 1980) (holding that role modeling example by gay male who merely attended high school prom with male date was "political statement" which constituted "protected speech").

The danger of state-mandated orthodoxy is especially high in this case because there remains a strong likelihood that requiring admission of openly gay Scoutmasters will confuse both the Scouts and the community as to what message Boy Scouts are really sending. For example, even if openly gay persons promised to teach only Boy Scouts' viewpoint on sexual morality, their contradictory example *could lead to a logical conclusion in the minds of young Scouts* and other observers of *"do as I say, not as I do."* Such a message would completely undermine the pedagogical value of role modeling as well as destroy the moral teaching against homosexual conduct. Therefore, the state's attempt to dictate appropriate role models in

this case is little different than, for instance, a state regulation requiring non-celibates to be admitted as Catholic priests.

Based on the foregoing, there is a great likelihood that the NJSC's ruling, if left intact, will be disruptive of core First Amendment expression.

III. THE NJSC'S JUDGMENT MUST BE REVERSED BECAUSE IT ASSUMES THAT THE RIGHT OF EXPRESSIVE ASSOCIATION ONLY APPLIES TO VIEWPOINTS WHICH ARE SHARED UNIVERSALLY BY THE ASSOCIATION'S MEMBERS AND IT FAILS TO RECOGNIZE THAT THE RIGHT OF SPEAKER'S AUTONOMY IS NOT LIMITED TO CONSISTENT, DISTINCT OR ARTICULATE MESSAGES

The NJSC's decision below also demands review because it denigrates the principle established in *Hurley* that the right of speaker's autonomy is not limited to consistent, distinct or articulate messages. The NJSC appears to have mistakenly assumed that members of Boy Scouts must universally have as a "shared goal" the "view that homosexuality is immoral" in order for that viewpoint to achieve any constitutional protection. *Dale, supra,* 160 N.J. at 613. The NJSC concluded that "Boy Scouts' religious sponsors differ in their views about homosexuality" and, therefore, "it appears that *no single view on this subject functions as a unifying associational goal* of the organization." *Id.* at 615 (emphasis added). The NJSC's limited view of the rights of speech and expressive association in this regard were clearly rejected in *Hurley*.

Notwithstanding the fact that the *Hurley* parade had "multifarious" and "conflicting" voices, this Court ruled that it was, nevertheless, still an expressive association entitled to First Amendment protection. *Hurley,* 515 U.S.

at 562, 569. Unlike Boy Scouts, the parade organizers "had no written criteria and employed no particular procedures for admission, voted on new applications in batches, had occasionally admitted groups who simply showed up at the parade without having submitted an application, and did 'not generally inquire into the specific messages or views of each applicant.' " *Id.* at 562 (citations omitted). These facts did not diminish their First Amendment right to exclude from the parade individuals bearing an undesirable message. Since the record in this case discloses that Boy Scouts are much more selective and have a clearer sense of expressive purposes, the protection from government interference should be even greater here.

Furthermore, there are important policy reasons why the right of expressive association should not be limited to viewpoints in which the members of an association universally agree. As a practical matter, such a limitation would so limit the right of expressive association as to make it meaningless to any large organization. There are many large private groups in this country which lack "genuine selectivity" and contain many members whose "messages" contradict each other.[9] For example, only two

---

[9] For example, the American Bible Society, American Mizrachi Women, Inc., Baptist World Alliance, Catholic Relief Services, Christian Records Services, Inc., Ecumenical Association For Housing, Episcopal Community Services, Girl Scouts of the U.S.A., Graduate Theological Union, Jewish Community Centers Association of North America, The Jerusalem Fund of Aish HaTorah, Jewish Vocational and Career Counseling Service, Lutheran World Relief, Inc., Masonic Lodges, The Salvation Army, The Society For The Propagation Of The Faith, Union of American Hebrew Congregations, Union Rescue Mission, and Young Women's Christian Association. *See The Guide to Gifts and Bequests, 1995-1997: A Directory of Philanthropically Supported Institutions* (1995) at 23-239.

generations ago, the Democratic Party had some members who wanted to enact extensive civil rights legislation (such as Senators Hubert Humphrey and Paul Douglas) and other members who believed with equal fervor in segregation (such as Senator Richard Russell). The Democratic Party also did not have (and still does not have) a consistent way of selecting its members. Merely because the Democratic Party included members who believed in segregation as well as those who wanted extensive civil rights laws enacted does not mean that the First Amendment right of expressive association does not apply to the Democratic Party and its chosen platform. This Court in *Hurley* clearly rejected the view limiting expressive association rights to small homogeneous groups with narrow viewpoints or rigid rules of selection. Thus, the NJSC's decision below directly conflicts with this Court's opinion in *Hurley* regarding the applicability of expressive association rights to large and diverse private associations.

IV. THIS COURT SHOULD RESIST THE TEMPTATION TO RESTRICT RIGHTS OF SPEECH OR EXPRESSIVE ASSOCIATION IN THIS CASE BECAUSE SUCH RESTRICTIONS WILL ULTIMATELY WEAKEN THE RIGHT OF ALL PERSONS TO SPEAK OR ASSOCIATE FOR EXPRESSIVE PURPOSES, ESPECIALLY THE RIGHTS OF GAY AND LESBIAN GROUPS AND INDIVIDUALS

This amicus respectfully submits that this Court should resist efforts from either side of the political spectrum to compel ideological orthodoxy, especially when it is directed against expressive associations. Far from vindicating the rights of homosexuals, a ruling which undermines the concept of expressive activity and association in this case may lay the groundwork for denial of First

Amendment rights of gays and lesbians in other cases where such a doctrine works in their favor.

For example, there is a strong argument to be made for the contention that the First Amendment has long been the strong ally of gays and lesbians. William B. Rubenstein, the director of the ACLU's Lesbian and Gay Rights Project, has written:

> " . . . [I]n the immediate aftermath of Stonewall, a *series of First Amendment cases* challenged *government* restrictions on lesbian and gay organizations. For example, there is a whole line of cases that traces the formation of lesbian and gay student groups on college campuses and these groups' fights for university recognition. Without exception, the final decisions in each of these cases vindicated the rights of the lesbian and gay litigants. . . .
>
> "These cases are mirrored by similar cases outside the university that also uphold the association of lesbians and gay men *on First Amendment grounds* and ranged from First Amendment protections for gay bars to the protection of a gay high school student to bring a male date to his high school prom. Similarly, *the First Amendment* has been used to prohibit *governmental* publications from denying the existence of lesbian and gay groups and events.
>
> . . . .
>
> "This is not to say that the First Amendment has always worked perfectly for lesbians and gay men. There are a number of serious internal and external limitations on its applicability. First, the *First Amendment is triggered only where 'state action' exists*, although anti-gay silencing is not so limited. *Instances of private censorship* – an encyclopedia's failure to include an entry on gay life, for example – *are not actionable* . . .

> " . . . [T]he *First Amendment has been the only consistent friend of lesbian and gay rights litigators* since Stonewall. With rare exceptions, when a case is properly framed as a First Amendment case, lesbian and gay plaintiffs prevail. . . . The First Amendment is premised upon an ideal – currently absent from Fourteenth Amendment jurisprudence – that the judiciary should protect those ideas it finds deplorable. It finds ours deplorable, but has, in a series of important cases, protected us nonetheless."

William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the 'Hate-Speech' Debate from a Lesbian/Gay Perspective* in *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* 286-88 (1994) (emphasis added) (footnotes omitted).

Since the First Amendment has been the faithful ally of gays and lesbians, there exists a great danger in cutting back its protections, even if it is being used as a defense against a gay plaintiff. Mr. Rubenstein articulately describes this danger:

> "I am cautious, first, because *allowing limitations on free speech might well limit our ability to speak freely*, and in this instance, therefore, *particularly limit our ability to come out, to undertake the very act of self-identification central to overcoming lesbian/gay oppression*. Second, I am also cautious because I worry that allowing limitations on the primary instrument of gay equality may well limit the equality itself.
>
> . . . .
>
> "In sum, *my experience litigating on behalf of lesbians and gay men makes me reluctant to be a party to placing limitations on the First Amendment* – and this is my main point. I hesitate to be a party to limitations on the First Amendment . . . because *the First Amendment is our instrument, at present our strongest tool, of constitutional equality. It's what we've got and I believe we should guard it carefully." Id.* at pp. 291-92 (emphasis added) (footnote omitted).

Interestingly, in a footnote, Mr. Rubenstein *concedes the fact that the Boy Scouts are exercising First Amendment rights* when they exclude gays from troop leadership positions. *Id.* at 287, 297 n.26. He appears not to be troubled by such a concession because of his overall theme that strengthening First Amendment rights in general will ultimately assist gay and lesbian rights.

This is partly because a ruling in favor of the Boy Scouts will not lead to a general undermining of legal protections for gays and lesbians. Hotels, restaurants, and other commercial establishments rarely, if ever, exist for an expressive purpose. Unlike the Boy Scouts, the purpose of most commercial establishments is to make a profit, not a moral point. It simply strains credibility to suggest that most, or even many, businesses exist to teach their customers, clients, or membership the virtues of traditional fatherhood and family values. Therefore, their conduct can be constitutionally regulated in conformity with the civil rights laws. Furthermore, even if some expressive businesses do exist, the small limitation on antidiscrimination laws made necessary to guard First Amendment expression will only advance the civil liberties of all citizens.

By contrast, a ruling against the Boy Scouts in this case would seriously weaken gay and lesbian rights in other cases. For example, the case of *Fricke v. Lynch*, 491 F.Supp. 381 (D.R.I. 1980), is a compelling example of how cutting back on the right of expressive role modeling in this case may unwittingly *reduce* gays' and lesbians' First Amendment rights in other cases. In *Fricke*, the federal

district court ruled that a gay teenager was engaging in protected expressive activity when he attended his public high school prom with a male date. The unwillingness of the Court in this case to recognize the expressive nature of the Boy Scouts' role modeling may thus, ironically, strengthen arguments that gays and lesbians who attend proms with same-sex partners are likewise not engaging in protected expressive activity.

Mandating the acceptance of openly gay Scoutmasters in this case might also adversely affect the ability of activist gay organizations to refuse the membership applications of "born again" Christian fundamentalists who are opposed to the founding purposes of the gay club and who wish to use their membership to "reform" the gay club from within. Allowing such intrusions actually implements a false notion of societal "equality" by attempting to internally "diversify" expressive associations in a way which dilutes or alters both the content and impact of the association's message.

The affected First Amendment rights would not necessarily stop at prom dates and associational rights. In *Gay Students Organization of the University of New Hampshire v. Bonner*, 509 F.2d 652 (CA1 1974), the issue was whether a state university could bar a gay student organization from sponsoring "social events," such as dances and parties. The court ruled in favor of the homosexual student association on First Amendment grounds: "Considering the important role that social events can play in individuals' efforts to associate to further their common beliefs, the prohibition of all social events must be taken to be a substantial abridgement of associational rights, even if assumed to be an indirect one." *Id.* at 659-60. The court emphasized the importance of the exchange of ideas occurring "in an informal atmosphere." *Id.* at 660. Thus, in *Bonner*, an expansive view of First Amendment

"associational rights" which includes "conduct" and "activities" such as parties and dances resulted in more, not less, protection of a gay association from capricious state regulations.

One legal commentator eloquently described the importance to the gay rights movement of not limiting what is defined as expression:

> "*Homosexual conduct*, from public hand-holding and kissing by same-sex couples to private sexual conduct, *fosters the diverse polity that the First Amendment envisions*. Public *expression of same-sex intimacy is as important* a critique of gender assumptions and gender roles in American society *as any published treatise*. It is therefore not only individually expressive, but also socially valuable under the robust pluralism endorsed in Sullivan. The fact that *gestures like kissing and hand-holding are symbolic of ideas and attitudes* rather than literal statements of position in a debate does not diminish their importance. The *public debate has* never been limited to books, articles, letters to the editor, speeches, and signs; it has *always included symbolic gestures* such as dancing, visual art, advertising imagery, public demonstrations, clothing, and physical conduct." (William David Cole & William N. Eskridge, *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 Harv. C.R.-C.L. L.Rev. 319, 328-29 (1993) (emphasis added).)

If the public debate has always included such expressive conduct as dancing, imagery, and physical conduct, then there is no reason to exclude expressive role modeling from the categories of protected expression. However, if the Court takes the rigid position advocated by Dale that role modeling is mere conduct that may be regulated so long as no "oral expression" or "advocacy" is

involved, then gay plaintiffs who seek to rely on the First Amendment based primarily on their expressive *behavior* will encounter an extremely difficult legal battle and may find their own expressive activities being restricted unless such constitutional rights are clearly protected. Thus, if Dale prevails in this case, it may prove to be a Pyrrhic victory indeed for homosexuals everywhere and may actually blunt their best weapon in the fight for civil rights – the First Amendment.

V. THIS COURT SHOULD ENSURE THAT THE SCOPE OF EXPRESSIVE ASSOCIATION RIGHTS ARE NOT INTERPRETED TOO NARROWLY SO THAT STATE AND LOCAL LAWMAKERS ARE NOT DISCOURAGED FROM PASSING NEEDED LEGISLATION TO PROTECT MINORITIES SUCH AS GAYS AND LESBIANS

Several recent commentators have criticized this Court's opinion in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) as unduly restrictive of the right of expressive association. *See, e.g.*, Comment, *Civil Rights – Public Accommodation Statutes – New Jersey Supreme Court Holds That Boy Scouts May Not Deny Membership To Homosexuals – Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999), Petition for Cert. Filed, 68 U.S.L.W. 1083 (U.S. Oct. 25, 1999) (No. 99-699)*, 113 Harv. L.Rev. 621 (1999) ("the Supreme Court should revisit Roberts to develop a broader and more accurate association test"); David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 Univ. Chi. Legal Forum 133, 166 ("ever since *Roberts* was decided, litigants and courts have cited it for the proposition that antidiscrimination laws, no matter how trivial, should trump federal constitutional rights").

Some suggested resolutions include creating a "commerciality test" which would recognize that "businesses and facilities have attenuated intimate and expressive

interests because they promote professional, not personal, relationships and do not ordinarily advocate social policies." (Comment, *supra*, 113 Harv. L. Rev. at 625.) While the commerciality test may come closer to protecting the broad spectrum of cultural interests that are not adequately protected under the *Roberts* test, it may still be inadequate because the line between commercial associations and ideological organizations is not always easily drawn (*e.g.*, kosher food processing companies). The commerciality test, by itself, is suspect because it appears to merely constitutionalize public accommodations analysis.

Even if this Court decides not to revisit the *Roberts* test, the present case is still quite distinguishable from the facts in *Roberts*. A close reading of this Court's opinion in *Roberts* and in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), shows that requiring full membership privileges for women in those cases did not significantly affect the ideological or philosophical character of the Rotary Club or the Jaycees. In *Rotary Club*, this Court specifically found that the Rotary Club allowed women *to attend* their meetings and *to participate* in many of their activities. 481 U.S. at 549 n.8. In *Roberts*, the court found that the Jaycees allowed women to be "associate members." 468 U.S. at 613.

By allowing women to openly participate in their meetings or to occupy second class membership status, the Rotary Club and the Jaycees showed that they did not consider women, as a group, to be "individuals with ideologies or philosophies different from those of its existing members." *Id.* at 627. Requiring these clubs to allow women *full* participation or membership status equal to men therefore did not significantly interfere with or impede the right of expressive association because *these clubs already allowed women to participate in a significant way* and because *symbolic inclusion of women, as a group,*

did not significantly alter the form or content of the expressive interests of these clubs.[10]

By contrast, the basis for refusing Dale's application in this case is clearly ideological. The Boy Scouts' selection criteria is restrictive and ideologically-oriented. All members, both youth and adult leaders, must outwardly subscribe to the Scout Oath and Scout Law, which require the members to be "morally straight" and "clean," a requirement which the record shows has been consistently interpreted by the Boy Scouts for over 80 years as meaning that a scout leader must not outwardly practice or advocate homosexuality. (JA 457-459.)

Unlike the merely second-class treatment of women participants in the Rotary Club and Jaycees cases, above, the Boy Scouts do not in any way encourage openly homosexual persons to participate in their meetings and functions. Thus, openly gay persons are not merely made second-class members by Scouting. Such a total exclusion is consistent with an ideological exclusion.

Furthermore, the trial court concluded that "[t]he consequences of restoring Dale to a position of adult leadership would be devastating to the essential nature of scouting." (223a.) The record in this case shows that introduction of homosexual role models would likely impact Scouting's ideological foundations and support, leading to possible withdrawal of sponsorship by at least some religious organizations (*see, e.g.*, JA 712-713), unlike

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[10] There is no indication in either the *Roberts* or the *Rotary Club* opinions that the Jaycees or the Rotary Club were engaging in expressive role modeling or that their rules reserving full membership privileges only to males were *intended to communicate a message*. Thus, the male-only aspects of both these clubs would fail the "intent to convey a particularized message" prong required to show expressive activity, as laid down in *Texas v. Johnson, supra*, 491 U.S. 397, 404.

the mere promotion of women to full membership status in *Rotary Club* and *Roberts*, which had no such impact.

The NJSC's judgment in this case goes far beyond the original intent of most public accommodations laws which merely require equal access to public accommodations when arbitrary exclusion of minorities is unrelated to constitutionally-protected expression. The ruling below is in direct contradiction to a long constitutional tradition which seeks to preserve "political and cultural diversity" by strengthening, not weakening, the exclusionary rights of expressive associations. *See Roberts, supra*, 468 U.S. at 622 (citing numerous cases).

Accordingly, a narrow interpretation of expressive association rights in this case may actually discourage state legislators, who might be inclined otherwise, from expanding public accommodations protections for fear of negatively impacting social and cultural associations with expressive interests. Therefore, by interpreting expressive association rights expansively in this case, the Court will actually be fostering cultural diversity and encouraging the expansion of public accommodations protections for minority groups such as gays and lesbians.

CONCLUSION

This amicus respectfully submits that this Court should overturn efforts from any part of the political spectrum to compel ideological orthodoxy, especially when it is directed against expressive associations. Far from vindicating the rights of homosexuals, a ruling which undermines the right of expressive association in this case may substantially chill the First Amendment rights of all citizens, including those of homosexuals, and "will permit the government to acquire ever more power for itself at the expense of individual autonomy and civil

society." David E. Bernstein, *supra*, 1999 Univ. Chi. Legal Forum at 196.

Respectfully submitted,

PAUL A. HOFFMAN
Counsel of Record
DRACUP & PATTERSON
505 N. Tustin Avenue, Suite 282
Santa Ana, California 92705
(714) 542-3500

MANUEL S. KLAUSNER
PATRICK J. MANSHARDT
One Bunker Hill Building
601 W. 5th Street, 8th Floor
Los Angeles, California 90071

Attorneys for Amicus Curiae
The Individual Rights Foundation

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In The

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF OF CHRISTIAN LEGAL SOCIETY, CAMPUS CRUSADE FOR CHRIST INTERNATIONAL, INTERVARSITY CHRISTIAN FELLOWSHIP/USA, REJOYCE IN JESUS CAMPUS FELLOWSHIP, AND SOUTHERN CENTER FOR LAW & ETHICS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

KIMBERLEE WOOD COLBY
Counsel of Record
CARL H. ESBECK
CHRISTIAN LEGAL SOCIETY
CENTER FOR LAW AND
RELIGIOUS FREEDOM
4208 Evergreen Lane, Suite 222
Annandale, Virginia 22003
(703) 642-1070

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities iii

Interest of the *Amici Curiae* 1

Summary of Argument 3

Argument 8

I. PUBLIC UNIVERSITIES HAVE THREATENED RELIGIOUS STUDENT GROUPS WITH LOSS OF ACCESS TO CAMPUS FACILITIES IF THE GROUPS REFUSE TO AGREE TO ACCEPT AS OFFICERS PERSONS WHO DO NOT SHARE THE GROUPS' CORE RELIGIOUS VALUES, INCLUDING THEIR RELIGIOUS VIEWPOINTS REGARDING HOMOSEXUAL CONDUCT 8

A. Denial of Equal Access to Religious Groups Because They Require Their Officers Not to Engage in or Advocate Homosexual Conduct Is an Unconstitutional Condition in Violation of This Court's Decisions in *Widmar v. Vincent* and *Rosenberger v. University of Virginia* 8

B. The Dilution of Religious Liberty in *Employment Division v. Smith* Makes the Protection of the Freedom of Speaker Autonomy Critical to Safeguarding Religious Groups' Ability to Select Their Leadership Based on Their Standards of Conduct 13

TABLE OF CONTENTS – Continued

Page

II. THE FIRST AMENDMENT RIGHT OF SPEAKER AUTONOMY PROTECTS THE RIGHT OF AN ORGANIZATION WHOSE PURPOSE IS THE TRANSMISSION OF VALUES TO LIMIT ITS LEADERSHIP TO PERSONS WHO SHARE THE ORGANIZATION'S CORE VALUES, AS DEFINED BY THE ORGANIZATION..... 16

A. An Organization Dedicated to the Transmission of Values Need Not Demonstrate that It Expresses an Explicit Message in order to Exclude from Leadership a Person Who Does Not Share Its Core Values 18

B. An Organization Dedicated to the Transmission of Values – Not the Government – Has the Right to Define the Organization's Own Values and Message through Its Selection of Leaders 21

C. An Organization Dedicated to the Transmission of Values Does Not Forfeit Its Right to Select Its Leadership Simply Because It Is Successful in Attracting Members or Has Some Interaction with Government 26

D. The Decision Below Imposes Unacceptably Costly Burdens on All Organizations Dedicated to the Transmission of Values, Chilling the Exercise of Their First Amendment Rights 27

E. Government Officials' Efforts to Recast the Values of an Organization to Fit the Prevailing Governmental Orthodoxy Are Antithetical to the First Amendment..... 28

Conclusion 30

Appendix 1a

TABLE OF AUTHORITIES

Page

CASES

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 20

Board of Education v. Mergens, 496 U.S. 226 (1990) 12

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)..... 13

Combs v. Central Texas Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999)..... 16

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987)..... 15, 16, 28

Democratic Party v. Wisconsin, 450 U.S. 107 (1981) ... 24, 25

EEOC v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996)..... 16

Employment Division v. Smith, 494 U.S. 872 (1990) 14, 15, 16

Good News/Good Sports Club v. Ladue School District, 28 F.3d 1501 (8th Cir. 1994) 14

Grace Bible Fellowship v. Maine School Administrative District #5, 941 F.2d 45 (1st Cir. 1991) 12

Healy v. James, 408 U.S. 169 (1972) 12

Hsu v. Roslyn Union Free School District, 876 F. Supp. 445 (E.D.N.Y. 1995), *aff'd in part, rev'd in part*, 85 F.3d 839 (2d Cir.)..... 10, 12, 28

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995)..... *passim*

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) 15

TABLE OF AUTHORITIES – Continued

Page

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993) 13

McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) 16

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) 20

Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974) 20, 22

New York State Club Association v. City of New York, 487 U.S. 1 (1988) 23, 24, 25

Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1 (1986) 19, 20, 21

Riley v. National Federation of Blind of N.C., Inc., 487 U.S. 781 (1988) 20

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 15, 23, 24, 25, 29

Rosenberger v. University of Virginia, 515 U.S. 819 (1995) ..... *passim*

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 15, 25

Sherman v. Community School District, 8 F.3d 1160 (7th Cir. 1993) 14

Walker v. First Presbyterian Church, 22 Fair Empl. Prac. Cas. (BNA) 762, 23 Empl. Prac. Dec. (CCH) 31.006 (Cal. Super. 1980) 16

Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993) 14

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) 21, 30

TABLE OF AUTHORITIES – Continued

Page

Widmar v. Vincent, 454 U.S. 263 (1981) ..... *passim*

Wooley v. Maynard, 430 U.S. 705 (1977) 20

CONSTITUTIONAL PROVISIONS AND STATUTES

Title II of the Civil Rights Act of 1964 14

Title VII of the Civil Rights Act of 1964 15

Equal Access Act, 20 U.S.C. § 4071 *et seq.* (1996) 12

New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-5(hh) (West 1993) 5

U.S. Const. amend. I. ..... *passim*

OTHER AUTHORITIES

Bainbridge, Stephen M., *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994) 3, 9, 10, 11

Boy Scouts of America, *Boy Scout Handbook* (Tenth Edition, 1990) 19, 20, 21, 22, 28

Ga. Op. Att'y Gen. 97-32 (1997) 4, 9

Paulsen, Michael S., *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653 (1996) 4, 9, 10, 11, 12, 13

INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae **Christian Legal Society** ("CLS") is a nonprofit interdenominational association of over 4,000 Christian attorneys, law students, judges, and law professors. A key component of the ministry of the Christian Legal Society occurs through its student chapters at 165 law schools across the country, including student chapters at approximately 70 state law schools. Before becoming a member of CLS, a person must sign a statement of faith that he or she agrees with certain basic Christian tenets regarding the nature of God the Father, the Son, and the Holy Spirit, and the authority of the Bible.[2]

The purpose of *amicus curiae* **InterVarsity Christian Fellowship/USA** ("IVCF") is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord: growing in love for God, God's Word, God's people of every ethnicity and culture and God's purposes in the world. IVCF carries out its ministry through student chapters. Officers of those chapters are required to subscribe to the purpose and doctrinal basis of IVCF and must subscribe to certain basic biblical truths of Christianity. Currently, IVCF has approximately 747 chapters on 552 campuses in the United States, including chapters at 290 public universities and colleges.

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[1] Counsel for a party did not author this brief, in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of the brief. *See* S. Ct. Rule 37.6.

[2] The specific statements of faith for *amici's* student chapters are set forth in the Appendix with the more detailed statements of interest of the *amici curiae*.

Amicus curiae **ReJOYce in Jesus Campus Fellowship** ("RJCF") has student chapters at 23 universities and colleges, including student chapters at 14 state universities and colleges. Its purpose is to promote the teachings of Jesus Christ according to the Holy Bible through Bible study, campus activities and service to the campus community. While welcoming all students to attend its meetings, its voting members must subscribe to the group's Doctrinal Statement of Commitment to Historic Christianity, as well as agree to live by the group's written standards of personal conduct.

Amicus curiae **Campus Crusade for Christ International** ("CCC") has student chapters meeting at 731 universities and colleges across the country, including student chapters at 417 public universities and colleges. The purpose of CCC is to fulfill the Great Commission, Jesus' command to His disciples to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you." *Matthew* 28:19-20. Specifically, the goal of its student chapters is to reach every student at their campuses every year with the Gospel. Its leaders are to be effective witnesses of the Gospel to other students.

Amicus curiae **Southern Center for Law & Ethics** is a non-profit corporation involved in teaching, scholarship, and advocacy on issues relating to the interplay of ethics and law. The Center believes that the right of association implicated in this case is a significant constitutional right which enriches society with ideals drawn from religious and other significant ethical traditions.

Numerous state universities and colleges have tried to condition *amici's* student chapters' right of access to campus facilities upon their willingness to agree to accept

as officers persons who do not share their core religious values. University officials have claimed that *amici's* student chapters violate the university policies against discrimination on the basis of religion or sexual orientation, because the groups require their officers to subscribe to a statement of faith and to live according to biblical standards of conduct. If Boy Scouts must accept as a leader a person who rejects one of its core values, the ability of *amici's* student chapters to restrict their leadership to persons who share the groups' core values likely will be irreparably damaged.

Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

Many state universities have begun to force a new orthodoxy upon student organizations: homosexual conduct, and the advocacy of such conduct, must be accepted by all student groups as a morally correct (or at least, a morally neutral) choice. State universities have sought to enforce policies prohibiting discrimination on the basis of sexual orientation against student groups whose religious principles teach that "homosexual behavior [is] a sin that disqualifies those who practice it from membership or leadership within the group." Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994). For example, the University of Illinois denied recognition to the Christian Legal Society ("CLS") chapter at the College of Law because the CLS student leaders "refused to sign a University pledge to refrain

from discrimination on the basis of sexual orientation." *Id.* at 370.

University officials have launched a separate, but related, attack against religious student groups that discriminate on the basis of religion in the selection of their officers. For example, the University of Minnesota Law School threatened to deny recognition to the CLS chapter because it required its voting members and officers to subscribe to its statement of faith. The University judged this to be "discrimination on the basis of religion" in violation of the University's Equal Opportunity Statement. Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 668-672 (1996). In 1997, the Georgia Attorney General addressed the issue when it arose at Georgia Institute of Technology and concluded that denying recognition to ReJOYce in Jesus Campus Fellowship, a religious student group that required its voting members to affirm the group's statement of faith, would violate the group's free speech rights. Ga. Op. Att'y Gen. 97-32 (1997).

Since 1993, *amici's* student chapters have encountered similar problems at campuses across the country, including public universities and colleges in Michigan, Illinois, Ohio, Minnesota, Missouri, Georgia, California, New York, Arizona, Texas, and Vermont. Although these controversies eventually have been resolved in their favor, the groups have been forced to threaten litigation in many of these instances in order to challenge the restriction on their right of access under this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995).

Amici's student chapters generally do not wish to exclude persons who have homosexual inclinations, or even who have engaged in homosexual conduct in the past, from serving as officers. As long as the individuals now agree that homosexual *conduct* is sinful and that they will abstain from engaging in or advocating such conduct, they may be eligible to serve as leaders. University officials, however, have generally refused to define the term "sexual orientation" to include only "orientation". Instead university officials insist that "sexual orientation" reaches far beyond "inclination" to the protection of homosexual conduct as well as advocacy of homosexual conduct. Similarly, the New Jersey Law Against Discrimination sets forth such an all-encompassing definition of "sexual orientation," defining it to include "homosexuality or bisexuality by inclination, *practice*, identity *or expression*." N.J. Stat. Ann. 10:5-5(hh) (West 1993) (Pet. App. 226a) (emphasis added).

If Boy Scouts loses the right to restrict its leadership to persons who agree with its core values, then university officials will redouble their efforts to force religious student groups to accept as leaders persons who do not share their religious viewpoints, particularly regarding sexual conduct. After this Court's restriction of exemptions for religious persons from neutral, generally applicable laws, in *Employment Division v. Smith*, 494 U.S. 872 (1990), religious persons and organizations are vulnerable to such attacks.

Fortunately, the decision below cannot be reconciled with this Court's unanimous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In *Hurley*, this Court upheld the federal free speech right of a private organization, which had

been deemed a public accommodation under a state anti-discrimination law, to include in its parade only persons who would not impart a message the organization did not wish to convey. *Id.* at 559, 573.

In a factual and legal context parallel to this case, this Court stated:

> [T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

Id. at 573. This Court rejected the notion that an organization must express an explicit message in order to exclude from its expressive activities persons who do not share its core values. Instead, the rights of expressive association and speaker autonomy protect the right of an organization to define its own values and message through the selection of its leaders. In *Hurley*, this Court rejected the idea that an association forfeits its First Amendment right to define itself, its leadership, and its message simply because the organization is large or has some interaction with the government.

Essentially, the decision below allows one individual to hijack an entire organization that transmits values that the individual wishes to challenge. If the decision below is affirmed, every organization that transmits values will be threatened by costly litigation whenever a disgruntled person is denied leadership. Courts will be overseeing the internal workings of private associations, big and small, to determine the groups' criteria for leadership or whether certain leadership positions affect a particular group's message.

The First Amendment protects the right of organizations that transmit values to determine their own criteria for selection and retention of leaders. Were that not the case, the government would have *carte blanche* to reshape private organizations to reflect the government's values and message. This Court in *Hurley* flatly rejected the exercise of such governmental power, stating:

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups, or indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.

515 U.S. at 579.

Part I.A., *infra*, at pp. 8-13, describes the growing problem of state university officials conditioning religious student groups' access to campus facilities upon the groups' agreement to accept as leaders persons who do not share the groups' core religious values. Part I.B., *infra*, at pp. 13-16, demonstrates that the right of Boy Scouts of America to control its leadership selection will directly affect the ability of religious student groups to select their leaders free from state coercion. Part II, *infra*, at pp. 16-30, demonstrates that this Court's analysis in *Hurley* protects the right of an organization whose purpose is the transmission of values to limit its leadership to persons who share the organization's core values, as defined by the organization.

ARGUMENT

I. PUBLIC UNIVERSITIES HAVE THREATENED RELIGIOUS STUDENT GROUPS WITH LOSS OF ACCESS TO CAMPUS FACILITIES IF THE GROUPS REFUSE TO AGREE TO ACCEPT AS OFFICERS PERSONS WHO DO NOT SHARE THE GROUPS' CORE RELIGIOUS VALUES, INCLUDING THEIR RELIGIOUS VIEWPOINTS REGARDING HOMOSEXUAL CONDUCT.

A. Denial of Equal Access to Religious Groups Because They Require Their Officers Not to Engage in or Advocate Homosexual Conduct Is an Unconstitutional Condition in Violation of This Court's Decisions in *Widmar v. Vincent* and *Rosenberger v. University of Virginia*.

The right of religious student groups to meet on public university campuses is protected by this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995). In *Widmar*, this Court prohibited public university officials from denying equal access to student groups engaging in religious speech. The university officials had not denied *all* access to religious groups but *conditioned* their access to campus facilities on their agreeing to abstain from religious worship or religious teaching at their meetings. 454 U.S. at 265, 266 n.3. This Court held that such a condition violated a religious student group's freedom of speech as well as its freedom of association. *Id.* at 269, 277. In *Rosenberger*, this Court applied its *Widmar* analysis to reject university officials' denial of equal access to student activity funds for a student publication simply because its viewpoint was religious. 515 U.S. at 834-837.

The *Widmar* equal access right is endangered, however, by university officials' attempts to obstruct access by religious student groups by conditioning their right of

access on their agreeing not to discriminate on the basis of religion or sexual orientation in the selection of their officers. Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994) (denial of recognition threatened against student religious group that refused to sign university pledge regarding discrimination on the basis of sexual orientation); Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653 (1996) (denial of recognition threatened against student religious group that required voting members and officers to agree to its statement of faith); Ga. Op. Att'y Gen. 97-32 (1997) (same).

When a state university threatens to withdraw recognition of a religious student group because its leadership decisions are based on its religious convictions, the university "engage[s] in very nearly the precise conduct that *Widmar* forbids: discrimination on the basis of a group's religious nature and membership." Paulsen, *supra*, at 675. It makes little sense to recognize a constitutional right of equal access by a religious group, but simultaneously to deny a religious group the right *to be religious* in its message and its leadership.

Religious student groups have refused for a variety of reasons to sign university pledges regarding discrimination on the basis of religion or sexual orientation. *First*, the affirmative right of religious student groups to determine the qualifications of the persons who conduct their meetings is a critical component of the equal access right. Religious student groups' leaders conduct the groups' meetings and determine the content of those meetings.

Often the leaders are responsible for leading the group in worship, prayer and Bible study.

Second, a potential officer's willingness to subscribe to the group's statement of faith indicates his or her commitment to the group's message and identity – a commitment that is vital to the group's maintaining its identity. Paulsen, *supra*, at 671. The active commitment of its leaders to its core values is essential to the implementation of those values through the group's meetings and other activities. Bainbridge, *supra*, at 383.

Third, in a very real sense, *leaders are the message*. The leaders are the visible representatives of the group to the campus community. They frequently address campus issues on behalf of the organization and serve as the liaison between university officials and the group.

Fourth, statements of faith in a group's constitution are often important expressions of the group's collective identity to the greater campus community. Paulsen, *supra*, at 670-671. Statements of faith represent deliberative, substantive expression of the group's shared values.

Fifth, and relatedly, a group may object to governmental coercion – or at best, governmental bribery – to disaffirm, in effect, their commitment to particular religious convictions. *Id.* at 671. For example, the CLS chapter at the University of Minnesota Law School "was convinced that it would be wrong in principle to let government officials tell them how religious they could or could not be as a collective entity." *Id.*

Finally, a group may fear "hostile takeovers" by persons who do not share the group's core values. Paulsen, *supra*, at 671 n.39, *citing Hsu v. Roslyn Union Free School District*, 876 F. Supp. 445, 455-456 (E.D.N.Y. 1995), *aff'd in part, rev'd in part*, 85 F.3d 839 (2d Cir. 1996). This is a particularly relevant apprehension for small, unpopular

groups whose election process might be easily hijacked by persons who oppose their message.

By their refusal to relinquish their right to determine their groups' leadership qualifications, student groups forfeit numerous benefits and incur numerous harms, including: 1) loss of access to campus facilities (Paulsen, *supra*, at 670); 2) stigmatization as a discriminatory organization (Bainbridge, *supra*, at 384); 3) denial of equal access to funds made available to student groups (*id.*; Paulsen, *supra*, at 670); 4) loss of reduced rental rates for university facilities (*id.*); 5) prohibition of on-campus fundraising activities (Bainbridge, *supra*, at 385); 6) loss of reduced advertising rates in the campus newspaper (Paulsen, *supra*, at 670); and 7) imposition of a chilling effect on "conducting publicly-visible activities on University grounds for fear that doing so would lead to the imposition of further sanctions," (Bainbridge, *supra*, at 385).

This is precisely the "danger to speech from the chilling of individual thought and expression" against which this Court eloquently warned in *Rosenberger*:

> The . . . danger . . . to speech from the chilling of individual thought and expression . . . is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

515 U.S. at 835-836 (citations omitted).

The emergent campus conformity requires student groups to trade their right to determine the criteria for their officers' conduct and viewpoints in exchange for their fundamental right of access. These attempts to coerce orthodoxy on university campuses are as constitutionally objectionable today as were the "loyalty oaths" in the 1950s or universities' denial of access to radical student groups in the 1970s. Indeed, when public university officials conditioned recognition upon a student group's abandonment of its advocacy of violence and disruption, this Court rejected a university's ability to do so on both free speech and association grounds in *Healy v. James*, 408 U.S. 169 (1972).

Quite possibly, the imposition of nondiscrimination provisions may be "a thinly-veiled attempt to circumvent *Widmar* because of disagreement with its equal-access-for-religion result." Paulsen, *supra*, at 675. Precisely such an evasion occurred at the high school level when a New York school district sought to evade compliance with the federal Equal Access Act, 20 U.S.C. §§ 4071 *et seq.* (1996), as well as this Court's decision in *Board of Education v. Mergens*, 496 U.S. 226 (1990), by denying a student religious group equal access because the group would not agree to delete from its constitution a requirement that its officers share the group's religious faith. *Hsu v. Roslyn Union Free School District No. 3*, 876 F. Supp. 445 (E.D.N.Y. 1995) (upholding school district's denial of access), *aff'd in part, rev'd in part*, 85 F.3d 839 (2d Cir. 1996) (requiring school district to grant access to student religious group and allow group to use religious criteria in selection of its president, vice president and music leader, but not in its selection of secretary and activities leader). *See also, Grace Bible Fellowship v. Maine Sch. Admin. Dist. #5*, 941 F.2d 45 (1st Cir. 1991) (school district policy that justified denial

of access to community religious groups in part because school district served all races, ethnic groups, and all religious affiliations violated the religious group's speech rights).

Ironically, university officials violate their own anti-discrimination policies against discrimination on the basis of religion or creed when they penalize a religious group for selecting leaders who adhere to the group's core religious values. Paulsen, *supra*, at 674. University officials would immediately recognize the incongruity of a university policy requiring a student environmental group to have forest industry representatives as its leaders, or requiring Students Against Drunk Drivers to have a person who abuses alcohol as its leader. By prohibiting religious student groups from limiting their officers to persons who share their core ideology, university officials effectively penalize religious student groups for acting on the basis of their religious beliefs – a fundamental violation of the Free Exercise Clause. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The Free Speech Clause likewise prohibits such viewpoint-based discrimination against religious viewpoints. *Rosenberger*, 515 U.S. at 834-837; *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

B. The Dilution of Religious Liberty in *Employment Division v. Smith* Makes the Protection of the Freedom of Speaker Autonomy Critical to Safeguarding Religious Groups' Ability to Select Their Leadership Based on Their Standards of Conduct.

Protection of Boy Scouts' speech and associational right to limit leadership to persons who share the

organization's core values is vital to the protection of religious organizations' right to choose their leaders free from governmental intervention. For at least two reasons, the fact that *amici's* student chapters are religious is little guarantee that they would succeed in warding off governmental interference in their leadership selection.

First, because Boy Scouts' program has a strong religious component, many lower courts would be likely to interpret a ruling in this case against Boy Scouts as applicable to religious groups in general. *Cf., Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir. 1993) (parent alleged that Boy Scouts was a "public accommodation" for purposes of Title II of the Civil Rights Act of 1964 and, therefore, could not refuse to accept him and his son as members despite their refusal to comply with Boy Scouts' requirement that members and leaders affirm a belief in God). In some cases, Boy Scouts has been presumed to be religious. *See, e.g., Sherman v. Community Sch. Dist.*, 8 F.3d 1160 (7th Cir. 1993) (court presumed Boy Scouts to be religious for purposes of deciding Establishment Clause challenge to their access to public school facilities). In other cases, Boy Scouts has been the comparable group that triggers the right of equal access for a religious group. *See, e.g., Good News/Good Sports Club v. Ladue Sch. Dist.*, 28 F.3d 1501 (8th Cir. 1994) (Boy Scouts' transmission of moral values to youth triggered equal access for religious community group seeking to transmit religious and moral values to youth).

Second, as a result of *Employment Division v. Smith*, 494 U.S. 872 (1990), neutral government antidiscrimination laws arguably apply equally forcefully to both student religious organizations and nonreligious organizations. The *Smith* Court explicitly featured equal opportunity laws as examples of laws from which the

First Amendment religious liberty protection does not require exemption. *Id.* at 889. In *Smith*, however, the Court also indicated that a hybrid claim might be successful if it were "a challenge on freedom of association grounds reinforced by Free Exercise Clause concerns," *id.* at 882, *citing Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Under *Smith*, therefore, religious organizations need Boy Scouts' First Amendment rights to be protected if their own leadership decisionmaking is to be defended.

Free Exercise and Establishment Clause values should prohibit governmental interference with religious organizations' leadership selection. The First Amendment protects the institutional autonomy of religious entities from governmental intervention in the internal affairs of religious organizations. *See, e.g., Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-714 (1976), *cited with approval in Smith*, 494 U.S. at 877; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). Federal statute protects the right of religious institutions to use religious criteria in their employment decisions. *Amos*, 483 U.S. 327 (upholding constitutionality of religious exemption in Title VII). Governmental intervention in the leadership selection and retention process of religious organizations is fraught with First Amendment peril. As Justice Brennan observed:

> Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious

> organizations often furthers individual religious freedoms as well.

Id. at 342 (Brennan, J., concurring).

Nevertheless, religious institutions have been sued for violation of nondiscrimination laws in the selection and retention of leaders. *See, e.g., EEOC v. Catholic University of America*, 83 F.3d 455 (D.C. Cir. 1996) (Catholic nun's Title VII sex discrimination suit against Catholic University after denial of tenure); *Combs v. Central Texas Annual Conf. of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999) (female clergy's Title VII sex and pregnancy discrimination claim against church); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (claim of sex discrimination by clergy against religious organization); *Walker v. First Presbyterian Church*, 22 Fair Empl. Prac. Cas. (BNA) 762, 23 Empl. Prac. Dec. (CCH) 31.006 (Cal. Super. 1980) (homosexual organist sued church for dismissal under city laws prohibiting sexual orientation discrimination).

Thus, in the post-*Smith* legal framework, the right of Boy Scouts to select its leadership according to its own criteria will directly affect the ability of religious student groups to select their leadership free from government coercion.

II. THE FIRST AMENDMENT RIGHT OF SPEAKER AUTONOMY PROTECTS THE RIGHT OF AN ORGANIZATION WHOSE PURPOSE IS THE TRANSMISSION OF VALUES TO LIMIT ITS LEADERSHIP TO PERSONS WHO SHARE THE ORGANIZATION'S CORE VALUES, AS DEFINED BY THE ORGANIZATION.

The decision below cannot be reconciled with this Court's unanimous decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In *Hurley*, this Court upheld the federal free

speech right of a private organization, which had been deemed a public accommodation under a state anti-discrimination law, to include in its parade only persons who would not impart a message the organization did not wish to convey. *Id.* at 559, 573.

In a factual and legal context parallel to this case, this Court stated:

> [T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

Id. at 573. Upholding the basic right of speaker autonomy, this Court concluded:

> [I]t becomes apparent that the state courts' application of the [Massachusetts public accommodation] statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in [the organization's] speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. *But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.*

Id. (emphasis added).

In *Hurley*, this Court considered and rejected arguments essentially identical to those marshalled by the court below to excuse its coercive interference with Boy

Scouts' selection of its leadership. None of the justifications offered by the court below satisfied this Court in *Hurley*.

A. An Organization Dedicated to the Transmission of Values Need Not Demonstrate that It Expresses an Explicit Message in order to Exclude from Leadership a Person Who Does Not Share Its Core Values.

A fundamental error of the court below was its insistence that Boy Scouts must show that it has an explicit "anti-homosexual" message in order for it to exclude from leadership a person who engages in or advocates homosexual conduct. Pet. App. at 64a, 66a. To the contrary, forcing an organization to express a particular message in order to avoid the state's coercive interference in its leadership selection violates the First Amendment's "fundamental rule that a speaker has the autonomy to choose the content of [its] own message." *Hurley*, 515 U.S. at 573. Forcing Boy Scouts to adopt an explicit "anti-homosexual" message in order to preserve its right to refuse leaders who are "pro-homosexual" in their conduct or advocacy would force Boy Scouts to include a message that it may not want explicitly to include for a variety of reasons.

Due to the broad age span of boys belonging to its organization,[3] Boy Scouts seems to take four complementary approaches to addressing the issue of

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[3] Boy Scouts' youth range from first graders, who may be as young as five years-old, through seniors in high school. Particularly at the Cub Scout level (first through fifth grades), family attendance at pack meetings and activities is encouraged. Consequently, preschool siblings are frequently exposed to the expressive content of Cub Scout meetings.

whether homosexual conduct is appropriate behavior for young men. *First*, Boy Scouts may not wish to broadcast a blanket, *explicit* "anti-homosexual conduct" message to all its members, particularly to its youngest boys. Even in this day of pervasive media, many youngsters remain oblivious to the issue of homosexuality; and many of their parents wish them to remain oblivious as long as possible. Parents who believe homosexual conduct is wrong may object nonetheless to their five year-old boys being given explicit instruction regarding homosexual conduct. Those parents might withdraw their young sons from an organization that openly discussed homosexuality, even if they agreed with the organization's "anti-homosexual conduct" message. Boy Scouts should not be required to choose between retaining its young boys as members and exercising its right to select its leadership. *See Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 15 n.11 (1986) (plurality opinion) (government cannot force a speaker to respond by requiring the speaker to include speech it does not wish to address).

Second, Boy Scouts may wish to present a program of positive values rather than negative commands. Human experience, particularly with teenagers, demonstrates that telling a teenager *not* to do something is often a spur to experimentation with precisely that conduct.

Third, Boy Scouts does express a direct positive message on sexuality to its older Scouts that presents heterosexual marriage and responsible childrearing as the appropriate expression of sexuality by adult men. In *The Boy Scout Handbook*, Boy Scouts gives an explicit message to older Scouts on sexuality: sexual activity is to occur between a man and a woman in the context of marriage when both are ready to take responsibility for each other and for any children they consequently might have. Boy

Scouts of America, *The Boy Scout Handbook* 527-528 (Tenth Edition, 1990). *See* Part II.B, *infra*, at pp. 21-22.

Fourth, Boy Scouts views the leaders themselves as role models, an embodiment of the values the organization wishes to convey to its young members. Most organizations whose purpose is to transmit values, particularly to youth, choose their leaders carefully, knowing that the leaders communicate the organization's message by their actions as well as their words. Certainly, if a leader were interviewed in a local newspaper regarding his current leadership of his college chapter of the National Organization for the Legalization of Marijuana ("NORML"), Boy Scouts could dismiss him from its leadership – even if he promised never to advocate marijuana use to the boys under his supervision, denied using marijuana himself, or promised not to engage in its use around the boys. The mere inconsistency between his personal advocacy of marijuana use and the organization's values undoubtedly would allow Boy Scouts to dismiss him without having to justify its decision to government officials.

Under this Court's precedent, Boy Scouts has a right both to express, and to refrain from expressing, any values it wishes. The organization's "right to tailor the speech, applies not only to expressions of *value, opinion, or endorsement*, but equally to statements of fact the speaker would rather avoid." 515 U.S. at 573 (emphasis added). Boy Scouts has a constitutional right "to decline to foster" ideological concepts, particularly those "they find morally objectionable." *Wooley v. Maynard*, 430 U.S. 705, 714-715 (1977). *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Pacific Gas*, 475 U.S. 1; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Miami Herald*

Pub'g Co. v. Tornillo, 418 U.S. 241 (1974); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

As this Court emphasized in *Hurley*, "a narrow, succinctly articulable message is not a condition of constitutional protection." 515 U.S. at 569. Instead, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.' " 515 U.S. at 573, *quoting Pacific Gas*, 475 U.S. at 16.

Were this not the law, any individual effectively might hijack any organization for his or her personal expressive purposes. The First Amendment prohibits government officials from coercing values-transmission organizations to acquiesce in takeovers by leaders who do not share the organization's core values.

B. An Organization Dedicated to the Transmission of Values – Not the Government – Has the Right to Define the Organization's Own Values and Message through Its Selection of Leaders.

Although, as discussed in the preceding section, Boy Scouts need not have an expressive message in order to exercise the right to require its leaders to share its core values, Boy Scouts in reality has explicit values that it wishes transmitted – values with which respondent's leadership would conflict. As already discussed, *supra*, at p. 19, for adolescent and teenage scouts, Boy Scouts expresses an explicit message regarding appropriate sexual conduct for men: sexual activity is to occur between a man and a woman in the context of marriage when both are ready to take responsibility for each other and for any children they consequently might have. *Handbook, supra*, at 527-528.

In addition to the *Handbook*, the Scout Oath and Scout Law are interpreted by Boy Scouts to preclude homosexual conduct or the advocacy of homosexual conduct. In leading the Scout Oath at meetings, the leader recites with the scouts a pledge "to keep myself morally straight." *Id.* at 5. Boy Scouts interprets its Oath to mean, among other things, abstinence from homosexual conduct. The leader also leads scouts in reciting the Scout Law at meetings. Boy Scouts has interpreted its Scout Law to preclude a scout from engaging in homosexual conduct or advocating such conduct.

Boy Scout leaders are responsible for teaching and explaining to new scouts the Scout Oath and Scout Law. One of the requirements for joining Boy Scouts is to "[u]nderstand and agree to live by the Scout Oath [and] the Scout Law." *Id.* at 4. The Scoutmaster is required to explain the joining requirements to a new scout and must sign the *Handbook* to confirm, among other things, that a new scout "[u]nderstand[s] and agree[s] to live by the Scout Oath [and] the Scout Law." *Id.* Besides ensuring that a new scout memorizes and understands the Scout Oath and Law, an adult leader's responsibilities include answering questions a scout has about their meaning.

The court below impermissibly substituted its understanding of the Scout Oath, Law, and *Handbook* for that of the Boy Scouts organization itself. The First Amendment protects the right of an organization to define its purposes without interference by the state.[4]

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[4] Nor may a court interfere with an organization's internal decisionmaking simply because the organization may send individual messages that are not always uniform. In *Hurley* and *Tornillo*, respectively, the parade and the editorial page addressed myriad subjects from a variety of viewpoints, even

In *Hurley*, this Court specifically discussed *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *New York State Club Association v. City of New York*, 487 U.S. 1 (1988), as cases that "recognized that the State did not prohibit exclusion of those whose views were at odds with positions espoused by general club memberships." 515 U.S. at 580, *citing Roberts*, 468 U.S. at 627, and *New York State Club Assn.*, 487 U.S. at 13. In *Roberts*, this Court deemed it "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." 468 U.S. at 622. Recognizing that "[g]overnment actions may unconstitutionally infringe upon this freedom [by] try[ing] to interfere with the internal organization or affairs of the group" (*id.* at 622-623), this Court continued:

> *There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.* Such a regulation may impair the ability of the original members to express only those views that brought them together. *Freedom of association therefore plainly presupposes a freedom not to associate.*

Id. at 623 (emphasis added). And concurring in *Roberts*, Justice O'Connor stated:

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allowing diverse messengers to espouse contradictory opinions. Nonetheless, this Court stated that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Hurley*, 515 U.S. at 570.

> [A]n association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message *and the choice of its members*. . . . Protection of the association's right to define its membership derives from the recognition that *the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice*.

Id. at 633 (O'Connor, J., concurring) (emphasis added).

The Court emphasized the commercial and business nature of the affected associations and took pains to distinguish them from genuinely political, religious, or other values-based groups, whose expressive purposes would be impaired by any governmental interference with their membership or leadership decisions. *Roberts*, 468 U.S. at 623; *id.* at 633 (O'Connor, J., concurring); *New York State Club Association*, 487 U.S. at 13. Indeed, Boy Scouts served as an example of a group whose expression would be protected, even though it might "take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service." *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.").

In a leading freedom of association case, *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981), this Court acknowledged that:

> [T]he freedom to associate for the common advancement of political beliefs . . . necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only. . . .

> On several occasions this Court has recognized that the inclusion of persons . . . may seriously distort [the party's] collective decisions – thus impairing the party's essential functions – and that political parties may accordingly protect themselves from intrusion by those with adverse political principles.

Id. at 122. *Cf., Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713-714 (1976) (recognizing church autonomy to exclude leaders free from governmental intervention).

As in *Democratic Party*, Boy Scouts has chosen to "define their associational rights by limiting those who could participate" in the group's leadership. 450 U.S. at 122. As in *Democratic Party*, compelled inclusion of a leader who does not share a core value that the group holds "may seriously distort its collective decisions – thus impairing the [group's] essential functions." *Id.*

Like the impact in *Democratic Party* and *Hurley*, and *unlike* the impact on the organizations in *Roberts* and *New York State Club Association*, the impact on Boy Scouts if it is required to accept as a leader a person who actively and publicly advocates homosexual conduct will be significant. Boy Scouts has steadfastly insisted that the values it seeks to transmit to youth do not include homosexual conduct or its advocacy. Leaders are the primary means by which Boy Scouts transmits its values to its youth members, and those leaders transmit Boy Scouts' values as much by the lives they lead as by their words.

Thus, where, as here, an association seeks to maintain a distinctive identity based on core values it seeks to transmit, the First Amendment requires that the group be free to make adherence to the purposes and values of the group a condition of leadership.

C. An Organization Dedicated to the Transmission of Values Does Not Forfeit Its Right to Select Its Leadership Simply Because It Is Successful in Attracting Members or Has Some Interaction with Government.

Like the state court in *Hurley*, the court below determined that a private group's activities constituted a public accommodation, a determination that the state court then used to justify substitution of the government's values for the organization's core values. 515 U.S. at 571-573. This Court in *Hurley*, however, ruled that designation as a public accommodation did not trump the organization's First Amendment right of speaker autonomy.

This Court ruled that the enormous size of the parade, the lack of selectivity in admitting participants to the parade, and the interaction of government with the parade organizers did not undermine the Veterans Council's First Amendment right of speaker autonomy. Specifically, the fact that the Veterans Council parade was large, including over 10,000 participants and 750,000 spectators, failed to diminish its expressive rights. *Id.* at 561. Nor did the lack of selectivity in the Council's admission of participants justify the government's override of its expressive rights. *Id.* at 563. Indeed, Boy Scouts provides far greater oversight of its leadership selection process than the Veterans Council provided in selecting its parade participants. *Id.* at 562 (noting that the Veterans Council "had no written criteria and employed no particular procedures for admission, voted on new applications in batches, [and] had occasionally admitted groups who simply showed up at the parade without having submitted an application").

In *Hurley*, the Veterans Council received substantial assistance from the City of Boston to stage its parade, which did not curtail its expressive rights. *Id.* at 560-561. The fact that the parade occurred on public property did not reduce the organization's First Amendment rights. The mere fact that a group meets on public property or receives public funding does not transform the group's speech into government speech. *See generally, Widmar v. Vincent*, 454 U.S. 263 (1981); *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995). Thus, the factors relied upon by the court below for bypassing the Boy Scouts' First Amendment rights were weighed and found wanting by this Court in *Hurley*.

D. The Decision Below Imposes Unacceptably Costly Burdens on All Organizations Dedicated to the Transmission of Values, Chilling The Exercise of Their First Amendment Rights.

If the decision below were affirmed, state and federal courts would be mired in determining whether leadership decisions by every private organization violated myriad federal, state, and local antidiscrimination provisions. At the behest of any disgruntled office seeker, courts would be required to review the internal elections of organizations to ensure that the elections had been conducted in a nondiscriminatory manner. Even more troubling, courts would become enmeshed in determining which leadership positions were central to the core mission of an organization, and thereby exempt from nondiscrimination laws. For example, one federal court ruled that a religious student group could use religious criteria in selection of its president, vice president and music leader, because those positions were central to the group's religious identity; however, the group could not

use religious criteria to select its secretary or activities leader, because those offices were not central – at least in the court's eyes – to the group's religious identity. *See Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996).

Potential litigation will have a chilling effect on private associations as they make leadership decisions with the knowledge that each decision may be challenged in court. Small organizations may be easily bankrupted by the costly legal defense against a single meritless claim. As Justice Brennan explained in a comparable situation, "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (Brennan, J., concurring).

Indeed, the potential for guerilla warfare among ideological organizations is enormous under the decision below. Persons who do not share an organization's core values may apply for leadership positions with nothing to lose. If they are accepted into leadership, they can use their positions to change the organization's ideology; if they are rejected, they can subject the organization to burdensome litigation expenses and intrusive discovery into the organization's internal decisionmaking.

E. Government Officials' Efforts to Recast the Values of an Organization to Fit the Prevailing Governmental Orthodoxy Are Antithetical to the First Amendment.

As in *Hurley*, the court below substituted its judicial vision of "diversity" and "inclusiveness" for the Boy Scouts' own interpretation of its core values, its Scout Oath, its Scout Law, and its *Handbook*. But this Court has

eloquently rejected as "decidedly fatal" such restructuring of an organization's purposes and values by the government, explaining:

> It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective. . . . *The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups, or indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.*

515 U.S. at 579 (citations omitted) (emphasis added). *See Roberts*, 468 U.S. at 622-623; *id.* at 634 (O'Connor, J., concurring) ("A ban on specific group voices on public affairs violates the most basic guarantee of the First Amendment – that citizens, not the government, control the content of public discussion."); *Rosenberger*, 515 U.S. at 834-837.

Ironically, the court below undermines the very values of "diversity" and "inclusiveness" it professes to uphold when it uses the state's power to "re-educate" an organization that wishes to transmit a particular set of values. Five decades ago, this Court rejected the state's

attempts to coerce citizens to embrace the state's hierarchy of values – values much less controversial than those imposed by the court below – and declared:

> We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Barnette, 319 U.S. at 641-642.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

KIMBERLEE WOOD COLBY
Counsel of Record
CARL H. ESBECK
CHRISTIAN LEGAL SOCIETY
CENTER FOR LAW AND
RELIGIOUS FREEDOM
4208 Evergreen Lane, Suite 222
Annandale, Virginia 22003
(703) 642-1070

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APPENDIX

Statements of Interest of the *Amici Curiae*

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of over 4,000 Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 165 law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

Members of Christian Legal Society must sign the following Statement of Faith:

Trusting in Jesus Christ as my Savior, I believe in:

- One God, eternally existent in three persons, Father, Son and Holy Spirit.
- God the Father Almighty, Maker of heaven and earth.
- The Deity of our Lord, Jesus Christ, God's only Son, conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.
- The presence and power of the Holy Spirit in the work of regeneration.
- The Bible as the inspired Word of God.

The Center strives to preserve religious freedom in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs *amicus curiae*, in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations.

The nation's Declaration of Independence "instituted a new government" by first announcing that it was "laying its foundations on [immutable] principles." One of these "self-evident truths" was that all persons are divinely endowed with rights that no citizen may divert nor government abridge. Among such inalienable rights are those enumerated in – but not conferred by – the First Amendment, the foremost of which is religious freedom. Because the source of religious freedom as acknowledged in the Declaration of Independence, is the Creator, not a constitutional amendment, statute, or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of federal, state, or local government. This nation has no higher duty than to protect inviolate its full and unimpaired enjoyment. Hence, the unequivocal and non-negotiable prohibition attached to this our First Freedom is "Congress shall make no law. . . . "

The Christian Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

Amicus Curiae **Campus Crusade for Christ International** ("CCC") has student chapters meeting at 731 universities and colleges across the country, including student chapters at 417 public universities and colleges. The purpose of CCC is to fulfill the Great Commission, Jesus' command to His disciples to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you." *Matthew* 28:19-20. Specifically, the goal of its student chapters is to reach every student at their campuses every year with the Gospel. Its leaders are to be effective witnesses of the Gospel to other students.

Campus Crusade for Christ International has the following Statement of Faith:

The sole basis of our beliefs is the Bible, God's infallible written Word, the 66 books of the Old and New Testaments. We believe that it was uniquely, verbally and fully inspired by the Holy Spirit, and that it was written without error (inerrant) in the original manuscripts. It is the supreme and final authority in all matters on which it speaks.

We accept those areas of doctrinal teaching on which, historically, there has been general agreement among all true Christians. Because of the specialized calling of our movement, we desire to allow for freedom of conviction on other doctrinal matters, provided that any interpretation is based upon the Bible alone, and that no such interpretation shall become an issue which hinders the ministry to which God has called us.

We explicitly affirm our belief in basic Bible teachings, as follows:

1. There is one true God, eternally existing in three persons – Father, Son and Holy Spirit – each of whom possesses equally all the attributes of Deity and the characteristics of personality.

2. Jesus Christ is God the living Word, who became flesh through His miraculous conception by the Holy Spirit and His virgin birth. Hence, He is perfect Deity and true humanity united in one person forever.

3. He lived a sinless life and voluntarily atoned for the sins of men by dying on the cross as their substitute, thus satisfying divine justice and accomplishing salvation for all who trust in Him alone.

4. He rose from the dead in the same body, though glorified, in which He lived and died.

5. He ascended bodily into heaven and sat down at the right hand of God the Father, where He, the only mediator between God and Man, continually makes intercession for His own.

6. Man was originally created in the image of God. He sinned by disobeying God; thus, he was alienated from his Creator. That historic fall brought all mankind under divine condemnation.

7. Man's nature is corrupted, and he is thus totally unable to please God. Every man is in need of regeneration and renewal by the Holy Spirit.

8. The salvation of man is wholly a work of God's free grace and is not the work, in whole or in part, of human works or goodness or religious ceremony. God imputes His righteousness to those who put

their faith in Christ alone for their salvation, and thereby justifies them in His sight.

9. It is the privilege of all who are born again of the Spirit to be assured of their salvation from the very moment in which they trust Christ as their Savior. This assurance is not based upon any kind of human merit, but is produced by the witness of the Holy Spirit, who confirms in the believer the testimony of God in His written Word.

10. The Holy Spirit has come into the world to reveal and glorify Christ and to apply the saving work of Christ to men. He convicts and draws sinners to Christ, imparts new life to them, continually indwells them from the moment of spiritual birth and seals them until the day of redemption. His fulness, power and control are appropriated in the believer's life by faith.

11. Every believer is called to live so in the power of the indwelling Spirit that he will not fulfill the lust of the flesh but will bear fruit to the glory of God.

12. Jesus Christ is the Head of the Church, His Body, which is composed of all men, living and dead, who have been joined to Him through saving faith.

13. God admonishes His people to assemble together regularly for worship, for participation in ordinances, for edification through the Scriptures and for mutual encouragement.

14. At physical death the believer enters immediately into eternal, conscious fellowship with the Lord and awaits the resurrection of his body to everlasting glory and blessing.

15. At physical death the unbeliever enters immediately into eternal, conscious separation from the Lord and

awaits the resurrection of his body to everlasting judgment and condemnation.

16. Jesus Christ will come again to the earth – personally, visibly and bodily – to consummate history and the eternal plan of God.

17. The Lord Jesus Christ commanded all believers to proclaim the gospel throughout the world and to disciple men of every nation. The fulfillment of that Great Commission requires that all worldly and personal ambitions be subordinated to a total commitment to "Him who loved us and gave Himself for us."

In response to God's love, grace and truth: The purpose of **InterVarsity Christian Fellowship/USA** is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord: growing in love for God, God's Word, God's people of every ethnicity and culture and God's purposes in the world.

Each member of the Board of Trustees, Staff and any Council of Reference, as a qualification of office, as the case may be, shall subscribe, at the time of election or before taking office and yearly thereafter, to her or his belief in the Doctrinal Basis of the fellowship, which shall be the basic biblical truths of Christianity, including:

(a) The unique Divine inspiration, entire trustworthiness and authority of the Bible.

(b) The Deity of our Lord Jesus Christ.

(c) The necessity and efficacy of the substitutionary death of Jesus Christ for the redemption of the world, and the historic fact of His bodily resurrection.

(d) The presence and power of the Holy Spirit in the work of regeneration.

(e) The expectation of the personal return of our Lord Jesus Christ.

InterVarsity carries out its ministry through student chapters. Officers of those chapters also are required to subscribe to the purpose and doctrinal basis. Currently, there are about 747 such chapters on 552 campuses in the United States. (Of these campuses, 250 are private institutions, 290 are public, and the status of 12 is unknown.) InterVarsity follows biblical procedure to deal with suspected moral or doctrinal deviation.

This Doctrinal basis and procedure has resulted in conflict on at least 18 campuses, primarily on the campus institution's claim of violation of campus codes prohibiting discrimination on the basis of religion or sexual orientation.

Amicus curiae **ReJOYce in Jesus Campus Fellowship** ("RJCF") has student chapters at 23 universities and colleges, including student chapters at 14 state universities and colleges. Its purpose is to promote the teachings of Jesus Christ according to the Holy Bible through Bible study, campus activities and service to the campus community. While welcoming all students to attend its meetings, its voting members must subscribe to the group's Doctrinal Statement of Commitment to Historic Christianity, as well as agree to live by the group's written standards of personal conduct.

The Bylaws of ReJOYce in Jesus Campus Fellowship at Georgia Institute of Technology, which is representative of the Bylaws of other RJCF student chapters, set

forth its *Doctrinal Statement of Commitment to Historic Christianity by Voting Members*, as follows:

This organization affirms the Holy Bible as the authoritative revelation of God to man, inerrant in the original manuscripts. This organization seeks to maintain a climate of free inquiry, while also maintaining unity of its leadership within the broad context of Christian orthodoxy. To do so, this organization requires that any attending member who wishes to become a voting member of this organization shall also affirm this fact and shall subscribe to the following confession of Christian faith:

"I confess and believe:

"The Bible, Old and New Testaments, is God's divinely inspired Word;

"The triune God – God, the Father, the Son, Jesus Christ, who is true God and true man, and God, the Holy Spirit, who is a divine personage;

"All have sinned and come short of the glory of God and therefore all are in need of salvation;

"Salvation has been provided for all mankind through Jesus Christ, who is the only way to the Father and the only way anyone may obtain eternal life;

"The virgin birth of Jesus Christ, and that He who knew no sin was made sin for us that we might be made the righteousness of God in Him;

"That Jesus, having paid for our sins, was raised bodily from the dead, and having washed those who believe in His own blood, became the first begotten of

many brethren where He now sits at the right hand of the Father in heaven;

"It is the will of God for every believer to be filled with the Holy Spirit, anointed with His power, and doing the works of Jesus, according to John 14:12;

"Those who have received Jesus Christ as their personal Lord and have been born again are the Church, which is His body;

"There will be a bodily resurrection of both the just and the unjust: the just unto eternal life with God and the unjust unto eternal damnation with satan and his followers;

"In water baptism and in the observance of the Lord's Supper;

"In the catching up of the Church, and the very soon visible return of the Lord Jesus Christ."

Article V of the Bylaws presents *Standards of Personal Conduct for Voting Members*, which includes:

Any person who desires to be a voting member of this organization shall agree to conduct himself or herself in accordance with the following standards of personal conduct set forth herein.

A. A voting member of this organization shall not commit those acts which are expressly forbidden in Scripture, including idolatry, premarital or extramarital sex, homosexual behavior, drunkenness, coveting, theft, profanity, occult practices and dishonesty. (Exodus 20:1-17; Lev. 18:22; Deut. 18:10-11;

Rom. 1:18-32; I Cor. 5:9-13, 6:18-19; Eph. 5:1-12).

The **Southern Center for Law & Ethics** is a non-profit corporation founded in January 1985 and based in Birmingham, Alabama. The Center is particularly involved in teaching, scholarship, and advocacy on issues relating to the interplay of ethics and law, and has submitted *amicus curiae* briefs in various significant cases in this Court. The Center believes that the right of association implicated in this case is a significant constitutional right which enriches society with ideals drawn from religious and other significant ethical traditions. Society can benefit from the virtue-infusing effects of religious and other significant ethical traditions only by allowing broad scope to the constitutional right to associate for various purposes, including the character-training of the young implicated in this case.

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IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA, *et al.*,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of *Certiorari* to the Supreme Court of New Jersey

BRIEF OF FAMILY RESEARCH COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JANET M. LARUE *
SETH C. LEIBSOHN
MIRIAM R. MOORE
801 G Street, N.W.
Washington, D.C. 20001
(202) 393-2100
Counsel for the Family Research Council
* Counsel of Record

39 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

INTEREST OF AMICUS CURIAE.....1

SUMMARY OF ARGUMENT..... 1

ARGUMENT.....3

I. THE DECISION BY THE NEW JERSEY SUPREME COURT VIOLATES THE BSA'S FUNDAMENTAL RIGHTS OF SPEECH AND EXPRESSIVE ASSOCIATION UNDER THE FEDERAL CONSTITUTION.....3

A. Civil liberties can only flourish when the fundamental rights of speech and expressive association, such as the BSA is engaged in, are protected against governmental interference.....3

B. The forced inclusion of a member into the BSA, against the BSA's beliefs and interests, as the BSA articulates those beliefs and interests, eliminates BSA's rights of speech and expressive association..... 5

C. The New Jersey Supreme Court erred in its analysis of whose First Amendment rights were at stake and in determining that the LAD served a compelling interest sufficient to over-ride the BSA's First Amendment rights..... 9

II. THE FUNDAMENTAL FREEDOM OF INTIMATE ASSOCIATION PROTECTS RELATIONSHIPS AMONG BOY SCOUTS..... 14

A. An intimate association exists among Scoutmasters, Scouts and their parents..... 14

1. Size and congeniality matter..... 15
2. Selectivity matters..... 17
3. Purpose matters..... 19
4. The exclusion of outsiders from critical aspects of the relationship matters..... 20

B. New Jersey is not justified in infringing on the Boy Scouts' freedom of intimate association.....20

III. THE DECISION BY THE COURT BELOW IMPERMISSIBLY INTRUDES ON THE BSA'S ASSOCIATIONAL RIGHTS AND DUTY TO ENSURE THE GREATEST PROTECTION TO THE SCOUTS ENTRUSTED TO THEIR CARE..... 21

A. The New Jersey Court erred in concluding that the BSA's exclusion of homosexuals is "invidious discrimination" based on "unsupportable stereotypes."..... 22

B. The intimate association that exists between the BSA Scout leaders and Scouts is a natural attraction to pedophiles seeking opportunities to sexually abuse boys.....26

CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases

Bowers v. Hardwick, 478 U.S. 186 (1986).....13

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Roberts v. United States Jaycees, 468 U.S. 609 (1984).....passim

Romer v. Evans, 517 U.S. 620 (1996).....4, 13

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393 U.S. 503 (1969).....9

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319 U.S. 624 (1943).....9

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952 P.2d 218 (Cal. 1998).....13, 16,18

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64 Cal. Rptr. 2d 85 (Cal. Ct. App.1997).....15, 18-20

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528 A.2d 352 (Conn. 1987).....18

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734 A.2d 1196 (N.J. 1999).....passim

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926 S.W.2d 287 (Tex. 1996).....26, 29

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INTEREST OF *AMICUS*

Family Research Council, Inc. (hereinafter "FRC") is a non-profit, research and educational organization dedicated to articulating and advancing a family-centered philosophy of public life. In addition to providing policy research and analysis for the legislative, executive, and judicial branches of the federal government, FRC seeks to inform the news media, the academic community, business leaders, and the general public about family issues that affect the nation. FRC's legal and public policy experts are continually sought out by federal and state legislators for assistance and advice on the unique relationship between parents and their children. FRC has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts, and state courts. The issues in this case directly affect the physical, psychological and emotional well being of more than 4 million boys throughout the United States enrolled in the Boy Scouts of America. **(FRC)** has particular knowledge about issues of child safety that will be helpful to the Court in this case.[1]

SUMMARY OF ARGUMENT

The decision by the New Jersey Supreme Court declaring the Boy Scouts of America (hereinafter "BSA") to be a public accommodation under the New Jersey Law Against Discrimination (hereinafter "LAD") and requiring them to accept homosexuals as leaders and members violates the BSA's fundamental rights of speech, expressive

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[1] In accordance with Rule 37 of the Rules of this Court, the *amicus curiae* submit this brief in support of petitioner. All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. Counsel for *amicus curiae* authored this brief in its entirety, and no other person or entity, besides *amicus curiae*, has made a monetary contribution to the preparation of this brief.

and intimate Association, under the United States Constitution. In addition, forcing the BSA to accept homosexuals as leaders and members will open the door to unidentified homosexual pedophiles providing them with greater opportunities to sexually abuse Scouts within the intimate relationship that exists between Scouts and Scout Masters.

By enrolling their boys in the BSA, parents and families engage in expressive association and speech by communicating to their boys the ethical and moral beliefs they want their boys to live up to. By enrolling their boys in the BSA, parents, as well as the BSA, communicate their ethical and moral beliefs to other boys, as well as to the schools and communities in which they live.

Boy Scout units are small, intimate groups that create close personal relationships in which the members agree to live by a set of shared values and beliefs. These relationships pass down the values of parents and Scout leaders to the next generation, a fundamental freedom protected by the right of intimate association. The LAD displaces that freedom unnecessarily; sexual orientation discrimination can be prohibited in public accommodations without forcing the Boy Scouts to accept members who refuse to live by their moral code.

The New Jersey Court erred in concluding that the BSA's exclusion of homosexuals is "invidious discrimination"[2] based on "unsupportable stereotypes."[3] The court's mischaracterizations likely flow from misinformation regarding homosexuals and child molestation.

A nationwide investigation of child molestation in the Boy Scouts from 1971 to 1991 revealed that more than 2,000 boys reported molestations by adult Scout leaders. (Note: The Scouts, who have 150,000 Scoutmasters and

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[2] *Dale v. BSA*, 734 A.2d 1196, 1227 (N.J. 1999).

[3] *Id.* at 1244.

assistant Scoutmasters, ban hundreds of men each year from scouting out of concern that they might abuse boys.)[4] The fiat by the court below will only add to these numbers, thus burdening the BSA's compelling responsibility to protect Scouts from risks of sexual abuse.

ARGUMENT

I. THE DECISION BY THE NEW JERSEY SUPREME COURT VIOLATES THE BSA'S FUNDAMENTAL RIGHTS OF SPEECH AND EXPRESSIVE ASSOCIATION UNDER THE FEDERAL CONSTITUTION.

A. Civil liberties can only flourish when the fundamental rights of speech and expressive association, such as the BSA is engaged in, are protected against governmental interference.

Associations such as the NAACP and the Southern Christian Leadership Conference, *because of their unfettered ability to combine*, made their mark on this nation in helping it to live up to its creed as they saw it and as society-at-large now sees it. Government intrusion into such associations, dictating or changing membership and the associational purpose, would not have allowed these associations to flourish or act in the manner required for their voices and impact to be heard and felt. For such reasons the courts have long-safeguarded the fundamental rights of expressive association and free speech inherent therein.[5]

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[4] Patrick Boyle, *Scout's Honor* 316 (1994).

[5] *See, e.g., N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958): "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an

The BSA is definitively the kind of association the long march of expressive associational rights was meant to protect. By enrolling their boys in the BSA, parents and families engage in expressive association and speech by communicating to their boys the ethical and moral beliefs by which they want their boys to abide. By enrolling their boys in the BSA, parents, as well Boy Scouts, communicate their ethical and moral beliefs to other boys. By enrolling their boys in the BSA, parents and boys communicate their ethical and moral beliefs to the schools and communities in which they live.

In an age of declining moral values and challenges to our youth to live in accordance with reliable standards of right and wrong, the BSA stands as an organization that serves and communicates such standards. While we may or may not be living in--and sending our children into a society of--a Kulturkampf,[6] we can all freely admit that our youth face distinct ethical challenges in society today. To varying degrees it was always thus, however, from its very inception, the BSA was founded to stand athwart such societal vicissitudes in order to teach, instill, and communicate unflagging standards of conduct.

The BSA grew out of a movement to instill "Victorian virtues" in young boys.[7] To this day, despite

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inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment...." *Id.* at 461; *See also, N.A.A.C.P. v. Button*, 371 U.S. 415 (1963): "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Id.* at 429. The *Button* Court also recognized that an association does not have to be a "political party" or engaged in politics to "make[] possible the distinctive contribution of a minority group to the ideas and beliefs of our society." *Id.* at 331.

[6] *See Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., Rehnquist, C.J., Thomas, J., dissenting).

[7] Heather MacDonald, *Why the Boy Scouts Work*, City J., (Winter, 2000), at 16.

social and legal attempts to change them, the BSA remains strong in the broken places of society:

> [S]couting is a brilliant method for infusing children with a set of values that can be especially hard to find.... The little details that fill each meeting constantly reinforce a code of conduct based on self-restraint...the essentials of civilized life....These details define a scout; they are part of his identity.[8]

The BSA is a critically important organization, communicating a message within and without, that deserves the same respect as any other association attempting to work with its members for self and societal improvement. The BSA may not be popular in the context of certain of society's values, it may not be popular because of the warp and woof for which it stands, but the history of our nation is often written by that which flouts modern convention. It is for this reason that the First Amendment right of expressional association is deemed fundamental by the courts. It is for this reason that the BSA has that right to be protected against attempts of governmental coercion to change it from within and use it for what government, not the BSA, believes it does and should stand for.

B. The forced inclusion of a member into the BSA, against the BSA's beliefs and interests, as the BSA articulates those beliefs and interests, eliminates BSA's rights of speech and expressive association.

The associational rights cases decided in this Court between 1984 and 1988[9] dealt with clubs or organizations different in nature from the BSA but the dicta and

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[8] *Id.* at 20.

[9] *See New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Rotary Int'l. v. Rotary Club*, 481 U.S. 537 (1987); *Roberts v. Jaycees*, 468 U.S. 609 (1984).

distinctions therein foreshadowed the rights to be vindicated in the case at bar.

In *Roberts*, this Court upheld the Minnesota Human Rights Act against a challenge by the Junior Chamber of Commerce, which asserted that admission of women to the Chamber would impede the organization's mission.[10] *Roberts*, however, is as important for what it says as it is for what it held. While recognizing the right of expressive association, Justice Brennan, writing for the majority, wrote:

> According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority....Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.[11]

In what can only be described as a ringing endorsement for the rights asserted here by the BSA, Justice Brennan continued:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire....Freedom of association therefore plainly presupposes a freedom not to associate.[12]

While the Court in *Roberts* found that admission of women to the Junior Chamber of Commerce would not alter the message of the Chamber, Justice O'Connor was moved to write a concurring opinion re-establishing the distinctions between commercial and other expressive First Amendment rights in the associational context: "[T]his case...accords

[10] *Roberts*, 468 U.S. at 631.
[11] *Id.* at 622.
[12] *Id.* at 623

insufficient protection to expressive associations and places inappropriate burdens on groups claiming the protection of the First Amendment."[13]

In complete disregard for the plain meaning of Justice O'Connor's concurrence, the court below eviscerates the BSA's right to determine its own message and membership. As Justice O'Connor so aptly put it:

> Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice....[C]itizens, not the government, control the content of public discussion.[14]

However, the court below, in attempting to control the content of public discussion, held it is not enough for the Boy Scouts to determine what it stands for or to say what its message is; the court below knew better.

Justice O'Connor saw the danger of such courts when she wrote "Whether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it."[15] There is a great deal the BSA does not explicitly say it forbids but that it rationally should be allowed to--and in fact does--forbid because it has been understood from time immemorial that such things are forbidden under the rubric of ethical and moral values as the BSA defines those terms. If the court below is disheartened that the BSA does not hold itself out publicly as an expressive association on the issue of homosexuality, we wonder what it thinks of Justice O'Connor's wise words that "No association is likely ever to be exclusively engaged in expressive activities," and that "[P]rotected expression

[13] *Id.* at 632 (O'Connor, J., concurring).
[14] *Id.* at 633-634 (O'Connor, J., concurring).
[15] *Id.* at 633 (O'Connor, J., concurring).

may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service," and, finally, "Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."[16]

Justice O'Connor reiterated these concerns in her concurrence in *New York State Club Association v. City of New York*.[17] There she stated:

> [T]here may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who share some other common bond. The associational rights of such organizations must be respected.[18]

While not claiming any right to exclude based on race, religion, or ethnic background, the BSA is making that claim with respect to homosexuality. Homosexual members, especially those who articulate their membership in that lifestyle and head organizations dedicated to homosexual rights, as Dale did when he was ousted from the BSA,[19] threaten the very meaning of the BSA as it encourages such concepts as "morally straight," "values," and "strong character." These words may not mean what the New Jersey Supreme Court wants them to mean, but they clearly mean such to the BSA and the BSA has the right to instill these ethics.[20]

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[16] *Id.* at 636 (O'Connor, J., concurring).
[17] *New York State Club Ass'n*, 487 U.S. 1 (1988).
[18] *Id*, at 19 (O'Connor, J., concurring).
[19] *Dale*, 734 A.2d at 1204-1205.
[20] Indeed, it is not a stinted definition of such words as "values" and "morally straight" to think they forbid homosexual activity. There is a long-standing Natural Law tradition that uses those words interchangeably with objections to such things as homosexuality. *See, e.g.,* Janet E. Smith, "Thomas Aquinas on Homosexuality," 129 in *Homosexuality and American Public Life* (1999). *See also,* Harry V. Jaffa, *Homosexuality and Natural Law* (Claremont Institute, Center for the Study of Natural Law: www.claremont.org/publications/homosexuality.cfm) (visited February 19, 2000).

C. The New Jersey Supreme Court erred in its analysis of whose First Amendment rights were at stake and in determining that the LAD served a compelling interest sufficient to over-ride the BSA's First Amendment rights.

In 1943, when this nation was at war with the Nazis and Imperial Japan and our every resource was dedicated to the outcome of that war,[21] a minority citizen named Barnette would not let his child salute the flag in school because it would have violated his deepest moral and religious beliefs.[22] In that time of great consternation and need of patriotic unity, this Court summoned the constitutional courage to support Barnette's right to dissent from the cultural climate. This Court reasoned that to compel a person to "utter what is not in his mind" violates our most basic constitutional precepts.[23] Barnette was free, through his symbolic action, and for his own reasons, to stand against the culture in which he lived. This Court stated: "Symbolism is a primitive but effective way of communicating ideas....A person gets from a symbol the meaning he puts into it...."[24]

We should not retreat from that lesson here and we must equally admit that just as refusing to salute the flag is the communication of an idea, like the wearing of an

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[21] The generation forged during this time is now known as "The Greatest Generation." *See* Tom Brokaw, *The Greatest Generation*, (1998).
[22] *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629-630 (1943).
[23] *Id.* at 634.
[24] *Id.* at 632-633.

armband[25] is the communication of an idea, so too is donning the BSA uniform and joining the BSA the communication of a set of ideas. Just as Barnette could not be mandated to "utter what is not in his mind," so too should the BSA not be compelled to utter what is not in theirs.

Dale's co-presidency of the Rutgers University Lesbian/Gay Alliance and his spoken words, which landed him and a picture of him in the *Star-Ledger* newspaper,[26] coupled with his membership in the BSA, as a homosexual, alters the message the BSA communicates both to its boys within and to the community without. Justice Handler, in his concurrence below, melded his hand on this point when he wrote:

> The significance of the connection between identity and expression in respect of sexual orientation has been similarly recognized by New Jersey's Legislature....A prime example of self-identifying speech is the language of "coming out," that is, publicly acknowledging one's self as lesbian or gay. Dale's acknowledgment of his homosexuality, therefore, constitutes self-identifying speech....[27]

Justice Brennan made the same point: "The fact of petitioner's bisexuality, once spoken, necessarily and ineluctably involved her in that [public policy regarding homosexual rights] debate."[28] Justice Brennan continued by saying "[P]etitioner's 'speech'...is better evaluated as no more than a natural consequence of her sexual orientation....[I]t is realistically impossible to separate her spoken statements from her status."[29] Dale's speech can thusly be seen in two ways: his leadership role in the

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[25] *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).
[26] *Dale*, 734 A.2d at 1204-1205.
[27] *Id.*, at 1239. (Handler, J., concurring).
[28] *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1012 (1985) (Brennan, Marshall, JJ., dissenting).
[29] *Id.* at 1017 (Brennan, Marshall, JJ., dissenting).

Lesbian/Gay Alliance along with his statements to the press, on the one hand, and his status as described by Justice Handler below and Justices Brennan and Marshall in this Court, on the other.

Framed in this manner, the BSA's rights become all the more salient. Just five years ago, this Court unanimously ruled in favor of a parade, deemed to be a public accommodation, upholding its right to exclude a message of homosexuality under the First Amendment.[30] In *Hurley*, an Irish heritage parade (represented by Mr. Hurley), seeking to keep a homosexual rights organization out of its march, was challenged under the Massachusetts public accommodations law and Hurley's First Amendment rights were vindicated. Throughout *Hurley*, this Court stated the case for the First Amendment over and against the claims of the public accommodations law in a manner that also seems to have foreshadowed the case at bar.

Where the court below reasoned that the BSA's open invitation to society to join the BSA required it to rescind Dale's ouster,[31] and where the court below reasoned that the size of the BSA implies an open membership not discriminatory of message,[32] Justice Souter writing for this Court stated: "[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech "[33] Where the court below found that the BSA includes sponsors and members who subscribe to different views,[34]this Court stated: "[T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a

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[30] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).
[31] *Dale*, 734 A.2d at 1211.
[32] *Id.* at 1216.
[33] *Hurley*, 515 U.S. at 569-570.
[34] *Dale*, 734 A.2d at 1223.

private speaker to shape its expression by speaking on one subject while remaining silent on another,"[35] and "[W]hatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[36]

It is clear beyond peradventure what this Court unanimously re-established in *Hurley*. Even though the Irish heritage parade had many voices, indeed, no seeming rhyme or reason to its voices as viewed by outsiders, "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"[37] Furthermore, this Court maintained:

> [A] speaker has the autonomy to choose the content of his own message.[38] [W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.[39] While the law is free to promote all sorts of conduct..., it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.[40]

Comparing *Hurley* to *New York State Club Assn, supra*, the *Hurley* Court maintained:

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[35] *Hurley*, 515 U.S. at 574.
[36] *Id.* at 575.
[37] *Id.* at 574. (internal citations omitted).
[38] *Id.* at 573.
[39] *Id.* at 576. This view has been held relevant in other contexts as well. For example, in trademark law, this Court has affirmed that "[O]ne injury to a trademark owner may be 'the gradual whittling away or dispersion of the identity and hold upon the public mind of the mark or name' by nonconfusing uses." *San Francisco Arts & Athletics, Inc., v. U.S. Olympic Comm.*, 483 U.S. 522, 539 (1987) (internal citations omitted).
[40] *Hurley*, 515 U.S. at 579.

> GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.[41]

Furthermore, it is the right of the group to define its own message.[42] The *Hurley* Court could not have been more clear. "[T]he Constitution looks beyond written or spoken words as mediums of expression"[43] and such mediums, as the BSA, enjoy the fundamental rights guaranteed by the First Amendment.

Nonetheless, the court below attempted to whittle away the BSA's message by bootstrapping Dale's LAD claim to the concept of a compelling state interest, aimed at eliminating discrimination, that would over-ride the BSA's fundamental First Amendment rights.[44] While agreeing that there is a compelling state interest in eliminating certain forms of discrimination, this Court has never held, either in the due process or equal protection contexts, that there is either a fundamental right to homosexual conduct or that homosexual rights should be analyzed with anything greater than a rational basis test.[45] While it is true that fundamental rights, such as those asserted here, can in some cases be infringed by compelling state interests,[46] the *Hurley*

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[41] *Id.* at 581.
[42] The California Supreme Court, in Judge Kennard's concurrence, noted this in its Boy Scouts case when Judge Kennard wrote "[W]hen an individual seeks to use state power to force a private organization to accept that individual as a member...the First Amendment rights at issue are those of the organizations and its members, not those of the applicant." *Curran v. Mount Diablo Council of the B.S.A.*, 952 P.2d 218, 256, n.1. (Cal. 1998). (Kennard, J., concurring).
[43] *Hurley*, 515 U.S. at 569.
[44] *Dale*, 734 A.2d at 1227.
[45] *See Bowers v. Hardwick*, 478 U.S. 186 (1986) (no fundamental right to homosexual conduct); *Romer*, 517 U.S. 620 (rational basis/relationship test used in analyzing amendment affecting homosexual rights).
[46] *Roberts*, 468 U.S. at 623.

Court, in analyzing the Massachusetts public accommodations law (which is similar to the New Jersey LAD), refused to ratchet up the Massachusetts protections to the level of a compelling interest that would vitiate Hurley's First Amendment rights.[47]

In sum, in an age when we laugh and mock what we used to honor and venerate, the BSA stands against a cultural tide that may or may not have lasting consequences but that the BSA nevertheless opposes in speech, association, and training. The BSA has a fundamental right to function according to its dictates and not those of a court that would redefine who they are. If the New Jersey Supreme Court's decision stands, the precedent will have been set that any group or voluntary association legally functioning in this society will be on notice that it can no longer determine its own code of ethics and interpret its own code of morality--the state and courts will know better. Should that precedent be established, the First Amendment will have been reduced to a shadow of itself, if not an absurdity, and we all, including those in favor of the BSA's position and those opposed, will be diminished.

II. THE FUNDAMENTAL FREEDOM OF INTIMATE ASSOCIATION PROTECTS RELATIONSHIPS AMONG BOY SCOUTS.

A. An intimate association exists among Scoutmasters, Scouts and their parents.

This Court has established that certain types of personal relationships are protected from unjustified interference by the State under the freedom of intimate association.[48] In *Roberts v. Jaycees*, this Court enunciated several factors to be considered in evaluating the intimacy of

[47] *Hurley*, 515 U.S. at 571-572, 577-578.
[48] *Roberts*, 468 U.S. 609, 618 (1984).

an association, including size, purpose, selectivity, congeniality, and seclusion from others in critical aspects of the relationship.[49] This Court looked at the local level of the Jaycees and held they were too large and unselective to qualify for protection. The local chapters examined reached 400 members or more, and they had never refused membership to any male within the age requirements.[50] Women and other nonmembers were included in many Jaycees activities.[51]

1. Size and congeniality matter.

In contrast, the typical local Scout gathering is small. "Scouting units are small, intimate groups."[52] Most activity is centered in the "Patrol," a group of five to eight boys engaging in supervised interpersonal interaction,[53] typically in a private home,[54] meeting once a week.[55] The "Troop" is comprised of three or four Patrols (about 30 boys) and headed by a Scoutmaster.[56] The Troop meets once a month.[57] The Patrol is composed of a Scout's closest friends in the Troop.[58] "Patrol solidarity is strongly encouraged through the adoption of Patrol names and Patrol calls . . . . Each Patrol has its own flag, emblem, boy leader, meetings, camping trips, and during Troop meetings, the Patrols

[49] *Id.* at 620.
[50] *Id.*
[51] *Id.* at 621
[52] Boy Scouts of America, *The Official Scoutmaster Handbook* 139 (1998).
[53] *Welsh v. BSA*, 993 F.2d 1267, 1272 (7th Cir. 1993); *Yeaw v. BSA*, 64 Cal. Rptr. 2d 85, 87 (Cal. Ct. App.1997); Paul Varela, Note, *A Scout is Friendly: Freedom of Association and the State Effort to End Private Discrimination*, 30 Wm. & Mary L. Rev. 919, 939 (1989).
[54] *Welsh*, 993 F.2d at 1272.
[55] *Yeaw*, 64 Cal. Rptr. at 92.
[56] Varela, *supra* note 53, at 939.
[57] *Yeaw*, 64 Cal. Rptr. at 92.
[58] *Id.*

compete against each other in various games and contests."[59] A "sense of belonging is reinforced by the Scout uniform and the reminder that all Scouts have accepted a system of shared values and beliefs."[60] "The relationships in scouting are continuous, personal and social . . . ."[61] Scoutmasters are instructed to develop close personal relationships with every boy in the Troop.[62] The Scoutmaster is a role model for the Scout; he serves to impress upon the Scout the BSA's vision of morality and appropriate gender behavior. According to the *Official Scoutmaster Handbook*: "The Scouts . . . look up to you for guidance on a number of levels, many of them unspoken. The way you treat others, provide leadership, and act . . . will influence Scouts' actions."[63]

Scoutmasters give Scouts advice on moral and social issues normally confined to a parent-child relationship, including friendship, personal safety, using judgment, racism, peer pressure, sexual abuse, and sexual responsibility.[64] This can only be achieved through a high level of intimacy and trust. Far from being silent on the subject of sexual behavior, as suggested by the New Jersey Supreme Court, the Boy Scouts take definite and consistent stands on sexual morality and homosexuality.[65] Scoutmasters are trained to inform Scouts that homosexuality is not "morally straight" and therefore incompatible with the Boy Scout Oath.[66] Scoutmasters are instructed to answer questions or provide advice on sexual matters and family life when requested.[67] The Boy Scout

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[59] *Scoutmaster Handbook, supra* note 52, at 20-2.
[60] *Yeaw*, 64 Cal. Rptr. at 92.
[61] *Id.*
[62] *Scoutmaster Handbook, supra* note 52, at 3, 9,120-29, 138. Varela, *supra* note 53, at 942.
[63] *Scoutmaster Handbook, supra* note 52, at 3.
[64] Boy Scouts of America, *The Boy Scout Handbook* 331-81 (11th Ed. 1998).
[65] *Curran*, 952 P.2d 218, 225 (1998).
[66] *Id.* at 226 n.8.
[67] *Id.* at 226 n.9.

Handbook advises boys to remain abstinent until marriage and encourages boys to ask a Scoutmaster if they have questions about "growing up, about relationships, or about sex...."[68]

The closeness of this relationship and the care entrusted to the Scoutmaster has been considered an aggravating factor justifying increased sentences in cases of molestation,[69] and justification for releasing records of child abusers to the Boy Scouts.[70]

2. Selectivity matters.

The Scouts limit their membership to boys between the ages of 11-17 who intend to adopt the organization's shared beliefs and values by promising to live by the Scout Oath, Law, Motto, Slogan, and the Outdoor Code.

> Although the Scouts intentionally admit a large number of boys from diverse backgrounds, admission to membership is not without the exercise of sound discretion and judgment. This is evident from the [Boy Scout] Constitution and By-laws as well as the Boy Scouts' Oath and Scout Law. The Oath represents the commitment of each member.... [T]he Scouts organization is not only selective, but [] its very Constitution, By-laws and doctrine dictate that it remain selective."[71]

The Scouts believe without these qualifications the purpose of Scouting cannot be achieved, and have spent thousands

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[68] *Boy Scout Handbook, supra* note 64 at 377.
[69] *Washington v. P.B.T.*, 67 Wash. App. 292 (Wash. Ct. App. 1992) ("[T]he appellant's position as senior patrol leader indicates that he enjoyed a position of trust with his victim ....").
[70] *W.P. v. Poritz*, 931 F. Supp. 1199, 1212 (D.N.J. 1996), *rev'd* on other grounds, *sub nom E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997); *Oregon v. Burke*, 818 P. 2d 511, 517 (Or. Ct. App. 1991).
[71] *Welsh*, 993 F.2d at 1276-77.

of dollars in court battles to protect the selectivity of their membership.[72]

The New Jersey Supreme Court held in *Dale* that the requirement of adhering to the Scout Oath and Law is not a practical barrier to membership, when in fact the Scouts have disqualified boys and men from participation due to failure to live by the Oath. In *Welsh v. BSA* and *Randall v. Orange County Council*, the Scouts excluded from membership boys who refused to swear to do their duty to God, as required by the Cub Scout Promise, the version of the Scout Oath recited by Cub Scouts.[73] The Boy Scouts also refuse membership to those men who profess homosexuality because that behavior is inconsistent with the Oath's requirement that a Scout be "morally straight" and the Scout Law's requirement that a boy keep himself "clean."[74] "The [BSA] as an organization have taken a consistent position that homosexuality is immoral and incompatible with the Boy Scout Oath and Law."[75] New Scouts are informed at their first meeting with the Scoutmaster that "the Scout Oath and Law are not just to be memorized but are to be used as guidelines for living."[76]

In addition, because the beliefs and values of Scouting are well known, parents who find those values inconsistent with their own are unlikely to place their son in Scouting, thus any paucity of cases in this area arises from the fact that those unwilling to adopt the beliefs of the Scout Oath and Law do not apply for membership.

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[72] *Id.*; *Curran*, 952 P.2d 218 (Cal. 1998); *Randall v. Orange County Council*, 952 P.2d 261 (Cal. 1998); *Yeaw*, 64 Cal. Rptr. 2d 85 (Cal. Ct. App. 1997); *Quinnipac Council v. Comm. on Human Rights*, 528 A.2d 352 (Conn. 1987); *Seabourn v. Coronado Area Council*, 891 P.2d 385 (Kan. 1995); *Dale*, 734 A.2d 1196; *Schwenk v. BSA*, 551 P.2d 465 (Or. 1976).

[73] *Welsh*, 993 F.2d at 1268, *Randall*, 952 P.2d at 263.

[74] *Curran*, 952 P.2d at 225.

[75] *Id.* (quoting the trial court's decision).

[76] *Scoutmaster Handbook, supra* note 52, at 138.

Potential Scoutmasters are subject to even stricter membership requirements. In addition to the Scout Oath and Law, adult members are bound by the Declaration of Religious Principal and are subject to evaluation by the local council according to criteria designed to "select only individuals capable of accepting responsibility for the moral education and care of other people's children in accordance with scouting values."[77] An "old boy" Scout network often identifies potential Scoutmasters; these names are forwarded to a committee of Scout leaders who contact potential volunteers.[78] The vetting of candidates is necessary because the Scoutmaster is a role model to the Scout; the Scout is encouraged to imitate the Scoutmaster and seek his advice on personal matters.

3. Purpose matters.

The Boy Scouts are unlike the previous associations that this Court has evaluated for intimate association; the Jaycees and Rotary Club are organizations that foster business and commercial connections.[79] "The mission of the [BSA] is to prepare young people to make ethical choices over their lifetimes by instilling in them the values of the Scout Oath and Law."[80] Though many of the activities participated in are recreational or social, every Scout activity strives toward the three aims of Boy Scouting: building character, fostering citizenship, and developing mental, moral, and physical fitness.[81] "Scout programs are designed to reinforce a sense of shared values and beliefs, group identification, belonging, unity and camaraderie."[82] A parent's choice to enroll their son in Scouting is analogous to

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[77] *Dale*, 734 A.2d at 1216-17.

[78] Varela, *supra* note 53, at 941.

[79] *Roberts*, 468 U.S. at 616, 626; *Rotary Club*, 481 U.S. at 549.

[80] *Scoutmaster Handbook, supra* note 52, at 10.

[81] *Id.* at 7.

[82] *Yeaw*, 64 Cal. Rptr. at 92.

the parent's right of control over the education of their child and right to impart their own values to their children, both protected as fundamental freedoms.[83]

4. The exclusion of outsiders from critical aspects of the relationship matters.

Boy Scout planning, decision-making, and activity takes place mostly away from public view and nonmembers have no role in decision-making nor do they participate in activities as members would.[84] Most Boy Scout interaction takes place at the Patrol level, away from public view. The members lead, plan, and organize their own activities, without the input of nonmembers.[85] At the Troop level, visitors are allowed to attend meetings if they are not disruptive to the proceedings,[86] but they do not participate as members of the Scouts. Unlike the Jaycees, individuals who do not qualify for membership are not permitted to participate on a junior or associate level.

B. New Jersey is not justified in infringing on the Boy Scouts' freedom of intimate association.

Determining the limits of state authority over a private association "unavoidably entails a careful assessment of where the relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."[87] Along that spectrum, the relationship between Scout and Scoutmaster closely resembles a family relationship. The

[83] *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).
[84] *Welsh*, 787 F. Supp. at 1276-77; *Yeaw*, 64 Cal. Rptr. 2d at 92.
[85] *Welsh*, 787 F. Supp. at 1519-20.
[86] Varela, *supra* note 53, at 942.
[87] *Roberts*, 468 U.S. at 620.

relationship exemplifies the type of relationship meant to be protected: "personal bonds that have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs...."[88] Like the freedom of the parent to educate his child in his beliefs and in the manner of his choosing,[89] the relationships forged in Scouting enable parents and Scoutmasters to pass down their shared ideas and beliefs.

New Jersey's LAD significantly infringes on the Scouts' right of intimate association. The Scouts would be unable to carry out their purpose if the State required them to accept members who refuse to live by the code to which all are sworn to adhere. Forcing the Scouts to accept homosexuals as members would leave boys the option of attempting to form an intimate relationship with a leader who opposes the beliefs the Scout has sworn to uphold or to quit Scouting. In the case of Patrol meetings, the law would force parents who host meetings to accept into their *private home,* individuals who practice a behavior antithetical to theirs and the Scouts' moral beliefs.

Although New Jersey is free to extend public accommodation protection beyond the federal level, a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[90] New Jersey can prohibit sexual orientation discrimination in traditional public accommodations and professional or business associations without infringing on the right of intimate association.

III. THE DECISION BY THE COURT BELOW IMPERMISSIBLY INTRUDES ON THE BSA's

[88] *Id.* at 618-19.
[89] *Moore v. City of East Cleveland*, 431 U.S. 454 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce*, 268 U.S. at 535; *Meyer*, 262 U.S. 390 (1923).
[90] *NAACP v. Alabama*, 377 U.S. 288, 307 (1964).

ASSOCIATIONAL RIGHTS AND DUTY TO ENSURE THE GREATEST PROTECTION TO THE SCOUTS ENTRUSTED TO THEIR CARE.

A. The New Jersey Court erred in concluding that the BSA's exclusion of homosexuals is "invidious discrimination"[91] based on "unsupportable stereotypes."[92]

The court's mischaracterizations likely flow from its misinformation regarding homosexuals and child molestation. Justice Handler's concurring opinion incorrectly concludes: "The myth that a homosexual male is more likely than a heterosexual male to molest children has been demolished."[93]

Amicus is not asserting that Respondent is a pedophile, or that all homosexuals are pedophiles. It is undeniable, however, that many who are have used their position as Scout leaders to sexually abuse boys in their care. If the BSA is forced to include as members, men whose sexual preference is for other men, it is inevitable that more men whose sexual preference is for boys will enter through the same door.

A nationwide investigation of child molestation in the Boy Scouts from 1971 to 1991 revealed that more than 2,000 boys reported molestations by adult Scout leaders. (Note: The Scouts, who have 150,000 Scoutmasters and assistant Scoutmasters, ban hundreds of men each year from scouting out of concern that they might abuse boys.)[94] *See infra*, Section B. The fiat by the court below will only add to these numbers, thus burdening the BSA's compelling responsibility to protect Scouts from risks of sexual abuse.

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[91] *Dale*, 734 A.2d at 1227.
[92] *Id.* at 1244.
[93] *Id.* at 1243.
[94] Boyle, *supra* note 4, at 316.

Child psychologist, George A. Rekers, who specializes in the development of sexual orientation in children and adolescents, was called as an expert witness in a discrimination suit against the Boy Scouts under the District of Columbia Human Rights Act. Dr. Rekers testified that allowing openly gay men to be scoutmasters "would legitimize the value of homosexual behavior in the eyes of many of the Boy Scouts...There would be more homosexual conduct or behavior by the boys in such troops."[95]

The Gay Report, published by homosexual researchers Jay and Young in 1979, revealed that 73 percent of homosexuals surveyed had sex at some time with boys 16 to 19 years of age or younger.[96]

Although homosexuals account for less than two percent of the population, they constitute about a third of child molesters.[97] It is a common false assumption that a child molester who is married is, therefore, a heterosexual. Such assumptions have been made about married Scout leaders who have been banned from Scouting because of molestation charges. It should be understood that "Pedophiles sometimes marry for convenience or cover...and to gain access to children."[98] Further, as noted by the National Association for Research and Therapy of Homosexuality (NARTH), "since homosexual pedophiles victimize far more children than do heterosexual pedophiles, it is estimated that approximately 80 percent of pedophilic victims are boys who have been molested by

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[95] Tracy Thompson, *Scouting and New Terrain*, Washington Post Mag., August 2, 1998, at WO6.
[96] K. Jay and A. Young, *The Gay Report* 275 (1979).
[97] K. Freund and R.I. Watson, *The Proportions of Heterosexual and Homosexual Pedophiles Among Sex Offenders Against Children: An Exploratory Study*, J. of Sex & Marital Therapy 18 (1992). *See also*, K. Freund, and R.I. Watson, *Pedophilia and Heterosexuality vs. Homosexuality*, 10 J. of Sex & Marital Therapy 197 (1984).
[98] Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis*, National Center for Missing and Exploited Children 13 (2d Ed. 1987).

adult males."[99] "Teachers who practice homosexual acts are between 90 to 100 times more likely to involve themselves sexually with pupils than teachers who confine themselves to heterosexual acts."[100]

The *Journal of the American Medical Association* published an analysis of 166 studies between 1985 and 1997 of sexually abused boys. The analysis concluded that sexual abuse of boys often goes undetected and untreated. Sexually abused boys are at increased risk of post-traumatic stress disorder, major depression, anxiety disorders, paranoia, dissociation, somatization, bulimia, anger, aggressive behavior, poor self-image, poor school performance, running away from home, and legal trouble. "The perpetrators tend to be males who are known but frequently unrelated to the victims. The abuse typically occurs outside the home, is repeated and involves penetration."[101]

Kenneth V. Lanning, Supervisory Special Agent with the Behavioral Science Unit at the F.B.I. Academy writes: "In a recent study, Dr. Gene Abel found that two thirds of all victims molested outside the home were boys. Unlike intrafamilial sexual abuse, in which the most common reported victim is a young female, in child sex rings we are often dealing with the adolescent boy victim."[102] "As many as 66 percent or more of the victims in these cases are male. Most of these males are boys between the ages of 10 and 16."[103]

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[99] Thomas Schmidt, *Straight and Narrow? Compassion and Clarity in the Homosexuality Debate* 114 (1995).

[100] Paul Cameron, *Homosexual Molestation of Children*, 57 Psychol. Rep., 1227 (1985).

[101] American Medical Association, *Sexual Abuse of Male Children Common, Under-Recognized, Under-Treated* (Science News Update: www.ama-assn.org/sci-pubs/sci-news/1998/snr1202.htm)(visited Feb. 24, 1999)

[102] Kenneth V. Lanning, *Child Sex Rings: A Behavioral Analysis*, National Center for Missing and Exploited Children 10 (2d Ed. 1992).

[103] *Id.* at 11.

A study of Canadian pedophiles has shown that 30 percent of those studied admitted to having engaged in homosexual acts as adults, and 91 percent of the molesters of non-familial boys admitted to no lifetime sexual contact other than homosexual.[104]

In a 1985 study of the rates of molestation among homosexual pedophiles compared to heterosexual pedophiles, Dr. Paul Cameron found the following: 153 homosexual pedophiles had sexually molested 22,981 boys over an average period of 22 years. 224 heterosexual pedophiles had molested 4,435 girls over an average period of 18 years. The average homosexual pedophile molested an average of 150 boys, and each heterosexual pedophile molested an average of 20 girls, a ratio of 7.5 to one.[105]

Psychiatrist Jeffrey Satinover recognizes "This special issue [pedophilia] reflects the substantial, influential, and growing segment of the homosexual community that neither hides nor condemns pedophilia. Rather they argue that pedophilia is an acceptable aspect of sexuality, especially of homosexuality."[106]

The BSA has the constitutional right to determine its moral beliefs and to instill them in the Scouts parents have entrusted to their care. Moreover, BSA has a compelling duty to implement those beliefs in a manner that provides the greatest protection to the Scouts. The BSA's policy is not arbitrary "invidious discrimination." It is based on significant credible evidence that the intimate association that exists between Scouts and Scout leaders has been

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[104] W. L. Marshall, *et al., Early Onset and Deviant Sexuality in Child Molesters*, 6 J. of Interpersonal Violence 323-336 (1991): *cited in Pedophilia: The Part of Homosexuality They Don't Want You to See*, Colo. for Fam. Values Rep., 14 (March 1994).

[105] Cameron, *supra* note 101, at 1227-1236 (1985); *See* Gene Abel, *et al., Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 1 J. of Interpersonal Violence 16-17 (1987).

[106] Jeffrey Satinover, *Homosexuality and the Politics of Truth*, 63 (1996).

exploited by hundreds of homosexual pedophiles to sexually abuse thousands of boys.

B. The intimate association that exists between the BSA Scout leaders and Scouts is a natural attraction to pedophiles seeking opportunities to sexually abuse boys.

The hundreds of sexual abuse lawsuits brought by Scouts against Scout leaders occurred within the intimate association that exists in scouting that sexual predators exploit as Scout leaders.[107] Other courts have recognized that the intimate association between Scout leaders and Scouts is the ideal type that homosexual pedophiles seek access to in order to sexually abuse boys.[108]

The overnight camping trips that are a core activity of Scouting provide the ideal situation for pedophiles to molest boys. "Most preferential child molesters usually work towards a situation in which the child has to change clothing, or spend the night or both. If the child molester achieves either of these two objectives, the success of the seduction is almost assured."[109] "Some offenders use an existing structure such as a scout troop, a sports team, or school club."[110]

> There are certain high-risk situations that arise in investigating historical child sex rings. Unfortunately, certain youth organizations inadvertently provide the child molester with almost everything necessary to operate a child sex ring. A scouting organization, for example, fulfills the sex

[107] *See Lourim v. Swensen and Cascade Pacific Council*, 977 P.2d 1157 (Or. 1999).
[108] *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287 (Tex. 1996); *Washington v. P.B.T.*, 67 Wash. App. 292 (Wash. Ct. App. 1992).
[109] Lanning, *supra* note 102, at 13.
[110] *Id.* at 14.

> ring offender's needs for: 1) access to children of a specific age or gender, 2) a bonding mechanism to ensure the cooperation and secrecy of victims, and 3) opportunities to spend the night with a victim or have a victim change clothing. The bonding mechanism of the scouts is especially useful to the offender. Loyalty to the leader and the group, competition among boys, a system of rewards and recognition, and indoctrination through oaths and rituals can all be used to control, manipulate, and motivate victims. Leaders in such organizations, especially those who are not the parents of children involved, should be carefully screened and closely monitored.[111]

In a 1999 case, *Doe v. Goff*,[112] the plaintiff alleged that he was sexually molested by his volunteer Scout leader and filed suit against Goff and the BSA for allowing Goff to participate in Scouting and for failure to implement child protection programs. The trial court granted summary judgment for the BSA, which was affirmed on appeal.

Judge Breslin's dissenting opinion in *Goff* cites the case record and stipulation by the parties regarding the frequency of child sexual abuse reports that have been filed by Scouts against Scout leaders:

> From the record we know that on an average of more than once a week for the past two decades, a Cub Scout, Boy Scout or Explorer Scout of the Boy Scouts of America (Boy Scouts) has reported being sexually abused by an adult leader. P. Boyle, *Scout's Honor*, Washington Times, May 20, 1991, at 7.
>
> The parties stipulated in this case that, between 1981 and 1988, 392 adult volunteer leaders were placed

[111] *Id.* at 16. *See also U.S. Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, Child Pornography and Pedophilia*, 99th Cong., 1st Sess. 11-15 (1986) (Pedophiles will gravitate to Boy Scout leadership).
[112] 716 N.E.2d 323 (Ill. App. Ct. 1999).

on ineligible lists because of alleged sexual abuse of scouts. In 1988 alone, the Boy Scouts headquarters was notified of over one hundred allegations of molestation of troop members by adult leaders.

Furthermore, the record indicates that the Boy Scouts has taken steps to address sexual abuse of its scouts by: (1) publishing a pamphlet entitled Child Abuse: Let's talk about it and a booklet called How to protect your children from child abuse and drug abuse; and (2) producing and distributing a 90 minute videotape addressing sexual abuse and an educational video for scouts seeking help from being abused.[113]

Judge Breslin's analysis emphasizes the intimate association that exists between Scout leaders and Scouts that provides molesters with an ideal relationship and situation, which they exploit:

> Think about it. Each year thousands of young boys wave goodbye to mom and dad and go off to attend remote boy scout [sic] outings across the continent. Some of these expeditions last a week or more. There they are -- out in the wilderness -- no phone, no parents, no police, no teachers, none of the usual safety nets. Just the birds and the bears and the Boy Scout leaders. If that is not a description of taking custody so as to deprive one of normal opportunities of protection, I do not know what is.
>
> The Boy Scouts and its volunteers are responsible for the care and well-being of these vulnerable and impressionable children. In effect, they voluntarily step into the shoes of the parents. With such an undertaking should come the duty to act within reasonable means to protect scouts from sexual abuse by their adult leaders.[114]

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[113] *Id.* at 328.

[114] *Id.* at 329.

The *Washington Times* article cited by Judge Breslin lists "every case that the Washington Times found involving a Scout leader who was arrested or banned from Scouting for sexual abuse of Scouts."[115] There are 416 cases listed from 1971 through 1989.[116] Many of the cases involve multiple victims. Other courts have recognized that the intimate association between Scout leaders and Scouts is the ideal type that homosexual pedophiles seek access to in order to sexually abuse boys.[117]

Because so few pedophiles that molest boys are arrested, it is imperative that homosexuals are excluded from BSA membership in order to protect Scouts from potential abuse by homosexual pedophiles.

> Dr. Park Dietz, a psychiatrist specializing in forensics and child sex abuse, estimates that 10 percent of the men abusing boys are arrested. Dr. Gene Abel says that that relying on convictions or signed victim statements, such as the BSA demanded, 'would only include about five percent of the cases.'[118]

According to recent studies, child molesters average between thirty and sixty child victims before being caught and preferential child molesters [pedophiles] will sexually abuse an average of 380 children in their lifetime.[119] Unless

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[115] *Scout's Honor: The Abusers - State by State*, Wash. Times, May 20, 1991, at B6. In a California sexual abuse case, the BSA delivered "1871 Confidential Files" in response to a court order. Boyle, *supra* note 4, at 314.

[116] A search of the LEXIS federal and state database, using the search term "Boy Scouts and sexual abuse," identified another 42 cases from 1990 through the present involving sexual abuse of Scouts by Scout leaders. These do not include state trial court decisions where no appeal was taken.

[117] *Golden Spread Council*, 926 S.W.2d 287; *P.B.T.*, 67 Wash. App. 292.

[118] Boyle, *supra* note 4, at 63.

[119] Gene Abel, *Sexual Aggressive Behavior* (1986). *See, e.g.*, Abel, *supra* note 105, at 3, 21 (The number of offenses reported by "nonincarcerated child molesters ranged from 23.1 acts to 281.7 acts per offender").

the BSA learns that an applicant has a criminal record, he will not be excluded from membership. If the BSA is forced to admit homosexuals, homosexual pedophiles will be included. The BSA will not be able to exclude them until it is too late - after a Scout has been molested.

Although the Girl Scouts of America (GSA) now permits avowed lesbians to be members, it was the GSA's choice; no agency of government forced them to do so. Rightly or wrongly, most Scouting girls and their parents are not apprehensive about having women, whether heterosexual or homosexual, as GSA leaders in tents with young girls. At this time, there is little concern for abuse because reports of the numbers of women who molest girls are *de minimis*.

It would seem beyond cavil that the most inclusive interpretation a court could conceive of a public accommodation law, would not force the GSA to place men, whether heterosexual or homosexual, as leaders in overnight campouts with young girls. If the New Jersey Supreme Court's decision stands, the GSA will have no recourse if men demand entrance as leaders in the GSA.

The decision of the court below debases civil rights by reducing a noble body of law to an absurdity. Unless this Court reverses the decision, the constitutional rights of a private association and the health, safety and morals of Boy Scouts will be sacrificed on the altar of a civil right that belies its name.

CONCLUSION

For all of the above reasons, your *amicus curiae* pray that this Honorable Court will reverse the judgment of the New Jersey Supreme Court and declare that the New Jersey Law Against Discrimination may not be applied to the Boy Scouts of America in violation of their rights under the United States Constitution.

Respectfully submitted,

JANET M. LARUE*
SETH C. LEIBSOHN
MIRIAM R. MOORE
801 G STREET, N.W.
Washington, D.C. 20004
(202) 393-2100
Counsel for the Family Research Council

February 28, 2000

*Counsel of Record

Feb 28 2000

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Petitioners,

v.

JAMES DALE,
Respondents.

On Writ of Certiorari
To the Supreme Court of New Jersey

BRIEF OF PUBLIC ADVOCATE OF THE UNITED STATES, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, COMMITTEE TO PROTECT THE FAMILY FOUNDATION, CONCERNED WOMEN FOR AMERICA, AND NATIONAL CRIMINAL JUSTICE COUNCIL AS AMICI CURIAE IN SUPPORT OF PETITIONERS

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

Attorneys for
Amici Curiae

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070
**Counsel of Record*
February 28, 2000

34 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT

INTRODUCTION 3

I. THIS COURT'S DECISION IN HURLEY REQUIRES REVERSAL OF THE NEW JERSEY RULING 6

II. THE DECISION BELOW VIOLATES THE RIGHT TO ASSEMBLE PROTECTED BY THE FIRST AMENDMENT 10

III. THE DECISION BELOW ERRONEOUSLY EXPANDS THE CONSTITUTIONALLY-PERMISSIBLE LIMITS ON FREEDOM OF ASSOCIATION 17

CONCLUSION 29

TABLE OF AUTHORITIES

Page

U.S. CONSTITUTION
Amendment I ..... 3, *passim*
Amendment XIV 14

CASES
Bell v. Maryland, 378 U.S. 226 (1964) 28
Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) ..... 3, *passim*
Bowers v. Hardwick, 478 U.S. 186 (1986) 23
Burson v. Freeman, 504 U.S. 191 (1992) 20
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Griffin v. Strong, 983 F. 2d 1544 (10th Cir. 1993) 11
Hague v. CIO, 307 U.S. 496 (1939) 13
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) ..... 2, passim
L.P. v. Oubre, 547 So. 2d 1320 (La. 1989) 6
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Page

Romer v. Evans, 517 U.S. 620 (1996) 22
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Shapiro v. Thompson, 394 U.S. 618 (1969) 19
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United States v. Cruikshank, 92 U.S. 542 (1876) ... 13, 14
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Page

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INTEREST OF AMICI CURIAE

The amici curiae, Public Advocate of the United States, Lincoln Institute for Research and Education, Committee to Protect the Family Foundation, Concerned Women for America, and National Criminal Justice Council (a project of Citizens United Foundation), are nonprofit educational organizations sharing a common interest in the proper

construction of the Constitution and laws of the United States.[1] All of the *amici* were established within the past 25 years for public education purposes related to participation in the public policy process, and are tax-exempt under section 501(c)(3) of the Internal Revenue Code, except for Public Advocate of the United States, which is exempt under IRC section 501(c)(4).

For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. In the past, most of the *amici* have conducted research on other issues involving constitutional interpretation and filed amicus curiae briefs in other federal litigation, including matters before this Court, involving constitutional issues. Public Advocate of the United States and Lincoln Institute for Research and Education filed an *amicus curiae* brief in support of the Boy Scouts' Petition for Certiorari herein.[2]

SUMMARY OF ARGUMENT

The decision below is in conflict with this Court's unanimous decision in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995). It

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the various parties, have been submitted for filing to the Clerk of Court.

misapplies this Court's rulings in Roberts v. United States Jaycees, 468 U.S. 609 (1984), Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987), and New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988), and it also conflicts with this Court's rulings recognizing a constitutional right of association independent of "intimate" and "expressive" associations. Finally, it conflicts with this Court's rulings limiting governments to the imposition of content-neutral time, place and manner regulations upon the right of the people peaceably to assemble. If allowed to stand, the decision below will not only spawn confusion regarding the proper application of the First Amendment to claims of freedom of association, but will jeopardize fundamental constitutional principles long established by this Court.

ARGUMENT

INTRODUCTION

In a dramatic departure from the common law principle laying at the foundation of modern public accommodations laws, the Supreme Court of New Jersey extended that state's public accommodation law to impose an unprecedented legal obligation upon the Boy Scouts of America.

As this Court pointed out in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 571 (1995), modern public accommodation laws have a "venerable history," stretching back to the common law rule requiring an innkeeper to serve all travelers that come his way unless he had "good reason" not to. *See* III W. Blackstone, Commentaries on the Laws of England, Ch. 9, Sec. 6 (1768). Through the years, legislatures have extended this common law rule to reach

additional **business** entities besides innkeepers, and to narrow the range of "good reasons" justifying refusal of service to their **customers**. Hurley, *supra*, 515 U.S. at 571-72 (emphasis added).

Until now, this common law principle of equal treatment has been confined to entities that are **commercial** in nature and purpose. *E.g.*, Roberts v. United States Jaycees, 468 U.S.609, 631-40 (1984) (O'Connor, J., concurring), and has been limited to affording equal access to persons desirous of **receiving** the entities' full range of goods and services to accomplish business purposes. *E.g.*, Bd. of Directors of Rotary Int'l. v. Rotary Club, 481 U.S. 537, 541-43 (1987). In this case, however, the New Jersey Supreme Court has, first of all, stretched that state's public accommodation law to "root out" discrimination in a faith-based community service organization simply because its outreach is "broad," and also because it has government relationships such as its historic involvement with the President of the United States. *See* Dale v. Boy Scouts of America, 160 N.J. 562, 734 A. 2d 1196 (1999) at 29a-30a.[3]

The case below did not involve a boy scout who sought merely to **receive** the benefits of scouting. The New Jersey Supreme Court has imposed upon the Boy Scouts a duty to accept an avowed homosexual activist who seeks to **provide** those benefits as an assistant scoutmaster. By twisting the state's public accommodation law into the service of a homosexual adult who would be a provider of the services of the Boy Scouts, the New Jersey justices have transformed the state's public accommodation law into a type of employment

[3] The opinion of the Supreme Court of New Jersey on review herein is included at pages 1a-101a of Appendix A to the Petition for a Writ of Certiorari herein. Further references to that opinion in this brief will be designated, with the appropriate appendix page reference, as "N.J. Op."

discrimination statute applicable to unpaid volunteers. In doing so, they have demonstrated disregard for the kinds of exceptions normally attached to employment discrimination laws, such as those permitting bona fide occupational requirements, which would clearly be appropriate in the case of the Boy Scouts, where adult scoutmasters are placed in positions of authority and close contact with young boys.

If the ruling below were upheld, the Boy Scouts of America, their affiliates and their volunteers would be unfairly and unreasonably exposed to increased risks of liability, and the boy scouts, themselves, would be unnecessarily exposed to risks of harm and injury. These heightened risks — of injury and of legal liability — are especially noteworthy in this case. Forcing the Boy Scouts to accept avowed homosexuals as adult leaders would increase the risk of sexual molestation of young boys, given the fact that certain homosexual activists encourage legalizing sex with all persons, including minors. E. Rueda, *The Homosexual Network: Private Lives and Public Policy*, pp. 202-203 (Old Greeenwich, Conn.: The Derbin Adair Company, 1982). Additionally, there is evidence that the proportion of homosexual pedophiles is considerably higher than that of heterosexual pedophiles, and by one estimate, homosexual teachers are 90 to 100 times more likely to become sexually involved with their students than are heterosexuals. *See, e.g.*, G. Gallup, "Attitudes toward Homosexuals and Evolutionary Theory: The Role of Evidence," 17 *Ethology and Sociobiology* 281-84 (1996).

Indeed, the Boy Scout setting appears to be an ideal place for certain pedophiles, especially male homosexual pedophiles, to pursue potential boy victims, with overnight camp-outs in secluded locations providing ample time and opportunity for intimate contact. *See* P. Boyle, *Scout's Honor* 70-71 (Rocklin, Calif., Prima Publishing: 1994). If such molestation were to

occur, the Boy Scouts would likely bear the risk of legal liability for such conduct. *See, e.g.*, L.P. v. Oubre, 547 So. 2d 1320 (La. 1989); Lourim v. Swensen, 328 Or. 380, 977 P.2d 1157 (1999).

Having ignored both the common law principles underlying the public accommodation laws and the possible consequences of a ruling forcing the Boy Scouts to accept a homosexual activist as a scoutmaster, the New Jersey Supreme Court also erroneously disposed of the Boy Scout's constitutional claim of freedom of association. Indeed, that court paid no attention to the true legacy of freedom of association, neglecting even to address the relevant constitutional text establishing that freedom, and misapplying this Court's precedents upholding that freedom.

I. THIS COURT'S DECISION IN HURLEY REQUIRES REVERSAL OF THE NEW JERSEY RULING.

The decision below directly conflicts with this Court's unanimous decision in Hurley, *supra*, holding that requiring private organizers of a parade to permit a gay rights group to march in the parade violated the organizers' First Amendment rights. Ignoring the balancing test applied in Roberts v. United States Jaycees, 468 U.S. 609 (1984), this Court determined that Massachusetts' public accommodation law, as applied to South Boston's St. Patrick's Day Parade, "violates the fundamental rule of protection under the First Amendment, that a **speaker** has the autonomy to choose the content of his message." Hurley, *supra*, 515 U.S. at 573 (emphasis added).

The rationale in Hurley applies even more strongly to this case. As this Court observed in Hurley, by extending the

state's nondiscrimination law to marchers in a parade, the Massachusetts Supreme Judicial Court had applied the state's public accommodation law "in a **peculiar** way ... essentially requiring petitioners [the parade organizers] to alter the expressive content of their parade." *Id.*, 515 U.S. at 572 (emphasis added).

In this case, the Supreme Court of New Jersey has applied that state's public accommodation law in an **even more peculiar** way. Not merely requiring the Boy Scouts to admit a homosexual boy to scout **membership**, without regard for its policy against open homosexual expression, the New Jersey ruling requires the Boy Scouts to admit an avowed homosexual activist to scouting **leadership**. N.J. Op., pp. 65a-67a. By analogy to Hurley, the New Jersey ruling is tantamount to forcing an "assistant parade leader" upon the St. Patrick's Day parade organizers, with authority to influence the **whole** parade, not just a bunch of marchers with a message confined to one part of it. Yet, this Court in Hurley found the lesser intrusion upon "speaker autonomy" an impermissible encroachment upon the parade organizers' First Amendment rights.

In an attempt to avoid the rule in Hurley, the New Jersey Supreme Court distinguished "Boy Scout leadership" from a "parade," claiming that the latter was a "form of 'pure speech,'" whereas the former was something deserving less constitutional protection. N.J. Op., pp. 65a-66a. Just the opposite is true. A parade, such as the one in Hurley, is a once-a-year event, whereas Boy Scouting is a daily commitment with continuous speech. Indeed, the person being excluded from the Boy Scouts in this case is not just another participant in a single annual march down the streets of Boston, but rather a dedicated adult who, by virtue of his role as scoutmaster, had "no other reason to join apart from leadership in service to boys.'" N.J. Op., p. 11a.

In a further attempt to escape the shackles of Hurley, the New Jersey Supreme Court fashioned a Houdini-like escape, disingenuously asserting that the respondent had never promoted homosexuality as a Boy Scout leader, and that there was no indication that respondent intended to "teach" anything whatsoever about homosexuality as a scout leader." N.J. Op., pp. 65a-66a. This turns a blind eye to the fact that respondent's homosexual lifestyle had been hidden, and that it was his emergence as a publicly proclaimed homosexual activist and participant in a seminar promoting homosexuality among teenagers that gave rise to his dismissal from the Boy Scouts. It would be reasonable to infer, as the Boy Scout authorities did, that he would use his assistant scoutmaster position to promote the homosexual lifestyle to young boy scouts. Furthermore, under Hurley, respondent's very "coming out" and publicized activity as a homosexual leader constitutes speech antithetical to the Boy Scouts' message, compromising the Boy Scouts' right to autonomy over that message. *See* Hurley, *supra,* 515 U.S. at 576.

To this realistic concern for the welfare of young boys, the New Jersey court cast a callous glance, based, no doubt, in part on its disapproval of the Boy Scouts' message. *See* N.J. Op., pp. 58a-62a, 64a-67a. Clearly, the Supreme Court of New Jersey erred. In Hurley, for example, this Court scrupulously avoided a decision based on its approval or disapproval of either party's message, relying on the time-honored free speech principle that "shield[s] ... those choices of content that in someone's eyes are misguided, or even hurtful." Hurley, *supra,* 515 U.S. at 574.

The same standard of review and analysis employed by this Court in Hurley should obtain in this case. Not only is respondent's avowed homosexual identity inconsistent with the Boy Scouts' external message, his role as a Boy Scout leader

would interfere with the **internal** communication of that message. As this Court observed in Hurley, marchers in a "parade" make "some sort of collective point ... to each other" as well as "to bystanders along the way." *Id.*, 515 U.S. at 568. This is all the more true with regard to organizers of the parade. After all, the right of "speaker autonomy" does not turn on the existence of "a narrow succinctly articulable message" to outsiders, but upon the absolute right to select the "contingents to make a parade" (*id.*, 515 U.S. at 569-70), as well as those who lead the parade.

The New Jersey Supreme Court avoided this constitutional barrier as well, denying to the Boy Scouts the right to select the "contingents" constituting a Boy Scout troop, solely because, in the court's opinion, the Boy Scout Oath and Law had failed to "disseminate" to outsiders a concrete and specific-enough message "that homosexuality is immoral...." *See* N.J. Op., p. 64a. According to Hurley, however, it is not for the courts or any other government official to grant or deny First Amendment rights just because, in their eyes, the Boy Scouts do not disseminate a "particularized message" on homosexuality. It is enough that the Boy Scouts have made it clear that they do not wish even to suggest that homosexuality is moral. *See* Hurley, *supra,* 515 U.S. at 574-75.

The New Jersey courts below undoubtedly misapplied Hurley, opting instead to apply an entirely different set of rules governing "freedom of association" purportedly derived from a trilogy of this Court's opinions: Roberts v. United States Jaycees, 468 U.S. 609 (1984); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987); and New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988). The court's reliance upon those cases also was error.

II. THE DECISION BELOW VIOLATES THE RIGHT TO ASSEMBLE PROTECTED BY THE FIRST AMENDMENT.

Not once, in its analysis of First Amendment issues, did the New Jersey Supreme Court assess the constitutionality of the application of its state's public accommodation law in light of the text or history of that Amendment. To the contrary, the court below examined only certain substitute phrases such as the "freedom of intimate association" and the "freedom of expressive association" found in selected, recent decisions of this Court. Having failed to address the First Amendment issues according to the relevant constitutional text and history, and having limited its consideration to only three of this Court's precedents, all decided since 1984, and having even misapplied those three precedents, the court failed to address the First Amendment issues truly presented in this case.

A. Roberts, Rotary Club, and New York State Club Do Not Apply to This Case.

In its discussion of the Boy Scouts' First Amendment claim, the court below relied exclusively upon the Roberts, Rotary Club, and New York State Club cases, cited above. Not once, however, did the court acknowledge that those cases explicitly apply to First Amendment claims made by organizations that have been found by the courts to be commercial in nature and purpose. *See* Roberts, *supra*, 468 U.S. at 616 ("[T]he court ... concluded that the Jaycees organization is a 'business'..."); Rotary Club, *supra*, 481 U.S. at 542 (The state courts found that both the International Rotary and local Rotary Clubs were "business establishments" within the meaning of state law.); New York State Club, *supra*, 487 U.S. at 5 (The New York City Human Rights Law private club exception limited to clubs unrelated to "the business and

professional life of the city"). Having failed to find that the Boy Scouts are commercial in purpose and nature, the New Jersey Supreme Court misapplied the Roberts, Rotary Club and New York State Club precedents.

B. Freedom of Association is Not Limited to Intimate and Expressive Associations.

Additionally, the court below failed to recognize the full scope of the constitutional right of association, erroneously limiting its examination of that right to the Roberts trilogy of cases. The New Jersey justices placed primary reliance on this Court's opinion in Roberts v. United States Jaycees, *supra,* 468 U.S. at 622, wherein this Court identified the First Amendment "right of association" "as **implicit** in the right to engage in activities protected by" that Amendment. (Emphasis added.) Thus, this Court, in Roberts, treated "the right of association" as "**correlative**" to such express rights as "freedom to speak, to worship and to petition the government for redress of grievances...." *Id.* (Emphasis added.) As a "correlative" right, some lower courts, citing Roberts, have **insisted** that any person who claims a First Amendment constitutional right to associate **must** either claim and prove his right to an "intimate association" **or** must demonstrate that the association is for "expressive purposes." *See, e.g.*, Sanitation and Recycling Industry, Inc. v. City of New York, 107 F. 3d 985, 996 (2d Cir. 1997); Griffin v. Strong, 983 F. 2d 1544, 1546 (10th Cir. 1993); Winik-Nystrup v. Manufacturers Life Insurance Co., 8 F. Supp. 2d 1, 10-23 (D. Conn. 1998). That is precisely what the New Jersey Supreme Court did in this case.

In a section of the opinion below, labeled "Freedom of Expressive Association," the New Jersey justices conducted their First Amendment analysis of the Boy Scout policy with

respect to open, avowed homosexuals **solely** in relation of that policy to the "dissemination" of the Boy Scout message:

> We find that the LAD [Law Against Discrimination] does not violate Boy Scouts' freedom of expressive association because the statute does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views. The organization's ability to **disseminate** its message is not significantly affected by Dale's exclusion because Boy Scout members do not associate for the purpose of **disseminating** the belief that homosexuality is immoral; Boy Scouts discourages its leaders from **disseminating any** views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect to homosexuality. [N.J. Op., p. 52a (emphasis added).]

Within this framework of analysis, the New Jersey court dismissed the petitioners' claim that the Boy Scout Oath and Law require the exclusion of avowed homosexual Scoutmasters because the Oath and Law do not "on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral." N.J. Op., p. 56a. Finding that "no single view" on the "subject" of sexual morality "functions as a unifying associational goal of the organization," the court held that requiring the Boy Scouts to welcome an open, avowed homosexual scoutmaster into its ranks "does not violate Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [Boy Scouts] existing members' ability to carry out their various purposes.' Rotary Club, *supra*, 481 U.S. at 548...." N.J. Op., p. 56a.

Having limited its analysis of the Boy Scouts' claim of freedom of association to its "correlative" roles recognized in the Roberts and Rotary Club cases, the New Jersey court failed to abide by this Court's long line of cases recognizing a constitutional right of freedom of association **independently** rooted in "the right of the people peaceably to assemble," as expressed in the First Amendment and understood by America's founders.

In the seminal case of DeJonge v. Oregon, 299 U.S. 353, 364 (1937), this Court ruled that the right of the people peaceably to assemble was "a right **cognate** to those of free speech and free press and is **equally** fundamental." (Emphasis added.) As an "equal and cognate" right, the Court affirmed its earlier observation in United States v. Cruikshank, 92 U.S. 542, 552 (1876), that the right of the people to assemble was the right of "'citizens to meet peaceably **for consultation** in respect to public affairs....'" *Id.* (Emphasis added.) Thus, this Court embraced the historic understanding that the foundational purpose of the right of the people peaceably to assemble was to "**consult** for their common good." Article XVI of the August 16, 1776 Constitution of Pennsylvania reprinted in Sources of Our Liberties 331 (Perry, ed., American Bar Foundation, 1972) (emphasis added).

C. Freedom of Association Includes the Right of Like-Minded People to Join in a Common Cause.

Two years after the DeJonge decision, in Hague v. CIO, 307 U.S. 496 (1939), Justice Owen Roberts, in an opinion concurred in by Justice Hugo Black, engaged in an extensive review of the nature and application of the right of the people peaceably to assemble. First, in posing the question before the Court, Justice Roberts made clear that the issue of peaceable assembly related to "**dissemination** [of] information [about]

and **discussion** of the [National Labor Relations] Act, and of the opportunities and advantages offered by it...." *Id.*, 307 U.S. at 512 (emphasis added). Second, relying on Cruikshank, *supra,* Justice Roberts linked the labor act's policy of "freedom of association" to the constitutional "right peaceably to assemble and to **discuss** ... and **communicate**...." *Id.*, 307 U.S. at 512-13 (emphasis added). Finally, Justice Roberts reached his conclusion, often referred to and relied upon by this Court up to the present day:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, **communicating** thoughts between citizens and **discussing** public questions. [*Id.*, 307 U.S. at 515 (emphasis added).]

Justice Roberts' understanding of the consultative purpose of the people's right of assembly not only conformed to this Court's "right of association" cases in Cruikshank and De-Jonge, but also was a focus of this Court's freedom of association rationale in case after case prior to the decision in Roberts v. United States Jaycees, *supra*. Relying explicitly upon Justice Roberts' opinion in Hague, this Court ruled in Thomas v. Collins, 323 U.S. 516, 532 (1945), that "[t]he right to **discuss**, and **inform** people concerning the advantages and disadvantaged of unions and joining them is protected ... as part of free assembly" (emphasis added). Later, the Court returned to this theme, concluding that "the right either of workmen or of unions ... to assemble **and discuss their own affairs** is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and enlist the support of others." *Id.*, 323 U.S. at 539 (emphasis added).

In a series of cases involving the NAACP, this Court struck a similar note in its assessment of the purpose of the right of association. In NAACP v. Alabama, 357 U.S. 449, 460, 466 (1958), this Court, emphasizing the importance of protecting "the rights of [NAACP's] rank-and-file members to engage in lawful association in support of their common beliefs," whether they be "political, economic, religious or cultural," relied upon **both** the speech and the assembly clauses for its ruling that "the right of the members to pursue their **lawful private interests privately** and to associate with others in doing so ... come[s] within the protection of the Fourteenth Amendment" (emphasis added). In NAACP v. Button, 371 U.S. 415, 428, 431, 437, 444-45 (1963), this Court repeatedly treated freedom of "association" as a separate and distinct freedom from that of "expression." As for the former freedom, the Court observed that the Virginia rule against lawyer solicitation created "the gravest danger of smothering all **discussion** looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority." *Id.*, 371 U.S. at 434-37 (emphasis added). Nineteen years later, in NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909 (1982), this Court continued to recognize that the right to "assemble peaceably" was distinct from the freedom of speech, the former primarily protecting the right of the NAACP to "**discuss among themselves** their grievances against governmental and business policy." (Emphasis added.)

D. Freedom of Association Protects the Right of the Boy Scouts to Set Its Own Moral Standards.

To collapse this distinctive freedom of association into one of "expressive association," as the New Jersey courts did below, disregards these venerable authorities. By failing to utilize the traditional applications of the right to associate, independently grounded in the right of the people peaceably to

assemble, the Roberts and Rotary Club opinions unwittingly opened the door to the very government intrusions that the Assembly Clause was designed to prohibit. Instead of the people deciding with whom they will associate to discuss and advance common beliefs pertaining to "political, economic, religious or cultural matters," governments have been given license to impose their views of political, economic, religious and cultural orthodoxy, so long as they purport to do so in the cause of eliminating "invidious discrimination."

In his concurring opinion in Thomas v. Collins, *supra,* Justice Robert Jackson warned that the government would invent all kinds of reasons to intrude upon the right of the people to associate, but that the courts must remain vigilant to insure that the right of the people to assemble does not become a "hollow one." *Id.*, 323 U.S. at 547.

The Supreme Court of New Jersey opinion below illustrates the "hollowness" of a constitutional right of association if limited to the "correlative" right of freedom of association, recognized in the Roberts/Rotary Club/New York State Club line of cases. By focusing exclusively upon the "expressive" aspect of Scouting, the New Jersey judges were enabled to disregard completely the internal camaraderie of the organization, and thus to discard the essential role that common beliefs and attitudes must play to ensure freedom of association. *See* NAACP v. Button, *supra,* 371 U.S. at 429-31.

III. THE DECISION BELOW ERRONEOUSLY EXPANDS THE CONSTITUTIONALLY-PERMISSIBLE LIMITS ON FREEDOM OF ASSOCIATION.

A. Freedom of Association May Be Limited Only by Laws Protecting the Physical Peace.

According to the express language of the First Amendment's Assembly Clause, the **only** constitutionally-permitted condition that governments may impose upon the right of the people to assemble is that the assembly must be "peaceable." In its decision in DeJonge v. Oregon, *supra*, this Court overruled a criminal conviction under a state syndicalism act because there was not a scintilla of evidence of an "incite[ment] to violence and crime." By so ruling, this Court rejected the State's attempt to criminalize conduct simply because it occurred under the auspices of an organization which taught and advocated the violent overthrow of the government. As dangerous as such teaching was to the stability of the government, this Court stood firm in favor of "the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means." *Id.*, 299 U.S. at 365.

Eight years after DeJonge, this Court explained further that any regulation, criminal or civil, limiting "orderly discussion and persuasion ... must have clear support in public **danger**":

> Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow **widest** room for discussion, the **narrowest** range for its

> restriction, particularly when this right is exercised in conjunction with **peaceable** assembly.... [In this case], [t]he assembly was entirely peaceable ... [and] involved no element of clear and present, grave **and immediate danger to the public welfare**. [Thomas v. Collins, *supra,* 323 U.S. at 530, 536 (emphasis added).]

By demanding explicit proof of breach, or imminent threat of breach, of the **physical** peace in DeJonge and Thomas v. Collins, this Court forged a legacy of constitutional protection for the freedom of assembly and association that prevailed throughout the civil rights movement of the 1960's. Thus, in Cox v. Louisiana, 379 U.S. 536, 538-52 (1965), this Court struck down a conviction under a "breach of the peace" statute because there was no evidence of any threat to the physical peace of the community. In the same case, this Court struck down a conviction under an "Obstructing Public Passages" statute because of evidence that it had been enforced in a discriminatory manner inconsistent with this Court's insistence upon a viewpoint-neutral policy of "time, place and manner." *Id.*, 379 U.S. at 553-58.

This Court has required **real** evidence of a threat to the community's physical well-being, not only in cases applying criminal statutes to **public** assemblies, but also in civil statutes applied to private associations. In NAACP v. Alabama, *supra*, 357 U.S. at 465, the Court rejected Alabama's effort to obtain the membership list of the Alabama chapter of the NAACP, distinguishing an earlier decision approving a New York law requiring disclosure of membership in the Ku Klux Klan on the ground that "the Klan's activities ... involv[ed] acts of unlawful intimidation and violence."

Beginning in the 1960's, however, and continuing to the present day, this Court has sometimes departed from this very narrow test of constitutional permissibility, applying a broader, more flexible test, namely, whether "a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." NAACP v. Button, *supra*, 371 U.S. at 438.

B. The Compelling State Interest Test Should Have No Legitimate Role in Deciding This Case.

Application of the "compelling state interest" test, first formulated and applied by this Court in equal protection cases, has been, and continues to be controversial. As early as 1969, Justice John Marshall Harlan cautioned this Court to use the test only in cases involving race discrimination. Shapiro v. Thompson, 394 U.S. 618, 658-62 (1969) (Harlan, J., dissenting).

More recently, Justice Anthony Kennedy has voiced concern about the indiscriminate use of the compelling state interest test in First Amendment cases. In his concurring opinion in Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105 (1991), Justice Kennedy reminded the Court, as had Justice Harlan before him, that the compelling state interest test "derives from our equal protection jurisprudence ... and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only, apart from considerations of time, place, and manner of use of public forums." *Id.*, at 124. In a case decided upon the heels of Simon & Schuster, Justice Kennedy reiterated his concern, this time expressing his opinion that "our adoption of the compelling-interest test was accomplished by accident ... and as a general matter produces a misunderstanding that has

the potential to encourage attempts to suppress legitimate expression." Burson v. Freeman, 504 U.S. 191, 212 (1992) (Kennedy, J., concurring).

Justice Kennedy has not been the only voice expressing such concerns. In Roberts v. United States Jaycees, *supra*, 468 U. S. at 633, Justice Sandra Day O'Connor questioned this Court's "mechanical application of a 'compelling interest' test," and stated that the "First Amendment is offended by direct state control of the membership of a private organization engaged exclusively in protected expressive activity...." *Id.*, at 638. Referring to, *inter alia*, The Official Boy Scout Handbook, Justice O'Connor noted that "[e]ven the training of outdoor survival skills, or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.*, at 636. Freedom of association for such expressive associations, like the freedom of speech, should only be governed by "content-neutral state regulation of the time, place, and manner of any organization's relations with its members or with the State," and only then when such regulations are "'narrowly drawn' to serve a 'sufficiently strong, subordinating interest' 'without unnecessarily interfering with First Amendment freedoms.'" *Id.*, 468 U.S. at 634.

Finally, as discussed above, this Court unanimously eschewed application of the compelling state interest test in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), relying instead upon the absolute principle of "speaker autonomy" to turn back an attempt to use the Massachusetts public accommodation law to overlook the freedom of speech in the name of "eradicating discrimination." In doing so, the Court deliberately refused to follow the lead of

the lower court, which had applied the compelling state interest test on the authority of the Roberts case. *Id.*, 515 U S. at 563.

Had this Court done otherwise in Hurley, it would have been drawn into the kind of balancing of interests engaged in by the New Jersey Supreme Court below. After finding that the petitioners enjoyed the constitutional right of expressive association, the New Jersey justices opined that "[t]he right of expressive association must ... be weighed against" the compelling interest of the state to prevent "invidious discrimination" in each case. This probe led the state court, in turn, to determine the purpose of the Boy Scouts and the meaning of the Boy Scout Oath and Law, rather than to defend the right of the Boy Scouts to determine those for itself, thereby trampling on the very constitutional "autonomy" expressed and applied by this Court in Hurley.

C. The Compelling State Interest Test Was Used in This Case to Enforce Viewpoint Discrimination.

The compelling state interest test also led the New Jersey justices into a probing critique of the Boy Scouts' views on homosexuality, labeling them "archaic," "stereotypical" and "bigoted." N.J. Op., p. 62a. In contrast, the justices enthusiastically embraced the New Jersey legislature's views of homosexuality, or other similar sexual or affectional orientation, as enlightened and commendable — a "recognition that discrimination based on 'archaic' and 'stereotypical notions' about homosexuals that bears no relationship to reality...." N.J. Op., p. 62a.

Only by relying upon the compelling state interest test could the New Jersey Supreme Court have justified a law that infringed upon the right of the Boy Scouts to hold views contrary to a state-imposed orthodoxy. Such viewpoint

discrimination has been found by this Court to be *per se* a violation of the First Amendment. *See* Rosenberger v. University of Virginia, 515 U.S. 819 (1995). Yet, the compelling state interest test inevitably leads to such discrimination when applied to a law designed to prohibit certain acts of discrimination by an organization dedicated to views considered anathema by the state.

This failure of the compelling interest test to protect legitimate constitutional rights has led one astute observer to remark that "the ... test permits courts to render decisions based upon vague ideological commitments that have no basis in the Constitution." Bernstein, "Sex Discrimination Laws Versus Civil Liberties," 99 *The Univ. of Chi. L. Forum* ___ (1999).

The unconstitutionality of the compelling interest test is revealed by New Jersey Supreme Court Justice Handler's concurring opinion. Applying that test as set forth in Roberts, Justice Handler declared that the state had a compelling interest to prohibit organizations from using "stereotypical assumptions about homosexuals" in determining its standards for membership:

> One particular stereotype that we renounce today is that homosexuals are inherently immoral. That myth is repudiated by decades of **social science data** that convincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in and contribute responsibly and positively to society.... Accordingly ... there is no reason to view "a gay scoutmaster, solely because he is a homosexual, [as lacking the] strength of character necessary to properly care for [and] impart BSA humanitarian ideals to the young boys in his charge." [N.J. Op., pp. 95a-96a (emphasis added).]

Armed with the compelling state interest broadax, Justice Handler chopped down 6,000 years of Judaeo-Christian tradition and moral teaching, tendentiously relying upon selected social science studies to support his revolutionary views which are out of step with the authoritative rulings of this Court.

Only 14 years ago, in Bowers v. Hardwick, 478 U.S. 186 (1986), this Court upheld a Georgia state law criminalizing homosexual sodomy. In his concurring opinion, Chief Justice Warren Burger observed that "[c]ondemnation of [homosexual] practices is firmly rooted in Judaeo-Christian moral and ethical standards."[4] *Id.*, 478 U.S. at 192-93. Moreover, the Chief Justice observed that even pre-Christian Roman law made "[h]omosexual sodomy ... a capital crime" and that Blackstone [in his *Commentaries*] had described it as 'the infamous crime against nature....'" *Id.*, 478 U.S. at 196-97.[5]

---

[4] The Scriptural condemnation of homosexuality is extensive. Both the Old and the New Testaments condemn it. "Thou shalt not lie with mankind, as with womankind; it is abomination." *Leviticus* 18:22. "But the men of Sodom were wicked and sinners before the Lord exceedingly." *Genesis* 13:13. "And turning the cities of Sodom and Gomorrah into ashes condemned them with an overthrow, making them an ensample unto those that after should live ungodly." *II Peter* 2:6. "[F]or even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly...." *Romans* 1:26-27.

[5] Even in Romer v. Evans, 517 U.S. 620 (1996), in which this Court struck down a Colorado constitutional initiative against the enactment of laws prohibiting discrimination against homosexuals, this Court carefully refrained from invoking its moral judgment in substitution for that of the people of Colorado, limiting its ruling to a narrow finding that the initiative had been the product of an unconstitutional "animus" against homosexuals as a class. *Id.*, 517 U.S. at 665-66.

Invoking the compelling state interest test, the majority opinion dismissed such views as "bigotry," not worthy of serious consideration. N.J. Op., p. 61a. Justice Handler invoked social science literature to defend his legal ruling, but in doing so he appears to have revealed his own prejudices, failing to cite even one study that might cast doubt on the result he so desired to reach. In reality, the literature reveals that the experts do not agree. Indeed, social science data other than that cited by Justice Handler confirm the wisdom of a content-neutral First Amendment test. Left out from his survey, for example, are Dr. Judith Reisman's findings that adult homosexuals are far more likely than adult heterosexuals to solicit teenaged sexual partners. "Partner Solicitation Language As A Reflection Of Male Sexual Orientation." Collected Papers from the NARTH Annual Conference, Saturday, 29 July 1995. In her analysis of "In Search Of" ("ISO") advertisements placed by males in two magazines, the *Washingtonian*, which is predominantly heterosexual in orientation, and *The Advocate*, which is predominantly homosexual, Dr. Reisman found that under 1 percent of *Washingtonian* ISO advertisers as against 53 percent of *Advocate* ISO advertisers sought teens. She also found that on average only once a month did advertisers in *Washingtonian* seek a teenage girl, while 15 percent of the advertisers in *The Advocate* sought an average of 130 boys per month. *Id.*

Dr. Reisman's findings are supported by studies conducted by the homosexual community. In *The Gay Report*, a survey of homosexual attitudes and behavior, homosexual researchers Jay and Young found that 73 percent of homosexuals surveyed had at some time had sex with boys 16 to 19 years of age or younger. K. Jay and A. Young, *The Gay Report* (New York: Summit Books, 1979), p. 275. Approximately one out of four homosexuals admitted to sex with children and younger teens. Jay and Young, p. 275; A.P. Bell and M.S. Weinberg, *Homo-*

sexualities: A Study of Diversity Among Men and Women (New York: Simon & Schuster, 1978), p. 85.

Pedophilia plays a key role in the development of future homosexuals. Noted sex researchers Masters and Johnson observed:

> In most instances, homophile interests developed in the early to midteens.... There was no history of overt heterosexual experience prior to homophile orientation. Recruitment usually was accomplished by an older male, frequently in his twenties, but occasionally men in their thirties were the initiators. When the homosexual commitment was terminated, in most instances, the relationship was broken by the elder partner. With termination, the teenager was left with the concept that whether or not he continued as an active homosexual, he would always be homophile-oriented. [W. Masters and V. Johnson, *Human Sexual Inadequacy* (Boston: Little, Brown and Company, 1970), pp. 179-180.]

In one study (Bell and Weinberg, *supra*, p. 87), over 60 percent of the respondents identified their first homosexual partner as someone older; in another (P. Gephard and A.P. Johnson, *The Kinsey Data: Marginal Tabulations of the 1958-63 Interviews Conducted by the Institute for Sex Research* (Indiana University Press: Bloomington, Ind., 1979), p. 495, over 64 percent of the respondents identified their first homosexual partner as having initiated the sexual experience.

While Justice Handler and his New Jersey colleagues may have assumed that the homosexual lifestyle is "moral," it is difficult to know what standard was used. The promiscuous, reported behavior of many homosexuals could hardly be

considered moral. In a 1978 study by Bell and Weinberg, *supra*, 83 percent of active homosexuals had 50-plus partners, 73 percent had 100-plus partners, 58 percent had 250-plus partners, 41 percent had 500-plus partners and 26 percent had 1000-plus partners. Seventy percent of white homosexuals claimed that a majority of their sexual contacts were one-time encounters.

Gallup reported one study showing that more than 80 percent of promiscuous homosexual males admitted to having had sex with minors. Additionally, he reported that proportionally there are more homosexual pedophiles than heterosexual. G. Gallup, "Attitudes, etc." *Ethology and Sociobiology, supra,* at 281-84. Patrick Boyle has documented stories of numerous men whose first sexual encounter was with an adult male and who, having reached adulthood, in turn enticed a young boy into having sex with him. P. Boyle, *Scout's Honor*, *supra*, at 28.

During the period 1971 through November 1991, the Boy Scouts banned 1,871 individuals from Scouting for sexual abuse. P. Boyle, *Scout's Honor*, *supra*, at 315. (Not all of these cases involved male scout leaders abusing male Scouts.) At least 2,071 Scouts reported being abused by leaders, with another 2,737 victims who may or may not have been Scouts. *Id.*, at 316. It could be said that based on their experience as well as the social science literature, the Boy Scouts would be violating the trust conferred on them by the parents of countless young boys if they allowed avowed homosexuals to continue in leadership roles, modeling their lifestyle to those impressionable boys, resulting in behavior by those boys which the Boy Scout Oath and Law seek to avoid.

D. Only a Narrowly and Precisely Drawn Time, Place and Manner Test Protects Associational Rights.

With such scientific literature as this, it is not for judges, much less state legislatures, to survey the sociological studies on homosexuality and then, in pursuit of some ideal society without discrimination, force people to associate with each other only in conformity with the views endorsed by the civil authorities. Nor is it meet for judges to dismiss as "bigotry" or "prejudice" any view of homosexuality that does not square with their own. Civilly-enforced associational conformity is the very evil that the Assembly Clause was designed to prevent, guaranteeing to the people the right to decide with whom they will associate so long as they conduct themselves in a manner that is consistent with the physical peace of the community.

During the 1950's and 1960's, this Court was called upon again and again to declare and apply the First Amendment to speeches, assemblies and petitions of people who actively opposed the racial views held by civil authorities in the South. During those tumultuous times, this Court applied content-neutral constitutional principles that did not permit it or any other court to take sides in the ongoing political debate. Rather, as in Edwards v. South Carolina, 372 U.S. 229, 235 (1963), it held the constitutional line protecting "free speech, free assembly and freedom to petition for redress of ... grievances ... in their most pristine and classic form." This Court did so because it adhered to the original principles of content neutrality unencumbered by the compelling state interest test that invites an open-ended balancing of governmental interests against those of the individual.

This case presents to this Court an excellent opportunity to reject the compelling state interest test as having no permanent

place in its First Amendment jurisprudence, and to replace it with time-honored, content-neutral principles permitting the state to regulate people's assemblies only on the basis of precisely and narrowly drawn time, place and manner restrictions.

E. Laws Against Discrimination Must Not Be Allowed to Trump Important Civil Liberties.

At the height of the civil rights movement in the 1960's and into the 1970's, when this Court was faced with constitutionally-based claims of right to be served in restaurants without regard to race, liberal-minded Justices of this Court, including William O. Douglas, Arthur Goldberg, Hugo L. Black, and Thurgood Marshall rejected the notion that it was for government to forcibly conform America in the name of eliminating racial prejudice . *See* Bell v. Maryland, 378 U.S. 226, 313, 345 (1964) (Goldberg, J., concurring and Black, J., dissenting); Palmer v. Thompson, 403 U.S. 217, 238 (1971) (Douglas, J., dissenting); and Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 180 (1972) (Marshall, J., joining Justice Douglas dissent). Since those heady days, the path of equal protection has led the nation to the exaltation of a utopian egalitarianism that threatens to "trump ... civil liberties." Bernstein, "Sex Discrimination Laws Versus Civil Liberties," *supra,* 99 *Univ. of Chi. L. Forum* at ___.

Even the homosexual community has recognized that if the New Jersey court opinion is upheld, it will threaten their right to set their standards for their own organizations which discriminate against "straights." *See* R. Sincere, "New Jersey Supreme Court Ruling on Boy Scouts Threatens Freedom for All — Including Gays," *Wall Street Journal* (August 11, 1999) Independent Gay Forum, www.indegayforum.org/articles/sincere1.html. *See* also N. Ashford, "Equal Rights, Not Gay

Rights," Independent Gay Forum, www.indegayforum.org/articles/ashford7.html.

By upholding the right of the Boy Scouts of America to set its own moral standards, this Court will insure that **all** groups of like-minded Americans may freely associate with one another without government intrusions based upon a state-imposed orthodoxy of opinion.

CONCLUSION

For the reasons set forth above, Public Advocate of the United States, Lincoln Institute for Research and Education, Committee to Protect the Family Foundation, Concerned Women for America, and National Criminal Justice Council respectfully urge this Court to reverse the decision of the Supreme Court of New Jersey.

Respectfully submitted,

HERBERT W. TITUS
TROY A. TITUS, P.C.
5221 Indian River Road
Virginia Beach, VA 23464
(757) 467-0616

WILLIAM J. OLSON*
JOHN S. MILES
WILLIAM J. OLSON, P.C.
Suite 1070
8180 Greensboro Drive
McLean, VA 22102
(703) 356-5070

Attorneys for *amici curiae*
* *Counsel of Record*
February 28, 2000

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BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF *AMICUS CURIAE* OF GAYS AND LESBIANS FOR INDIVIDUAL LIBERTY IN SUPPORT OF PETITIONERS

WILLIAM H. MELLOR*
CLINT BOLICK
SCOTT G. BULLOCK
DANA BERLINER
MATTHEW B. BERRY
INSTITUTE FOR JUSTICE
1717 Pennsylvania Ave., NW
Suite 200
Washington, D.C. 20006
(202) 955-1300

Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. FREEDOM OF ASSOCIATION IS OF PARAMOUNT IMPORTANCE TO ALL AMERICANS, INCLUDING GAY AND LESBIAN AMERICANS 3

II. AS APPLIED TO THE BOY SCOUTS, NEW JERSEY'S LAW AGAINST DISCRIMINATION VIOLATES THE FIRST AMENDMENT 15

III. IF AFFIRMED, THE NEW JERSEY SUPREME COURT'S DECISION WOULD HARM GAY AND LESBIAN AMERICANS 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Adolph Coors Co. v. Wallace, 570 F. Supp. 202 (N.D. Cal. 1983) 8

Aztec Motel v. State, 251 So. 2d 849 (Fla. 1971) 7

Big Mama Rag v. United States, 631 F.2d 1030 (D.C. Cir. 1980) 8

Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987) 4, 22

Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 218 (Cal. 1998).....15, 16

Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999).....23, 24

Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980) 19

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Gay Activists Alliance v. Bd. of Regents of the Univ. of Oklahoma, 638 P.2d 1116 (Okla. 1981)..... 13

Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976)..... 12

Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592 (Cal. 1979) 19

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TABLE OF AUTHORITIES – Continued

Page

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Healy v. James, 408 U.S. 169 (1972) 12, 13, 14

Hurley v. Irish American Gay Group of Boston, 515 U.S. 557 (1995) 20, 23, 26

In re Freedman, 235 A.2d 624 (Pa. Super. 1967)..... 10

In re Gay Activists Alliance v. Lomenzo, 293 N.E.2d 255 (N.Y. 1973)..... 7

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Kerma Restaurant Corp. v. State Liquor Authority, 233 N.E.2d 833 (N.Y. 1967) 11

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TABLE OF AUTHORITIES – Continued

Page

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Page

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Page

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Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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INTEREST OF *AMICUS CURIAE*[1]

Gays and Lesbians for Individual Liberty (GLIL) is a non-partisan organization founded in 1991 to advance the principles of the free market, individual responsibility, and non-interference by government in the private lives of all citizens. GLIL seeks to educate members of the gay and lesbian community about these principles, while at the same time promoting tolerance and acceptance of homosexuals among members of the wider society. GLIL is based in Washington, D.C., with members across the United States and in several foreign countries. To achieve its goals, GLIL sponsors lectures, debates, panel discussions, fundraisers for charitable organizations, and social events. GLIL also publishes a newsletter and utilizes a website to express its views, while its members contribute articles to various publications.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court's decision restricting the ability of the Boy Scouts of America (BSA) to choose its own leaders and define its own membership criteria dangerously erodes the freedom of all Americans, including gay Americans, and should be reversed.

---

[1] In conformity with Supreme Court Rule 37, Gays and Lesbians for Individual Liberty has obtained the consent of the parties to the filing of this brief, and letters of consent have been filed with the Clerk. GLIL also states that counsel for a party did not author this brief in whole or in part and that no persons or entities other than *amicus*, its members, and its counsel made a monetary contribution to the preparation and submission of the brief.

Freedom of association is one of the core liberties safeguarded by the Bill of Rights. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In particular, this Court has consistently recognized that the First Amendment protects the freedom of expressive association, which it has described as the "freedom to engage in association for the advancement of beliefs and ideas." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

While a robust protection for the freedom of association is important to all Americans, it holds a special significance for gay and lesbian Americans. Throughout this nation's history, gays have suffered in a variety of contexts when freedom of association has not been respected and governments have been allowed to trample on the rights of citizens to freely gather together.

An organization's decision whether or not to associate with openly gay individuals conveys a powerful message – either one of openness and tolerance, or one of exclusion and disapproval. Either way, a message is sent. It is therefore troublesome, from a First Amendment perspective, when a well-intentioned law prohibiting discrimination is applied in a way to stifle such communication.

The BSA's ability to communicate its disapproval of homosexuality, for instance, is undoubtedly undermined when the State of New Jersey requires the organization to allow openly gay individuals to become Scoutmasters, individuals who are supposed to serve as role models to young Scouts.

The New Jersey Supreme Court's decision here is especially pernicious for it places the government in the

intolerable position of second-guessing a private organization's interpretation of its own rules and articulation of its own message. If this litigation has made one thing clear, it is that the leadership of the BSA disapproves of homosexuality and wishes to communicate this in some form to its membership and to the outside world.

An organization's freedom of expressive association cannot depend upon the degree to which it may choose to emphasize certain aspects of its message at certain times. Such a rule, in fact, works perversely to the detriment of gay Americans. Under the test adopted by the New Jersey Supreme Court, which accords protection only to forcefully stated messages, groups such as the Boy Scouts will be encouraged to stress their anti-gay views so that they may retain their freedom of expressive association.

GLIL strongly disapproves of the BSA's moral views with respect to homosexuality and wishes the organization would voluntarily end its policy of excluding gays from serving as Scoutmasters. Nevertheless, the First Amendment protects the freedom of the BSA to maintain this misguided policy if it so desires. To deny the BSA's right to express its moral views through its decisions to associate with or exclude certain people endangers the rights of all Americans, including gay Americans.

ARGUMENT

I. FREEDOM OF ASSOCIATION IS OF PARAMOUNT IMPORTANCE TO ALL AMERICANS, INCLUDING GAY AND LESBIAN AMERICANS.

This Court has long recognized that freedom of association is a vital aspect of the liberty secured by the Bill of Rights and Fourteenth Amendment. See, e.g., *NAACP v.*

Alabama ex rel. Patterson, supra. In protecting this important freedom, this Court's jurisprudence has divided associational liberty into two separate spheres.

First, it has identified what is commonly referred to as the freedom of intimate association, which "protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships." *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537, 544 (1987). And second, it has protected what is commonly known as the freedom of expressive association, which gives Americans the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." See *Roberts*, 468 U.S. at 622 (1984).

This Court has explained that freedom of expressive association is "indispensable" to preserving the whole host of liberties protected by the First Amendment. See *id*. at 618. "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were also not guaranteed." *Id*. at 622. And, this Court has noted that in determining the level of protection to be given to expressive association, "it is immaterial whether the beliefs sought to be advanced pertain to political, economic, religious or cultural matters." *NAACP*, 357 U.S. at 460.

While freedom of association is important to all Americans, it holds a special significance for gays and lesbians. The right to freely associate is one that has been violated repeatedly throughout American history and is still threatened with regularity even today. In particular, government has consistently targeted gays' freedom of

association, with persecution of gay organizations, nightclubs, and student groups especially prevalent. This situation has gradually improved, however, as more robust protection for everyone's right to freely associate has allowed gay organizations and institutions to grow and operate openly.

Political Organizations

Government attempts to disrupt gay organizations began as soon as those organizations started operating in the public eye. The Society for Human Rights, the first American gay organization, was formed in Chicago in 1924 with the purposes of uniting gays, creating a publication, discouraging sex with minors, and educating legislators and the public about homosexuality.[2] The founder of the Society and several of its members, however, were soon prosecuted for disorderly conduct by hostile government officials. One pleaded guilty; the founder succeeded in court but lost his job.[3] This event put an end to the Society in 1925.[4]

The federal government for many years engaged in a policy of surveillance of gay organizations. According to an investigation in 1950, the Army and Navy both kept files on thousands of alleged homosexuals.[5] The FBI also kept track of and harassed gay organizations, as well as gay individuals. It initiated a security investigation into

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[2] See Jonathan Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* 385-89 (1976 ed.) [hereinafter *Gay American History*].

[3] See William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 44-45 (1999) [hereinafter *Gaylaw*].

[4] See *Gay American History* at 393.

[5] See *Gaylaw* at 74.

the Mattachine Society[6] in 1953 and began maintaining a file on the Daughters of Bilitis[7] in 1959.[8] In 1956, FBI agents visited the office of *One*, a gay journal, and threatened employees regarding statements made in the journal about the presence of homosexuals in the FBI. Agents also notified the employers of the journal's staff of their participation in a homosexual publication.[9]

At the same time as this harassment was taking place, the U.S. Supreme Court gave teeth to the freedom of association embodied in the First Amendment. First, in *Yates v. United States*, 354 U.S. 298 (1957), it indicated that Communists had the right to participate in organizations and engage in anti-American advocacy. One year later, the Court held that the State of Alabama could not require the disclosure of the NAACP's members. See *NAACP v. Alabama ex rel. Patterson, supra*.[10] Not coincidentally, gay organizations began to operate more openly in the late 1950s.[11]

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[6] The Mattachine Society was formed in 1950 as a "service and welfare organization devoted to the protection and improvement of Society's Androgynous Minority." *Gay American History* at 409. Its purposes included integrating homosexuals into society and seeking legal reform. *Id.* at 409-10.

[7] The Daughters of Bilitis was the first American lesbian organization. Its purpose was to promote the integration of lesbians into society through education and legislative reform. *Id.* at 336, 426.

[8] *Gaylaw* at 74-75.

[9] *Id.* at 75-76.

[10] See also *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark. 1968), *aff'd per curiam*, 393 U.S. 14 (1968) (no forced disclosure of Republican Party membership).

[11] See *Gaylaw* at 93.

Unfortunately, attempts at suppression of gay organizations did continue throughout the 1960s and 1970s. This Court's freedom of association decisions, however, provided the crucial framework for overturning most government efforts to interfere with gay associations. In addition to the decisions of the 1950s, this Court in 1963 provided further support for the freedom of association in *NAACP v. Button*, 371 U.S. 415 (1963). It held that the NAACP's activities were "modes of expression and association protected by the First and Fourteenth Amendments," *id.* at 428-29, and could not be prohibited by Virginia's ban on solicitation of legal clients.

The importance of the two *NAACP* decisions to gay people became apparent almost immediately. In the wake of the 1963 *NAACP v. Button* decision, Congress later that same year tried to revoke the District of Columbia charitable solicitation license of the Mattachine Society on the grounds that government should not sanction the association of gay people. The bill passed the House but failed in the Senate.[12]

States also attempted to deny incorporation to gay groups. New York courts overturned state refusals to recognize gay organizations,[13] although Ohio courts

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[12] *Gaylaw* at 114.

[13] See *In re Gay Activists Alliance v. Lomenzo*, 293 N.E.2d 255 (N.Y. 1973) (per curiam); *In re Thom*, 301 N.E.2d 542 (N.Y. 1973). See also *Aztec Motel v. State*, 251 So. 2d 849, 854 (Fla. 1971) (finding unconstitutionally vague statute that permitted the dissolution of a corporation where officers engaged in, *inter alia*, "organized homosexuality"); *Gaylaw* at 114-15 and accompanying notes.

upheld the denial of incorporation to the Greater Cincinnati Gay Society.[14] And through the late 1970s, the IRS denied tax-exempt certification to organizations that "promoted" homosexuality until a federal court held that its policy violated the First Amendment.[15]

This Court's decisions strengthening the freedom of association have also protected members of gay organizations from disclosure. In *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202 (N.D. Cal. 1983), the Coors Company sued various parties for allegedly interfering with a contract between Coors and a radio station by criticizing the company's political positions. Coors sought discovery of the identity of a gay organization's members, but the court rejected the request, relying on this Court's earlier rulings upholding freedom of association. *Wallace*, 570 F. Supp. at 207-08.

Gay people are making significant progress toward full acceptance and equality, yet they should not sacrifice freedom of association as an expedient to that goal. Loss of constitutional rights subjects all Americans, including gay people, to pure majoritarian rule. And while some states, such as New Jersey, discourage discrimination against gays, others, like Colorado, may actually encourage it.[16] This Court in *Romer v. Evans*, 517 U.S. 620 (1996), found that Colorado had impermissibly attempted, *inter alia*, to prevent gay people from seeking redress from

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[14] See *State ex rel. Grant v. Brown*, 313 N.E.2d 847 (Ohio 1974) (per curiam), *cert. denied*, 420 U.S. 916 (1975).

[15] See *Big Mama Rag v. United States*, 631 F.2d 1030 (D.C. Cir. 1980); Rev. Ruling 78-305, 1978-2 C.B. 172; *Gaylaw* at 115.

[16] See "Legislating Equality," Report of National Gay Lesbian Task Force (1999) at *http://www.ngltf.org/pubs/legeq99.pdf*.

their government in the same way as other citizens. In 1992, Colorado adopted a constitutional amendment precluding all legislative, executive, or judicial action at any level of state or local government designed to protect gays, lesbians, or bisexuals. This Court found the amendment violated the Fourteenth Amendment by placing such persons on an unequal footing with all other citizens. *Id.* at 634. In its decision, the Court also alluded to the detrimental effects of the amendment on freedom of association. Because the amendment prevented gay people from pursuing reforms through local ordinances or even state statutes, gay organizations would have been restricted from all political efforts other than seeking constitutional amendments. *Id.* at 631. Gay associations at public universities and associations of gay public employees also would have been immediately affected, as the amendment reversed bars on discrimination at universities and in public employment. *Id.* at 629. Therefore, although *Romer* is not technically a First Amendment case, it nevertheless lends support to the right of gay people to form associations for political ends.

Social Organizations and Nightclubs

Police departments and other government bodies, as well as private individuals, have historically sought to prevent gays from assembling, meeting one another, and forming intimate and expressive associations. Even the presence of a gay establishment in a neighborhood can have an expressive component, indicating that the establishment, and perhaps the neighborhood, is one where gay people are welcome and treated with respect. A gay bar or other meeting place also expresses the belief of the owner and patrons that gay people should have a place to congregate. These are important, positive messages. But

they are also sufficiently controversial to engender vigorous dissent and attempts to interfere with gay association at these establishments.

Police interference with gay social events and nightclubs has a sordid and often violent history in the United States. As early as 1899, the City of New York launched a campaign to close bars at which gay people congregated.[17] In the 1930s, police harassed and raided "drag balls" (competitive singing performances of men in drag) in New York, Los Angeles, Atlantic City, and San Francisco.[18]

Many cities also raided, closed down, and revoked liquor licenses for gay bars and nightclubs on the grounds that a gathering place for homosexuals constituted a disorderly house or public nuisance.[19] Police raids often resulted in arrests for disorderly conduct and vagrancy.[20] In the 1950s, police raids of gay establishments and arrests of gay people increased dramatically.[21] Indeed, it was one such interference with gay people's right to associate (at the Stonewall bar in New York City

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[17] See *Gay American History* at 44-47.

[18] See *Gaylaw* at 45.

[19] See *id.* at 45-46, 78-80; J.F. Ghent, "Sale of Liquor to Homosexuals or Permitting Their Congregation at Licensed Premises as Ground for Suspension or Revocation of Liquor License," 27 A.L.R.3d 1254 (2000). See, e.g., *Killeen v. United States*, 224 A.2d 302 (D.C. App. 1966); *Kotterman v. Grevemberg*, 96 So. 2d 601 (La. 1957); *Paddock Bar, Inc. v. Div. of Alco. Bev. Control*, 134 A.2d 779 (N.J. App. 1957); *Lynch's Builders Restaurant v. O'Connell*, 103 N.E.2d 531 (N.Y. 1952); *In re Freedman*, 235 A.2d 624 (Pa. Super. 1967).

[20] *Gaylaw* at 44, 64 & accompanying notes; see, e.g., *Gay American History* at 45-46.

[21] See *Gaylaw* at 62-65.

in 1969) that led to large demonstrations and the political formation of the gay rights movement.[22]

Eventually, state courts began applying this Court's freedom of association jurisprudence, thus allowing gay bars to operate freely.[23] Moreover, this Court admonished against overly vague criminal statutes, like the vagrancy laws sometimes used to arrest gay people congregating in bars. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Strict enforcement of the right to freedom of association has therefore enabled gay bars and social organizations to multiply.

Even today, however, the desire to suppress gay institutions has not disappeared. Many private citizens attack gay establishments or people attending them precisely because they disagree with the message of acceptance and celebration of homosexuality that a gay establishment suggests.[24] As majority opinion often disfavors gay establishments, it is vital to preserve freedom of association so that local governments will not attempt to use their power to discourage gays from congregating. Hostile private parties may enlist government bodies using condemnation, zoning, or other legal devices to block gay

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[22] See *Gay American History* at 347.

[23] See *Gaylaw* at 112-113. See, e.g., *Vallerga v. Dept. of Alco. Bev. Control*, 347 P.2d 909 (Cal. 1959); *One Eleven Wines & Liquors, Inc. v. Div. of Alco. Bev. Control*, 235 A.2d 12 (N.J. 1967); *Kerma Restaurant Corp. v. State Liquor Authority*, 233 N.E.2d 833 (N.Y. 1967).

[24] See, e.g., "Local Police Chief Accused of Supplying Confidential Information About [Gay] Activist," *Associated Press State & Local Wire* (March 31, 1999) (gay bar subjected to repeated attacks); Ron Martz & Kathy Scruggs, "Credit for 2 Bombings Claimed," *Atlanta Journal and Constitution* (Feb. 25, 1997) at 1A (bomber claimed to target "sodomite" organizations).

establishments.[25] For instance, when Camp Sister Spirit, a lesbian retreat, opened in rural Mississippi, local residents brought an unsuccessful statutory nuisance lawsuit in an attempt to close the institution.[26] A strong right to associate protects against such incursions.

Student Groups

This Court's freedom of association jurisprudence also has been of enormous benefit to gay associations at universities and schools. University students began to form gay student groups in the 1960s. Initially, public universities denied these groups recognition and student activities' funding. Gay student organizations received a major boost, however, when this Court recognized in *Healy v. James*, 408 U.S. 169 (1972), that university students have the First Amendment right to form associations. Shortly thereafter, federal circuit courts upheld students' rights to form recognized gay associations at public universities.[27]

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[25] See, e.g., "Foes Want Last Call at Bar in Marigny," *Times-Picayune* (Nov. 5, 1999) at B1 (nuisance); David Cazares, "Gay Club at Center of Debate," *Sun-Sentinel (Ft. Lauderdale)* (Mar. 11, 1999) at 1B (zoning); Natasha Kassulke, "Filling the Void," *Wisconsin State Journal* (Feb. 19, 1998) at 3 (parking regulations); Bud Kennedy, "School Proposal Calls for Razing 21-year-old Gay Bar," *Fort Worth Star-Telegram* (Sept. 7, 1999) at B1 (condemnation).

[26] "Mississippi Feminist Camp Can Stay Open, Judge Says," *Orlando Sentinel* (July 7, 1995) at A10.

[27] See *Gay Students Organization v. Bonner*, 509 F.2d 652 (1st Cir. 1974); *Gay Student Servs. v. Texas A. & M. Univ.*, 737 F.2d 1317 (5th Cir. 1984); *Gay Lib v. Univ. of Missouri*, 558 F.2d 848 (8th Cir. 1977); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976). See also *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361

Just as *Healy v. James* improved the rights of gays to form student associations, this Court's recent decision in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), also strengthens the rights of free speech and expressive association for everyone, including gay Americans. In *Rosenberger*, this Court held that the University of Virginia's refusal to give a controversial student newspaper, expressing anti-gay and religious views, funds from the school's student activities fee constituted impermissible viewpoint discrimination.

In the first federal appellate case considering the effect of *Rosenberger* on a gay association, the Eleventh Circuit concluded that the University of South Alabama, a public university, could not deny a gay student group funding or a student association bank account. See *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997). Thus, a case upholding the entitlement to university funding of a student newspaper expressing anti-gay views ultimately is helping to vindicate the free speech and association rights of gay Americans.

Public high school student organizations appear to be the next frontier for the freedom of association. Many high school students have begun to form "gay-straight alliances," groups with both gay and non-gay members that provide a forum for open discussion and work to diminish anti-gay violence and harassment in schools. Although many public schools have permitted these groups to form, others have tried various tactics to interfere with their associational freedom. One California

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(8th Cir. 1988); *Student Coalition for Gay Rights v. Austin Peay State Univ.*, 477 F. Supp. 1267 (M.D. Tenn. 1979); *Wood v. Davison*, 351 F. Supp. 543 (N.D. Ga. 1972); *Gay Activists Alliance v. Bd. of Regents of the Univ. of Oklahoma*, 638 P.2d 1116 (Okla. 1981).

school district tried to ban a gay-straight club, but a federal district court issued a preliminary injunction allowing the club to meet during the pendency of the lawsuit.[28] In Utah, after a similar court ruling, a school board, supported by the legislature, actually went to the extreme lengths of prohibiting all extracurricular clubs.[29] Most schools, however, will not go so far, and clear application of *Healy* and *Rosenberger* can be seen in the comparatively large numbers of high schools that now allow these organizations.[30]

Banning public school gay-straight student clubs also runs afoul of the Equal Access Act of 1984. Ironically, the Act was passed primarily at the behest of religious conservatives to allow religious clubs at public schools.[31] Associational freedom, though, applies to all, and gay public high school student groups have benefited just as much as religious groups.

In sum, gays as much as any disfavored group have suffered whenever the state has abridged freedom of association. To protect their own freedom of association, gays must stand firm for the freedom of association of others, even groups that exercise that freedom by excluding gays.

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[28] See Barbara Whitaker, "To Outlaw Gay Group, District May Ban Clubs," *New York Times* (Feb. 10, 2000) at A24.

[29] See Jennifer Toomer-Cook, "S.L. District Wins Club Suit," *Deseret News* (Nov. 6, 1999) at A1; Utah Admin. Code § 277-617-4 (passed Feb. 19, 1997).

[30] The Gay, Lesbian and Straight Education Network estimates there are currently over 700 gay-straight alliances at high schools. See Harriet Barovick, "Fear of a Gay School," *Time* (Feb. 21, 2000) at 52.

[31] *Id.*

II. AS APPLIED TO THE BOY SCOUTS, NEW JERSEY'S LAW AGAINST DISCRIMINATION VIOLATES THE FIRST AMENDMENT.

The New Jersey Supreme Court's decision requiring the Boy Scouts to accept openly gay Scoutmasters imperils all Americans' freedom of expressive association. As the California Supreme Court has stated, "the Boy Scouts is an expressive social organization whose *primary function* is the inculcation of values in its youth members." *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 238 (Cal. 1998) (emphasis added). Among the values it seeks to transmit is the view that "homosexuality is immoral and incompatible with the Boy Scout Oath and Law." *Curran*, 952 P.2d at 225. In particular, the BSA maintains that homosexual conduct violates the admonitions contained in the Scout Oath and Law that Scouts should be "morally straight" and "clean."

Amicus GLIL strongly disagrees with the message the BSA seeks to convey about homosexuality as well as the organization's policy of excluding gays from serving in leadership positions. GLIL recognizes, however, that the First Amendment protects not just "free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

Permitting New Jersey's Law Against Discrimination to require the BSA to accept openly gay Scoutmasters would represent a dangerous erosion of the First Amendment because it would diminish the organization's ability to effectively communicate its chosen message. The Scoutmaster Handbook states that "[b]oys learn from the example set by their adult leaders." Therefore, "[t]he Scouting program is organized around the principle that

the most effective way to teach the values of Scouting is through the leadership, counseling and example of the Scoutmaster." *Curran*, 952 P.2d at 226. Given this philosophy, it is important to ask the crucial question: what message would be sent to Scouts by the presence of openly gay Scoutmasters?

Amicus GLIL believes that the presence of openly gay Scoutmasters would send a positive message both to the boys in the organization and society as a whole. Much media attention has focused recently on the explosion of openly gay characters in movies and television programs, and those characters' role in fostering tolerance and acceptance of homosexuality.[32] The NBC sitcom *Will and Grace*, for example, features the first male homosexual lead character in any network prime time series: an openly gay attorney. While not overtly political, one commentator has noted, "There's a message to *Will and Grace* that homosexuality is just different, not better or worse,"[33] a sentiment with which GLIL concurs.[34]

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[32] See, e.g., Neal Justin, "Gays of Our Lives," *Star Tribune (Minnepolis)* (Nov. 7, 1999) at 1F; Manuel Mendoza, "More Gay Characters, Less Furor," *Dallas Morning News* (Apr. 28, 1999) at 1C.

[33] Julia Duin, "*Will & Grace* Makes Splash, But Few Waves," *Washington Times* (Oct. 16, 1998) at A2 (quoting Thomas Johnson, senior writer for the Parents TV Council).

[34] Scott Seomin, entertainment media director for the Gay & Lesbian Alliance Against Defamation, also explains, "When a gay child is struggling with his sexual identity and he sees a character like Will Truman, who is fully realized, has a good job and a nice apartment and friends who care about him, it has a real effect on how a gay kid views himself and his world." See Mendoza, *supra* note 32.

Fictional characters undoubtedly are an important means of changing societal attitudes about homosexuality. But even more effective are real life examples of openly gay individuals serving in positions at the core of our nation's civic life. When openly gay Americans occupy stations of public respect and prominence, a number of positive developments take place.

To begin with, the accomplishments and examples of openly gay individuals combat unfavorable stereotypes held by many heterosexual Americans. For instance, Matt Foreman, executive director of the Empire State Pride Agenda, explains that in the political arena, "There is something uniquely important about electing openly lesbian and gay people to office. . . . *It dispels stereotypes very quickly.*"[35] (emphasis added).

It is difficult to overstate the impact that openly gay Americans participating in public life have on societal attitudes about homosexuality. By encountering openly gay individuals on a day-to-day basis, straight Americans come to understand that gays deserve to be treated with tolerance and respect. As President Clinton's liaison to the gay community Elizabeth Julien Potter has put it, "What we've learned is that the only way for people to change hearts and minds is by coming out."[36] Similarly, openly gay actor Ian McKellen recently noted after receiving an Academy Award nomination, "This just

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[35] Somini Sengupta, "By The Way, A Mayor-Elect Is Gay," *New York Times* (Nov. 6, 1999) at B5.

[36] Michael Mello, "Gay and Lesbian Officials Still Crowded in Closet," *Associated Press State & Local Wire* (Nov. 19, 1999).

shows the importance of people in public life being honest and open about their sexuality because it encourages people to see there is nothing wrong with it."[37]

Apart from the powerful effect on the attitudes of society as a whole, the presence of openly gay Americans in civic life has a particularly significant effect on gay youth. Successful gay adults serve as role models for gay youth, encouraging them to embrace who they are and to be honest with their friends and families. Whether they are athletes,[38] teachers,[39] journalists,[40] community activists,[41] or government officials,[42] gay role models play a

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[37] Susan Wloszczyna, "Between Love and War Shakespeare Nets 13," *USA Today* (Feb. 10, 1999) at 1D.

[38] Chris Jones, "Ex-Boxer Leduc Still Battles to Help Young Gay Athletes," *London Free Press* (June 23, 1999) at B6 (telling story of openly gay Olympic silver medallist in boxing); Bill Kaufman, "Tewksbury Faces Snubs," *Calgary Sun* (Dec. 21, 1998) at 15 (recounting controversy surrounding openly gay Olympic gold medallist in swimming who now gives motivational speeches).

[39] Valerie Schremp, "Gay Students, Teachers Look for Network of Support," *St. Louis Post-Dispatch*, (Feb. 10, 1999) at B1 (openly gay teacher Rodney Wilson notes, "Well-adjusted gay adults are invaluable role models for gay youth").

[40] Simon Houston, "I Came Out So Kids Would Have A Better Gay Role Model Than Dale Winton," *Daily Record* (Oct. 4, 1999) at 9 (reporting that BBC anchorman revealed his homosexuality to "offer himself as role model for gay teenagers").

[41] Stephen Magagnini, "Slain Couple Were 'Soul of Redding'," *Sacramento Bee* (July 15, 1999) at A1 (noting that slain community leaders "served as role models for young people grappling with their own homosexuality").

[42] John L. Mitchell, "At 15, West Hollywood's Going Strong," *Los Angeles Times* (Nov. 13, 1999) at B1 (West Hollywood City Councilman Mayor Heilman explains that it is

crucial role in easing the loneliness and despair felt by most gay teenagers[43] and helping them to see themselves as part of a larger community.

Many courts have already recognized the expressive component of identifying oneself as gay.[44] See, e.g., *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 610-11 (Cal. 1979) (holding that "com[ing] out of the closet" is "political activity" under Calfornia law); *Fricke v. Lynch*, 491 F. Supp. 381, 384-85 (D.R.I. 1980) (holding that attending high school prom as same-sex couple constitutes "political statement" worthy of First Amendment

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important for young people "to realize that there are professional gays and lesbians in positions of power, whether in the City Council or administrative positions. There weren't that many role models 20 years ago").

[43] See, e.g., Martha Knox, "Schools Should Help Homosexuals Early," *University Wire* (Sept. 24, 1999) (reporting that 80% of gay teenagers experience feelings of strong social isolation). Merri Rosenberg, "A Center Offers a Haven for Gay Teenagers," *New York Times* (Aug. 29, 1999) at § 14WC, pg. 7 (noting that gay teenagers are two to three times more likely than their heterosexual counterparts to attempt suicide and are at increased risk of dropping out of school, becoming homeless, or being a victim of violence).

[44] Respondent Dale denies the expressive nature of identifying oneself as gay. See Brief In Opposition to Petition for Writ of Certiorari at 26. But while such an argument may serve his interests in this particular case, it would work to the detriment of gay and lesbian Americans in other cases, such as those involving First Amendment protection for openly gay government employees. See, e.g., *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998) (holding that removal of public high school volleyball teacher for acknowledging her homosexuality violated the First Amendment).

protection). This Court, in fact, specifically noted in *Hurley v. Irish American Gay Group of Boston*, 515 U.S. 557, 574 (1995), that the presence of openly gay marchers in a parade "would suggest [the] view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals." Justice Brennan also pointed out that acknowledging one's homosexuality "necessarily and ineluctably" involves one in the ongoing debate about the rights of gay Americans and is therefore deserving of constitutional protection. *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1012 (1985) (Brennan, J., dissenting from denial of certiorari).

Moreover, the expressive message communicated by identifying oneself as gay has been noted by legal scholars sympathetic to gay rights. Professor William Eskridge, for example, states that "coming out of the closet as a gay person is also an explicitly political act." William N. Eskridge, Jr., A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law, 106 *Yale L.J.* 2411, 2443 (1997). See also Evan Wolfson & Robert S. Mower, When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update On the Fight Against "Sodomy" Laws, 21 *Fordham Urb. L.J.* 997, 1025 n.100 (1994); Jose Gomez, The Public Expression of Lesbian/Gay Personhood as Protected Speech, 1 *Law & Ineq. J.* 121 (1983).

In short, GLIL believes that the participation of openly gay Americans in all aspects of this nation's public and civic life is important because it sends a positive

message of tolerance and acceptance to society.[45] Similarly, the service of openly gay individuals, like James Dale, as Scoutmasters would signal to young Scouts that homosexuality at the very least should be tolerated and that openly gay individuals can be good role models.

Consistent with the First Amendment, however, this message must be sent through private choice and must not be communicated due to government coercion. In *Roberts v. United States Jaycees*, this Court made it clear that "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. It therefore explained:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together.

Id. Consequently, infringements on an expressive organization's right to define its own membership and select its own leaders must pass strict scrutiny. See *id.*

In *Roberts*, this Court upheld the Minnesota Human Rights Act's requirement that the Jaycees allow female members. It determined that the Act advanced the State of Minnesota's compelling interest in eradicating sex discrimination through the least restrictive means because the "Jaycees . . . failed to demonstrate that the Act

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[45] Just as the statement, "I am gay," has profound expressive impact, so does membership in a gay organization. Many organizations make expressive statements simply by their names, e.g., Human Rights Campaign, Parents and Friends of Lesbians and Gays.

impose[d] any serious burdens on male members' freedom of expressive association." *Id.* at 626. The Court concluded that "[t]here is . . . no basis in the record for concluding that admission of women as full voting members will impede the organization's ability . . . to disseminate its preferred views." *Id.* at 627.[46]

This case, however, is easily distinguishable from *Roberts*. There, the Jaycees made no claim that the organization wished to exclude women in order to convey a specific message about the female gender, such as that women are inferior to men and shouldn't participate in civic life, or barred women to maintain a male-only environment. Indeed, such contentions would have been absurd as the Jaycees had already invited women to take part in most of the group's activities. See *Roberts*, 468 U.S. at 627. Rather, the Jaycees merely hypothesized that women may have different views than men on some issues so their inclusion as voting members might affect the organization's position on certain public policy issues. See *id.* at 627-28.

By contrast, the BSA here correctly contends that requiring the organization to accept openly gay Scoutmasters would *directly undermine* its ability to communicate its disapproval of homosexuality to young Scouts. As

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[46] See also *Rotary Club*, 481 U.S. at 548 (upholding California's Unruh Act requirement that Rotary Club admit women as members because "evidence fail[ed] to demonstrate that admitting women to Rotary Clubs [would] affect in any significant way the existing members' ability to carry out their various purposes"); *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988) (rejecting facial attack on application of New York City's Human Rights Law to private eating clubs because the Law did "not affect 'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints").

previously explained, the presence of openly gay Americans in civic life sends precisely the opposite message of that which the Boy Scouts seek to convey: gays should be accepted for who they are and can serve as admirable role models. Cf. *Hurley*, 515 U.S. at 574.

It is simply untenable to maintain, as did the New Jersey Supreme Court, that the presence of openly gay Scoutmasters would not "compel [the] Boy Scouts to express any message." *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1229 (N.J. 1999). Pursuant to Boy Scout philosophy, "[b]oys learn from the example set by their adult leaders." And from the example set by openly gay Scoutmasters, Scouts would learn that people shouldn't be ashamed of who they are and that differences in sexual orientation should be tolerated. While these are admirable sentiments, they are unfortunately not the values the BSA wishes to relay to its young members.

Any attempt by the BSA to communicate its disapproval of homosexuality to young Scouts would inevitably be hampered by the presence of openly gay Scoutmasters within the organization. As the Scoutmaster Handbook advises, Scoutmasters are expected to "practice what [they] preach" as "[t]he most destructive influence on boys is adult inconsistency and hypocrisy." If Scoutmasters, who are supposed to serve as role models for young Scouts, are openly gay, how will the BSA be able to convince young Scouts of its view that homosexuality is wrong? To say the least, the organization's message will be muddled.

The New Jersey Supreme Court attempted to avoid this First Amendment quagmire by reinterpreting the BSA's rules. According to the Court, the plain meaning of the Scout Oath and Law does not forbid homosexual

conduct, and the organization produced insufficient evidence that it wished to communicate its disapproval of homosexuality to Scouts. See *Dale*, 734 A.2d at 1223-25.

While amicus GLIL agrees with the New Jersey Supreme Court that gays can be "morally straight" and "clean," the BSA evidently does not concur, and it is patently offensive to First Amendment values for the government to reject an organization's interpretation of its own moral code.[47]

III. IF AFFIRMED, THE NEW JERSEY SUPREME COURT'S DECISION WOULD HARM GAY AND LESBIAN AMERICANS.

Respondent Dale and a number of *amici* gay advocacy groups argue that a loss for the Boy Scouts here would be a victory for gay Americans. But diminution in the scope of freedom of association is not something that gay people should hail. If the BSA loses, private organizations and institutions will have substantially diminished control over the composition of their membership and leadership. For the large number of gay organizations that seek to remain exclusively gay or gay-controlled, this decision could sound a death knell.

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[47] It is also irrelevant that religious organizations sponsoring Boy Scout troops do not share a common perspective on homosexuality. See *Dale*, 734 A.2d at 1224-25. A national organization does not lose its right to expressive association merely because a minority of its local affiliates may disagree with one of its policies. In fact, the ongoing dispute within the BSA regarding its policy toward openly gay individuals only serves to underscore the expressive message the policy communicates. See Jennifer Levitz, "Boy Scouts' Top Officials Launch Study of Homosexuality," *Providence Journal-Bulletin* (Aug. 14, 1999) at 1A.

Gay organizations often seek exclusively gay environments. There are exclusively gay social and activity clubs,[48] web sites,[49] retreats,[50] vacations,[51] and alumni and professional organizations.[52] Lesbian organizations and institutions, in particular, often seek to limit membership and participation. Many lesbian bars and clubs bar all men, straight men, or unaccompanied men, and many women's music festivals exclude men.[53] Sometimes organizations have no explicit policy excluding straight people, but their names indicate that they are meant to be gay organizations, e.g. Federal Gay Lesbian or Bisexual

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[48] See, e.g., Family Pride Coalition Website at *http://www.familypride.org/parentinggroups.html* (gay parenting and family groups); Golden Threads Website at *http://members.aol.com/goldentred* (older lesbians); GALA Choruses Website at *http://www.galachoruses.org* (gay and lesbian singing groups); SAGA North Website at *http://saganorth.com* (gay and lesbian winter sports club).

[49] See, e.g., Lesbian.org Website at *http://www.lesbian.org*; Gay.com Website at *http://www.gay.com*.

[50] See, e.g., Celebrate! Website at *http://www.celebrate.cwc.net/celebratemain.html* (annual retreat for lesbians and gay men); Triangle Recreation Camp Website at *http://www.camptrc.org* (camp site).

[51] See, e.g., Gay Travel Plus Website at *http://www.gaytravelplus.com/* (many gay and lesbian travel options); Gay Cruise Vacations Website at *www.gaycruisevacations.com* (gay cruises).

[52] See, e.g., Harvard Gay and Lesbian Caucus Website at *http://www.hglc.org/hglc*; Massachusetts Lesbian & Gay Bar Association Website at *http://www.mlgba.org*.

[53] See, e.g., Michigan Womyn's Music Festival Website at *http://www.michfest.com/General/general.htm*; North East Women's Musical Retreat Website at *http://members.aol.com/NEWMR99/page6.html*

Employees.[54] Finally, while many organizations do not insist on an exclusively gay membership, there would be resistance to leadership by heterosexuals. For instance, gay people certainly would not wish to force a group like Parents and Friends of Lesbians and Gays[55] to accept as a volunteer leader someone who was also active in Parents and Friends of Ex-Gays,[56] a group that counsels that gay people should try to become heterosexual.

Such threats are far from theoretical; at least one anti-gay group has already sued a gay parade for the right to participate and protest.[57] A state court ruled against the group on grounds similar to this Court's decision in *Hurley, supra*,[58] once again showing that gay Americans need the right to control their message as much, if not more, than other Americans. For gay organizations that wish to keep consistent the ideological perspective of their leaders, and for lesbians and gay men who want to preserve spaces that are exclusively lesbian or gay, a decision in favor of the Boy Scouts will protect their ability to maintain and control their expressive associations.

Moreover, the New Jersey Supreme Court's ruling if upheld would also work perversely to the detriment of gay individuals in a less obvious manner. Associations,

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[54] See Federal GLOBE Website at *http://www.fedglobe.org*.

[55] See Parents, Families, and Friends of Lesbians and Gays Website at *http://www.pflag.org*.

[56] See Parents & Friends of Ex-Gays Website at *http://www.pfox.org*.

[57] See Pat Flynn, "Hedgecock, Others Sue Over Gay Parade," *San Diego Union-Tribune* (July 13, 1994) at B2.

[58] See Pat Flynn, "Anti-Gay Protesters Barred From Today's Parade," *San Diego Union-Tribune* (July 16, 1994) at B3.

such as the Boy Scouts, seeking to preserve their freedom to express their disapproval of homosexuality would no longer be able to do so in a quiet manner. Instead, they would have to explicitly emphasize their anti-gay message in order to preserve their right to select their own leaders and define their own membership. Needless to say, such an outcome would hardly be to the benefit of gay Americans.

The New Jersey Supreme Court's decision will affect the shape of organizations' messages in subtle but meaningful ways. For example, if one examines the history of the Scouting movement, it is not surprising that there exists no explicit prohibition of homosexual conduct in Scout Law. This is because Scout Law is a collection of positive exhortations and not one of negative commands.

While the father of the Scouting philosophy, Lord Baden-Powell, most certainly wished to discourage immoral behavior among boys, he did not believe that a list of prohibitions was the best means of accomplishing this end. He wrote, " 'Don't,' of course is the distinguishing feature and motto of the old-fashioned system of repression; and is a red rag to a boy. It is a challenge to him to do wrong."[59] This is why Scout Law contains no prohibition against theft or murder even though this is conduct that respondent Dale would surely admit the BSA seeks to discourage.

The BSA's subtler manner of articulating its message, however, could not survive under the New Jersey Supreme Court's reasoning if the organization wished to retain its freedom of expressive association. Rather than utilizing a list of positive prescriptions combined with a reliance on the examples provided by role models, the

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[59] E.E. Reynolds, *Baden-Powell* 158 (1943).

BSA instead would have to try to influence conduct by communicating a list of clear and specific rules forbidding various behaviors in order to be able to exclude certain individuals from serving in a leadership capacity. Additionally, other organizations seeking to exclude gays would similarly have to amplify anti-gay sentiment so as to be assured of retaining their freedom of expressive organization. As a result, the shape and perhaps even the effectiveness of organizations' messages will be altered, and the volume of anti-gay rhetoric will artificially increase due to government intervention in the marketplace of ideas.

Indeed, this case illustrates the wisdom of Justice O'Connor's opinion in *Roberts v. United States Jaycees*. In her concurrence, Justice O'Connor forecast the difficulties that would flow from requiring an organization to prove that "the admission of unwelcome members 'will change the message communicated by the group's speech.' " *Roberts*, 468 U.S. at 632. She objected that "[w]hether an association is or is not constitutionally protected in the selection of its membership should not depend on what the association says or why its members say it." *Id.* at 633.

Instead, Justice O'Connor argued that associations predominantly engaged in protected expression should enjoy complete First Amendment freedom to define their own membership and select their own leaders. *Id.* at 637. Such an approach has the advantage of avoiding many of the thorny disputes present in this case. Will the presence of openly gay Scoutmasters undermine the BSA's chosen message? Does the BSA really wish to communicate a message to Scouts that homosexuality is immoral? And if so, in what form should it do this?

Justice O'Connor's approach has the virtue of recognizing that the answers to these questions are best left to

private organizations to figure out for themselves, and should not be second-guessed by courts. As such, her suggested rule of law would provide the best protection for both straight Americans' and gay Americans' freedom of expressive association and should be adopted by this Court.

If the Court were to apply Justice O'Connor's test in this case, there is little doubt that the Boy Scouts would qualify as an organization primarily engaged in protected expression rather than a commercial organization. As Justice O'Connor herself noted, "protected expression may . . . take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service." *Roberts*, 468 U.S. at 636. She also explained that "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.* (citing, among other sources, *The Official Boy Scout Handbook*).

CONCLUSION

Freedom of association plays a vital role in safeguarding all of the liberties protected by the First Amendment. While a creeping infringement of this freedom would harm all Americans, it would particularly threaten the welfare of gay and lesbian Americans, who have historically suffered when government has not respected citizens' right to gather together free from government harassment. Therefore, to paraphrase Voltaire, while amicus GLIL may disagree with what the Boy Scouts are associating to say, they will fight to the death to defend the Boy Scouts' right to associate with the people of their

choosing to say it. Accordingly, the judgment of the New Jersey Supreme Court should be reversed.

Respectfully submitted,

WILLIAM H. MELLOR*
CLINT BOLICK
SCOTT G. BULLOCK
DANA BERLINER
MATTHEW B. BERRY
INSTITUTE FOR JUSTICE
1717 Pennsylvania Ave., N.W.
Suite 200
Washington, DC 20006
(202) 955-1300

Counsel of Record

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In The

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA

Petitioners,

v.

JAMES DALE

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION

in support of the *Petitioner*

Barry C. Hodge
Counsel of Record for Amicus Curiae
The National Legal Foundation
2224 Virginia Beach Blvd., St. 204
Virginia Beach, VA 23454
(757) 463-6133

17pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. INTRODUCTION 2

II. HECKLER'S VETO 4

A. ORIGIN OF THE HECKLER'S VETO DOCTRINE 4

B. THE EXPANSION OF THE DOCTRINE 5

III. APPLICATION TO THE PRESENT CASE 7

A. HECKLER'S VETO APPLIED TO THE BOY SCOUTS' RIGHT OF EXPRESSIVE ASSOCIATION 8

B. HECKLER'S VETO APPLIED TO THE BOY SCOUTS' RIGHT OF FREE SPEECH 12

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Pages(s)

ACLU v. Johnson, ___ F.3d ___ (10th Cir. 1999) 6

American United for Separation of Church and State v. Grand Rapids, 980 F.2d 1538 (6th Cir. 1992) (*en banc*) 7

Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 2

Brown v. Louisiana, 383 U.S. 131 (1966) 5, 6

Chicago Acorn v. Metropolitan Pier and Exposition Authority, 150 F.3d 695, 701 (7th Cir. 1998) 6

Christian Knights of the Ku Klux Klan v. District of Columbia, 751 F.Supp. 212, 215 (D.D.C. 1990) 6

Cox v. Louisiana, 379 U.S. 536 (1965) 2, 3, 6

Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 218 (1998) 9

Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999) 2,10

Diamond Walnut Growers, Inc v. Nat. Labor Rel. Bd., 113 F.3d 1259, (D.C. Cir. 1997) 6-7

Doe v. Small, 964 F.2d 611, (7th Cir. 1992) (*en banc*) 7

Edwards v. South Carolina, 372 U.S. 229 (1963) 2, 6

Faragher v. Boca Raton, 118 S.Ct. 2275, (1998) 5

Feiner v. New York, 340 U.S. 315 (1951) 4,5

Forsythe Co. v. Nat. Movement, 505 U.S. 123 (1992) 5,6

Gregory v. Chicago, 394 U.S. 111 (1969) 6

Hunter v. Allen, 422 F.2d 1158, (5th Cir. 1970) 7

Hurley v. Irish-American Gay, Lesbian and Bisex. Group of Boston, 515 U.S. 557 (1995) 2, 12

Kunz v. New York, 340 U.S. 290 (1951) 4, 6

Nelson v. Streeter, 16 F.3d 145, (7th Cir. 1994) 7

Niemotko v. Maryland, 340 U.S. 268 (1951) 4

Pinette v. Capitol Square Review and Advisory Board, 30 F.3d 675, (6th Cir. 1994) 7

Reno v. ACLU, , 117 S.Ct. 2329, (1997) 5, 6

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 2, 9, 10, 12

Terminiello v. Chicago, 337 U.S. 1 (1949) 4

OTHER AUTHORITIES

Jerome A. Brown & C. Thomas Dienes, *Handbook of Free Speech and Free Press* (1979) 4

Harry Kalven, Jr., *The Negro and the First Amendment* (1965) 4, 5

Communications Decency Act of 1996 6

New Jersey's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to –49 ..... 1, 2, 10

INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae, The National Legal Foundation, is a 501c(3) organization that is dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. As such, the organization has a direct interest in seeing that groups such as the Boy Scouts of America be allowed to associate freely and freely communicate the traditional moral values to which they subscribe.

SUMMARY OF THE ARGUMENT

The New Jersey Supreme Court's application of New Jersey's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to –49, to the Boy Scouts of America is incompatible with the First Amendment of the United States Constitution. The Boy Scouts have rights of expressive association and of free speech which the New Jersey court did not honor. One way to view what is at stake in this case is by analogizing this lawsuit to the heckler's veto line of cases. When this is done, one can see that neither Respondent, James Dale, nor the New Jersey courts should be allowed to "veto" the Boy Scouts' message that homosexuality is immoral.

[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the amicus curiae, its members, and its counsel.

ARGUMENT

I. INTRODUCTION

The New Jersey Supreme Court's application of New Jersey's Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to –49, has placed the LAD on a collision course with the First Amendment of the United States Constitution. The problem may very well be that the New Jersey Supreme Court has misconstrued its own state's statute. That is, the court may have forced a square peg into a round hole by being wrong on two fronts—the Boy Scouts are simply not a place of public accommodation at all and they are clearly a private organization. *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1213-18 (1999). Or the problem may be that the New Jersey Supreme Court has misapplied this Court's tests designed to safeguard the rights of intimate association, expressive association, and free speech under *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). Or as amicus believes, both problems may exist.

Although amicus is cognizant that this Court has before it only the question of whether the New Jersey LAD, as applied, deprives the Boy Scouts of America of its First Amendment rights, amicus also believes that the case at bar is similar to cases such as *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Cox v. Louisiana*, 379 U.S. 536 (1965) in which:

> Because a claim of a constitutionally protected right is involved, it remains [the duty of the Supreme Court] in a case such as this to make an independent examination of the whole record. . . . In the area of First Amendment freedoms as well as other constitutionally protected rights, [the Supreme Court] cannot avoid [its] responsibilities by permitting [itself] to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding.

Cox, 379 U.S. at 545, n.8 (citations omitted) (internal quotation marks omitted). Thus, whatever the underlying problem with the New Jersey Supreme Court's opinion, this Court cannot be hamstrung in its efforts to set the matter right.

However, it is not the purpose of this brief to merely repeat the argument of the Boy Scouts and others that the New Jersey Supreme Court's intimate association, expressive association, and free speech analysis is flawed in the manner suggested above. Rather, amicus wishes to bring to this Court's attention a common sense analogy that, in the past, has helped this Court and other courts decide related issues. When viewed through this lens of common sense, it is clear that the New Jersey court's decision must be rejected and reversed. The analogy amicus offers is that of the heckler's veto.

II. HECKLER'S VETO

A. ORIGIN OF THE HECKLER'S VETO DOCTINE

The heckler's veto doctrine started as a description of just what it sounds like—literal hecklers shouting down literal speakers. While the early cases that are now generally recognized as heckler's veto cases (or at least close prototypes) are open to multiple interpretations, it is at least arguably true that courts actually allowed hecklers to shut down speakers.[2]

For example, in *Terminiello v. Chicago*, 337 U.S. 1 (1949), the Illinois courts, including the Illinois Supreme Court, had upheld a criminal conviction that was based upon the arrest of Arthur Terminiello when he refused to stop speaking in the face of sever heckling.

However, the courts, especially this Court, began a jurisprudential journey toward ever more protection of the speakers' First Amendment rights and away from judicial support for the hecklers. One stop on that journey was the trilogy of cases decided on January 15, 1951—*Niemotko v. Maryland*, 340 U.S. 268 (1951), *Kunz v. New York*, 340 U.S. 290 (1951), and *Feiner v. New York*, 340 U.S. 315 (1951). In *Feiner*, Chief Justice Vinson wrote that "the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and [we] are also mindful of the

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[2] See, generally, Jerome A. Brown & C. Thomas Dienes, *Handbook of Free Speech and Free Press* 81-93 (1979); Harry Kalven, Jr., *The Negro and the First Amendment* 123-160 (1965) discussions of the origins of the doctrine, and interpretations of various lines of cases that came together to form the doctrine, including a discussion of individual Justices' approaches.

possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings." *Id.* at 320.

Although this Court upheld Feiner's convictions because of a "clear and present danger of riot, disorder, interference with traffic u[illegible]n the public streets, or other immediate threat to public safety, peace, or order." *Id.* (internal quotation omitted), Justices Black, Douglas, and Minton would not have allowed a heckler's veto, even in the charged environment described by Chief Justice Vinson. At least from this point forward, the steady trend has been to protect speech against even potentially violent heckling.[3]

B. THE EXPANSION OF THE DOCTRINE

Even as the heckler's veto theory began to solidify as a pro-speaker, anti-heckler doctrine, its application also expanded. Specifically, courts began to apply the doctrine to activities other than actual speeches and to persons and things other than literal hecklers.

This Court (and various justices thereof) have applied the heckler's veto doctrine via (implicit) analogy to the activities such as civil rights sit-ins, *Brown v. Louisiana*, 383 U.S. 131, 133, n.1 (1966). (citing Kalven, *supra*, 140-160); a parade, *Forsythe Co. v. Nationalist Movement*, 505 U.S. 123, 140 (1992) (four justices dissenting); internet fora, *Reno v. ACLU*, 117 S.Ct. 2329, 2349 (1997); and job assignments, *Faragher v. Boca Raton*, 118 S.Ct. 2275, 2288-89 (1998). This

[3] See footnote 2 and sources cited there.

Court has applied the doctrine to persons and things beyond a literal heckler as well, including a breach of peace statute, *Brown* 383 U.S. at 133, n.1; a parade fee, *Forsythe Co.*, 505 U.S. at 140 (four justices dissenting); a minor's parent invoking a provision of the Communications Decency Act of 1996, *Reno* ;and a job supervisor, *Faragher*. Without using the term "heckler's veto," this Court has also applied the principle to various laws, ordinances, and governmental orders that were used to stop street protests, demonstrations, parades, and worship services. *See, eg.*, *Edwards v. South Carolina*, 372 U.S. 229 (1963), and *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gregory v. Chicago*, 394 U.S. 111 (1969); and *Kunz v. New York*, 340 U.S. 290 (1951).

Other courts have followed suit.[4] In *ACLU v. Johnson*, ___ F.3d ___, ___ (10th Cir. 1999), the Tenth Circuit applied the analogy to a minor's parent invoking a provision of the Communications Decency Act of 1996. In *Chicago Acorn v. Metropolitan Pier and Exposition Authority,* 150 F.3d 695, 701 (7th Cir. 1998), the Seventh Circuit applied the analogy to governmental discrimination in facility access based on user popularity. The District Court for the District of Columbia applied the analogy to the refusal of the District of Columbia to issue a parade permit in *Christian Knights of the Ku Klux Klan v. District of Columbia,* 751 F.Supp. 212, 215 (D.D.C. 1990). In *Diamond Walnut Growers, Inc v. National Labor*

[4] Several of the cases cited in the following discussion have subsequent history which will not be indicated. In some cases, the history is long and complex. Amicus has not cited these cases for their final result, but rather to point out that the heckler's veto doctrine/analogy was the most common sense based approach to the original issues before these courts.

Relations Board, 113 F.3d 1259, 1266 (D.C. Cir. 1997) (*en banc*), the District of Columbia Court of Appeals applied the analogy to safety issues during a labor strike. The Sixth Circuit applied it to a governmental refusal to grant a permit for a private religious display in a public forum. *Pinette v. Capitol Square Review and Advisory Board*, 30 F.3d 675, 679 (6th Cir. 1994). The Sixth Circuit also applied it to an injunction which forbade such displays, *American United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (*en banc*), as did one judge from the Seventh Circuit, *Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) (*en banc*) (Easterbrook, concurring). The Fifth Circuit applied the analogy to a city disorderly conduct ordinance. *Hunter v. Allen*, 422 F.2d 1158, 1163 (5th Cir. 1970). The Seventh Circuit applied it to the removal of a painting by public officials from private property. *Nelson v. Streeter*, 16 F.3d 145, 150 (7th Cir. 1994).

III. APPLICATION TO THE PRESENT CASE

In light of the foregoing discussion, it is obvious that the heckler's veto analogy has been applied to a wide variety of speech and associational activities. In many of these cases, the heckler's veto—either actual or by analogy—has been invoked as a shorthand, common sense way of stating a fundamental truth: Neither an individual, nor the government, nor an individual seeking to harness governmental compulsion via an injunction, can silence the speech or associational rights of another. Otherwise those rights would have no meaning.

The heckler's veto analogy is equally applicable in the present case. As seen above, the analogy has been applied to injunctions like the one in this case that seeks to make the Boy Scouts' First Amendment rights subject to James Dale's veto.

As widely as the analogy has profitably been applied, the Court could undoubtedly apply it to all three First Amendment rights that the New Jersey court analyzed. However, applying the analogy to the Boy Scouts' right to expressive association and to free speech keeps the analogy closer to its roots.

One additional point is worth noting before applying the analogy to the case at hand. Just as this Court ultimately set the heckler's veto jurisprudence right—even after some courts had initially allowed hecklers to prevail—so too in this case, this Court should correct the error of the New Jersey Supreme Court.

A. HECKLER'S VETO ANALOGY APPLIED TO THE BOY SCOUTS' RIGHT OF EXPRESSIVE ASSOCIATION

The Boy Scouts of America constitutes a constitutionally protected expressive organization with expressive associational rights. At the core of its very existence is the communication of a moral message to boys and young men. The Boy Scouts of America's self-proclaimed mission "is to instill the values of the Scout Oath and Law in young people and to prepare them to make ethical choices over their lifetime in achieving their full potential." *Petition for Writ of Certiorari*, at 2 (internal quotation marks omitted).

However, this Court need not merely accept the Boy Scouts' self-characterization. In their *Petition for Writ of Certiorari,* the Boy Scouts pointed out support for this assertion from two judicial sources. *Id.* at 14. First, the California Supreme Court acknowledged in *Curran v. Mount Diablo Council of the Boy Scouts of America*, the Boy Scouts of America is a "charitable, expressive, and social organization" whose "primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose." 952 P.2d 218, 236 (1998). Second, Justice O'Connor recognized as much in *Roberts v. United States Jaycees*, 468 U.S. 609, 638, n.* (1984) (O'Connor, J., concurring) (citations omitted), citing as examples of expressive associations, both the Boy Scouts and the Girl Scouts and stating that "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement."

It is apparent that the Boy Scouts of America's mission is the communication of its message to its young audience. And its message is one of character and morality. That message includes its views on homosexuality. It does not matter how or how often the Boy Scouts engage in expressive activity in support of that message. Its expressive associational activities must not be held hostage to James Dale's veto nor to the veto of the New Jersey courts.

The New Jersey Supreme Court's own statements about expressive association show the applicability of the heckler's veto analogy:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. Thus, the right to engage in activities protected by the First Amendment carries with it a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. The freedom to come together in furtherance of a collective purpose provides protection for minority views, thereby fostering political and cultural diversity.
>
> When the government attempts to interfere with the internal organization or affairs of the group, the members' freedom of expressive association may be curtailed. In this regard, the Supreme Court has said that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."

Dale, 734 A.2d at 1222 (internal quotations and citations omitted).

The New Jersey court went on the explain that the *Roberts* Court had noted that the right of association is not absolute. *Id.* That goes without saying.

However, the present case is one in which utilizing the heckler's veto analogy would point in the right direction.

The New Jersey court's analysis would have been better informed by comparing the present case to the heckler's veto cases than to the facts of *Roberts*. Surely, the Boy Scouts have a set of beliefs and a range of expressive activities as well defined as the individuals and groups subjected to the heckler's veto in each of the cases discussed above. And surely, New Jersey's LAD serves as a heckler's veto as much as the breach of peace laws involved in the early (and some recent) heckler's veto cases. Furthermore, here, as in many of the cases discussed above, one party seeks to regulate the expressive association of another. The Boy Scouts of America, in its message of traditional morality, in its choice of proponents of traditional morality as leaders, as well as in its decision to exclude avowed homosexuals from its leadership, expresses the idea that homosexuality is immoral. Dale, an avowed homosexual and gay rights activist, *Petition for Writ of Certiorari*, at 6, seeks not merely the acceptance of the Boy Scouts of America but rather to alter the association's message.

Furthermore, there is in effect another heckler's veto lurking just below the surface of this case. Dale, following the lead of interest groups that have sought to change the Boy Scouts of America's moral and religious messages by filing suit under public accommodations laws in California, Illinois, Florida, Oregon, Connecticut, Minnesota, Pennsylvania, Kansas and Washington D.C., brings this suit under the same type of statute in New Jersey. *See Brief of Boy Scouts of America as Amicus Curiae in Support of Reversal, Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston,* at 2. It is the sheer number of cases

and the exorbitant costs of defending them that serve as the heckler's *tour de force* in the attempt to change the Boy Scouts of America's message. This court should declare once and for all that the "litigator's veto" will prevail no more than the heckler's veto.

B. HECKLER'S VETO ANALOGY APPLIED TO THE BOY SCOUTS' RIGHT OF FREE SPEECH

The heckler's veto analogy is even more at home with the Boy Scouts' free speech rights. Just as the Boy Scouts disseminate its message through expressive activities, so too does it disseminates its message through pure speech. As this Court pointed out in *Roberts*, the two rights are closely connected. *Id.* at 622 ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in a wide variety of political, social, economic, educational, religious, and cultural ends.")

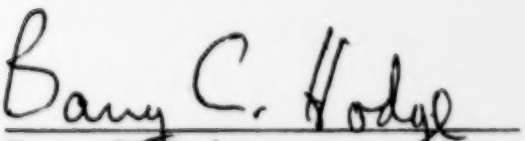
However, an additional point may be added here. The right to speak subsumes the right not to speak (just as the right to associate subsumes the right not to associate). *Id.* at 623, *Hurley*, 515 U.S. at 573. Yet, Dale seeks the right to force a message upon the Boy Scouts. Thus, Dale not only seeks to change the Boy Scouts' message with his presence; he also seek to change their message with his words. Dale states publicly that he disagrees with the moral position taken by Boy Scouts of America regarding homosexual conduct, and he "owe[s] it to the organization to point out to them how bad and wrong this policy is." *Petition for a Writ of Certiorari*, at 15.

Not only does Dale seek to impose a heckler's veto upon the Boy Scouts, he seeks nothing less than to entirely eradicate the Boy Scouts' current message about homosexuality and to force the Scouts to be a vehicle for his own message. This Court should not allow this to happen.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the New Jersey Supreme Court.

Respectfully submitted
this 26th day of February, 2000



Barry C. Hodge
Counsel of Record of
Amicus Curiae
The National Legal Foundation
2224 Virginia Beach Blvd., St. 204
Virginia Beach, VA 23454
(757) 463-6133

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA
Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
THE CLAREMONT INSTITUTE
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
250 W. FIRST ST., SUITE 330
CLAREMONT, CA 91711

EDWIN MEESE III
COUNSEL OF RECORD
214 MASSACHUSETTS AVE., N.E.
WASHINGTON, D.C. 20002
(202) 546-4400

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

35 pp

QUESTIONS PRESENTED

1. Whether a state law requiring the Boy Scouts, a private membership organization dedicated to fostering the development of civic and moral virtue in young boys, to appoint an avowed homosexual activist as an Assistant Scoutmaster infringes the Boy Scouts' rights of freedom of speech and association.
2. Whether such a state law infringes the rights of parents, who choose to augment the moral education of their children by participating in the Boy Scouts organization, to direct the upbringing of their own children.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED ii

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE..... 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. FORCING THE BOY SCOUTS TO ADMIT DALE AS AN ADULT LEADER VIOLATES THE BOY SCOUTS' FREEDOM OF ASSOCIATION. 4

A. The Boy Scouts Is Not A Commercial Association.....5

B. Boy Scout Troops Are Highly Intimate Private Associations.....9

C. The Boy Scouts' Membership Criteria Is Directly Tied to its Moral Purpose.....11

II. FORCING THE BOY SCOUTS TO ACCEPT DALE AS A SPOKESMAN/ADULT LEADER CONSTITUTES CONSTITUTIONALLY-PROHIBITED COMPELLED SPEECH. 15

III. UNDERMINING THE BOY SCOUTS' MISSION INFRINGES THE CONSTITUTIONAL RIGHT OF PARENTS TO DIRECT THE MORAL UPBRINGING OF THEIR CHILDREN.....17

IV. BECAUSE THE DECISION BELOW INTERFERES WITH THE MORAL TRAINING PROVIDED BY THE BOY SCOUTS, TRAINING WHICH THE AMERICAN FOUNDERS BELIEVED TO BE ESSENTIAL IN A REPUBLICAN FORM OF GOVERNMENT, THE STATE CANNOT HAVE A COMPELLING INTEREST IN UNDERMINING THAT TRAINING.....19

CONCLUSION..... 27

TABLE OF AUTHORITIES

CASES

Abood v. *Detroit Bd. of Ed.*, 431 U.S. 209 (1977).....5

Barnes v. *Glen Theatre, Inc.*, 501 U.S. 560 (1991) 24, 25

Board of Directors of Rotary Intern. v. *Rotary Club of Duarte*, 481 U.S. 537 (1987) 5, 9, 10, 11

Bowers v. *Hardwick*, 478 U.S. 186 (1986) 25

Brandenburg v. *Ohio*, 395 U.S. 444 (1966).....19

Cornelius v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182 (D. Conn. 1974).....10

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Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670, 952 P.2d 218 (1998) ... passim

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District of Columbia v. *Colts*, 282 U.S. 63 (1932) 24

Engel v. *Vitale*, 370 U.S. 421 (1962) 23

Everson v. *Board of Education*, 330 U.S. 1 (1947) 23

Federal Trade Commission v. R.F. Keppel & Bro., 291 U.S. 304 (1934).....24

Griswold v. *Connecticut*, 381 U.S. 479 (1965).....18

Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964).....6

Hurley v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)..... passim

Lane v. *Cotton*, 12 Mod. 472 (1701).....6

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 23

Meyer v. *Nebraska*, 262 U.S. 390 (1923) 18, 20

N.A.A.C.P. v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958).....4

N.A.A.C.P. v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982).....4

New York State Club Ass'n, Inc. v. *City of New York*, 487 U.S. 1 (1988).....5, 11, 12

Ohio v. *Whisner*, 351 N.E.2d 750 (Ohio 1976) 18

Parker v. *Levy*, 417 U.S. 733 (1974) 24, 26, 27

Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 3, 18

Prince v. *Massachusetts*, 321 U.S. 158 (1944).....18

Randall v. *Orange County Council*, 17 Cal.4th 736, 952 P.2d 261 (1998).....18

Reynolds v. *United States*, 98 U.S. 145 (1878).....24

Roberts v. *United States Jaycees*, 468 U.S. 609 (1984)..... passim

Schenck v. *United States*, 249 U.S. 47 (1919) 19

Schwenk v. *Boy Scouts of America*, 275 Ore. 327, 551 P.2d 465 (Ore. 1976).....8

Seabourn v. *Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P.2d 385 (Kan. 1995).....26

Thomasson v. *Perry*, 80 F.3d 915 (CA4 1996).....25

Tinker v. *Des Moines Ind. Comm. School Dist.*, 393 U.S. 503 (1969).....17

Van Iderstine v. *National Discount Co.*, 227 U.S. 575 (1913).....24

Welsh v. *Boy Scouts of America*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993).....8, 22

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Whitney v. *California*, 274 U.S. 357 (1927).....19

Wisconsin v. *Yoder*, 406 U.S. 205 (1972).....18

Wooley v. *Maynard*, 430 U.S. 705 (1977).....15

CONSTITUTIONS AND STATUTES

An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. 3, 1 Stat. 51 (1787).....22

Civil Rights Act of 1964, Title 2, 42 U.S.C. § 2000a.....13, 15, 17

Mass. Const. of 1780, Pt. 1, Art. 3.....21, 22

Pa. Const. of 1776, Art. II, § 45.....21

Va. Const. of 1776, Bill of Rights, Sec.15.....21

U.S. Const., Amend. I..... passim

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OTHER AUTHORITIES

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INTEREST OF AMICUS CURIAE[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principle, at issue in this case, that the inculcation of virtue in the citizenry was deemed by the Founders to be essential in a republican form of government.

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. This brief has been authored in its entirety by undersigned counsel for *amicus curiae*. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as *amicus curiae* in cases of constitutional significance. Of particular relevance here, the Institute has published extensively about the foundations of representative government and the constitutional protections of speech and association that are necessary to protect those foundations, including a monograph entitled "On the Front Lines of the Culture War: Recent Attacks on the Boy Scouts." In addition, the Claremont Institute participated as an *amicus curiae* in the courts below, filing briefs with both the intermediate appellate court and the Supreme Court of New Jersey, and filed an *amicus curiae* brief in this Court, in support of the petition for a writ of certiorari.

Recently, in order to further advance its mission, the Claremont Institute established an in-house public interest law firm, the Center for Constitutional Jurisprudence. The Center's purpose is to further the mission of the Claremont Institute through strategic litigation, including the filing of *amicus curiae* briefs in cases such as this that involve issues of constitutional significance going to the heart of the founding principles of this nation.

SUMMARY OF ARGUMENT

The Boy Scouts of America, as an institution, believes that homosexuality is wrong, just as it believes that adultery and pre-marital sex are wrong. It exists, in part, to foster those beliefs among the boys whose parents involve them in scouting and to teach boys respect for family as the cornerstone of civilized society. Its mission in this regard is consistent with the teachings of most major religions and in accord with the law of most civilized peoples throughout history. The Boy Scouts has been immensely successful as an organization in no small measure because it has remained true to the moral teachings that have shaped its purpose from its beginning nearly a century ago.

The primary legal issue in this case, however, is *not* whether the Boy Scouts' position on homosexuality is right or wrong. Rather, it is whether the Boy Scouts, a private membership organization, can constitutionally be compelled by a state court to place in an adult leadership position an individual who by both word and deed conveys a message about the immorality of homosexual conduct that is contrary to the message that the Boy Scouts itself seeks to convey.

Amicus Curiae The Claremont Institute respectfully contends that under the First and Fourteenth Amendments the Boy Scouts and other private organizations cannot be compelled by government to convey a message that they choose not to convey, nor be compelled to associate with individuals who would undermine the message they do wish to convey. The order of the New Jersey Supreme Court to the contrary is in fatal conflict with the precedent of this Court protecting the freedom of speech of private associations, *see Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), the freedom of expressive association, *see, e.g.*, *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), and the right of parents to direct the moral upbringing of their children, *see, e.g.*, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

By rejecting the Boy Scouts' articulation of its own moral purpose, the New Jersey Supreme Court ventured into dangerous territory. The precious freedoms protected by the First Amendment would be rendered meaningless if governmental bodies could simply define away the expressive components of a private group's message. Respondent himself and his own *amici* have acknowledged what the New Jersey Supreme Court flatly rejected—that the executive leadership of the Boy Scouts seeks, among other things, to teach boys about their moral obligations, a teaching that precludes the notion that there is nothing immoral about homosexuality, adultery, or pre-marital sex.

Finally, and perhaps most fundamentally, the rejection of the morality that the Boy Scouts itself claims to be fostering in favor of the moral relativism propounded by the New Jersey Supreme Court would have astounded our nation's Founders. For them, moral virtue, based on the innate nature of human beings, was a necessary prerequisite for republican government. The Boy Scouts has, for nearly a century, been a significant part of the effort to pass such virtue, and the freedom that flows from it, on to our posterity. By barring the Boy Scouts from continuing its mission, the New Jersey Supreme Court's decision strikes a blow to our republican regime.

ARGUMENT

I. Forcing the Boy Scouts to Admit Dale as an Adult Leader Violates the Boy Scouts' Freedom of Association.

This Court has long recognized that the First Amendment's protection of speech and assembly encompasses a correlative freedom of association. *See, e.g., N.A.A.C.P.* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907-909 (1982); *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). And there is perhaps no more fundamental tenet of the freedom of association than the right of the association itself to determine who shall be admitted to membership. During debate in the convention which gave us our Constitution, for example, Gouverneur Morris noted that "every Society from a great nation down to a club had the right of declaring the conditions on which new members should be admitted . . . ." *The Records of the Federal Convention of 1787, at* 238 (Max Farrand ed., Yale Univ. Press 1966). The sanctity of that principle continues to be recognized to this day: "There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). "Freedom of association . . . plainly

presupposes a freedom not to associate." *Id.* (citing *Abood* v. *Detroit Bd. of Ed.*, 431 U.S. 209, 234-35 (1977)).

Although not absolute, *id.*, the freedom to choose one's associates is particularly strong in the context of intimate and expressive associations, such as those fostered by the Boy Scouts at issue here. There are exceptions, as this Court's rulings in *Roberts* and two subsequent cases, *Board of Directors of Rotary Intern.* v. *Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1 (1988), make clear. But even a casual review of those cases demonstrates how clearly the Boy Scouts falls on the protection rather than the exception side of the line, for at least three reasons.

A. The Boy Scouts Is Not A Commercial Association

First, *Roberts*, *Rotary Club*, and *New York State Club Ass'n* all dealt with associations that fostered business and commercial connections. *Roberts*, 468 U.S., at 616, 626; *Rotary Club*, 481 U.S., at 549; *New York State Club Ass'n.*, 487 U.S., at 5-6. The Boy Scouts, on the other hand, is not a commercial organization. *See, e.g., Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 673, 952 P.2d 218, 220 (1998) (holding that the Boy Scouts is not a "business establishment" under the California Unruh Civil Rights Act). Its purpose is not to foster commercial relationships but rather to instill in young men certain moral principles and "to prepare them to make ethical choices over their lifetime in achieving their full potential." Boy Scouts Petition, at 2 (citing A.2238, the record before the New Jersey Supreme Court).

No mere formalism, the distinction between commercial and non-commercial private associations is rooted in the historic understanding of public accommodations, and until the New Jersey court's ruling, the latter has always been understood as constitutionally protected.

In English common law, a public accommodation was a business, such as an inn or eatery, that operated along the

highways and byways of the realm. William Blackstone noted that such businesses were said to have an implied contractual obligation to serve all comers by virtue of the fact that they held themselves out as serving the public.[2] Moreover, the English common law treated an innkeeper's refusal to accept a traveler without sufficient reason as more than merely a breach of an implied contract; it was also a breach of the peace. Innkeepers would be subject to a fine and even criminal indictment for thus "frustrat[ing] the end of their institution," namely, the provision of meals and lodging to travelers. W. Blackstone, 4 Commentaries, ch. 13.

Although these simple origins have been expanded upon in modern times, the Blackstonian principles remain at the root of State and federal public accommodations law and jurisprudence. When it enacted Title II of the Civil Rights Act of 1964, for example, Congress built upon the implied contractual commitment undertaken by innkeepers and applied it to other commercial enterprises such as hotels, restaurants, gas stations, theaters, and other places of entertainment.

Similarly, the California Supreme Court recently held that the Unruh Civil Rights Act, one of the most expansive state public accommodations statutes in the country, emphasizes the commercial nature of covered entities and does not extend

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[2] *See* W. Blackstone, 3 Commentaries on the Laws of England, ch. 9 ("If an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refused to admit a traveller"); *see also* J. Story, Bailments §§ 466a, 470, 476(2) (1846); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 284 (1964) (Douglas, J., concurring) ("[The English common law] reasoned that one who employed his private property *for purposes of commercial gain* by offering goods or services to the public must stick to his bargain" (emphasis added)); *Lane* v. *Cotton*, 12 Mod. 472 (1701), cited in *The Civil Rights Act of 1964: What it Means to Employers, Businessmen, Unions, Employees, Minority Groups* 79 (BNA, 1964).

to organizations that are not commercial in nature.[3] It is precisely the engagement in commerce that makes a private entity one which is "open to the public" and therefore within an area of traditional government concern and regulation.

The Boy Scouts as an organization does not fit within the Blackstonian or the *Curran* commercial framework for public accommodations. Unlike the innkeepers of old or their modern-day counterparts, the Boy Scouts is not engaged in a business or anything even resembling a business as far as its membership activities are concerned. *See Curran*, 17 Cal.4th, at 699-700, 952 P.2d, at 238 (noting that although the Boy Scouts "engages in business transactions with nonmembers on a regular basis," those "business transactions are distinct from the Scouts' core functions and do not demonstrate that the organization has become a commercial purveyor of the primary incidents and benefits of membership in the organization"). Furthermore, the Boy Scouts neither explicitly nor implicitly welcomes all comers. Rather, it offers membership *only* to those boys and adult leaders who are willing to subscribe to its principles. And unlike the innkeeper of old who refused a place to a weary traveler, refusing membership to one who does not subscribe to the Boy Scouts' views furthers rather than frustrates the ends for which the institution was established.

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[3] *See Curran* v. *Mount Diablo Council of the Boy Scouts*, 17 Cal.4th 670, 697, 952 P.2d 218, 236 (Cal. 1998) ("[A]lthough past California decisions demonstrate that the [Unruh] Act clearly applies to any type of for-profit commercial enterprise, and to nonprofit entities . . . whose purpose is to serve the business or economic interests of its owners or members, no prior decision has interpreted the 'business establishments' language of the Act so expansively as to include the membership decisions of a charitable, expressive, and social organization, like the Boy Scouts, whose formation and activities are unrelated to the promotion or advancement of the economic or business interests of its members"); *see also Seabourn* v. *Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 207, 891 P.2d 385, 404 (Kan. 1995) (declining to "divorce the concept of public accommodation from the usual meaning and the common understanding of the word business").

Consistent with this historical view, numerous courts throughout the country have found that the Boy Scouts is not covered by public accommodations laws. For example, in *Welsh* v. *Boy Scouts of America*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993), the Seventh Circuit held that the "place of public accommodation" language in Title II of the Federal Civil Rights Act of 1964, 42 U.S.C. § 2000a—language identical to that in the New Jersey public accommodations law at issue here—did not cover the Boy Scouts because the Boy Scouts is neither a "place" nor a "public" accommodation.

Similarly, the California Supreme Court in *Curran* interpreted the California Unruh Civil Rights Act to exclude the Boy Scouts from the Act's strictures. The Court there held that, "given the organization's overall purpose and function, the Boy Scouts cannot reasonably be found to constitute a business establishment whose membership decisions are subject to the [Unruh] Act." 17 Cal. 4th at 697, 952 P. 2d at 236.[4]

Of course, New Jersey need not interpret its own public accommodations law in conformity with other states' laws or with Title II, but it must conform its interpretation to the mandates of the federal Constitution. The point of the commercial/non-commercial distinction is that the "public"

[4] Other states have reached similar results under their own public accommodation laws. *See, e.g., Seabourn,* 257 Kan., at 210, 891 P.2d, at 406 (holding that the Boy Scouts is not covered by the Kansas public accommodations statute because "the Boy Scouts has no business purpose other than maintaining the objectives and programs to which the operation of facilities is merely incidental"); *Schwenk* v. *Boy Scouts of America*, 275 Ore. 327, 334, 336, 551 P.2d 465, 468, 469 (Ore. 1976) ("[T]he primary concern and purpose of the Oregon legislature in its enactment of the Oregon Public Accommodation Act was to prohibit discrimination by Business or commercial enterprises which offer goods or services to the public. . . . [T]he term 'place of public accommodation,' as defined by [the Oregon statute], was not intended by the Oregon legislature to include the Boy Scouts of America").

business purpose of the former may permit certain governmental regulations that are constitutionally impermissible when applied to the latter. Quite simply, the governmental interest is much less compelling, and the infringement on private liberty much more stark, when public accommodations laws are extended beyond their common law origins, and in this case, the law has been extended beyond the constitutional breaking point.

B. Boy Scout Troops Are Highly Intimate Private Associations

Second, unlike the Jaycees or Rotary Club, the Boy Scouts' structure and purpose foster relationships second to virtually no group other than a family in their degree of intimacy. *See, e.g.*, *Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 48 Cal.App.4th 670, 29 Cal.Rptr.2d 580, 597-98 (Cal.App. 1994), *review granted and opinion superseded by* 874 P.2d 901, 31 Cal.Rptr.2d 126, (Cal. 1994) *aff'd*, 17 Cal.4th 670, 952 P.2d 218 (Cal. 1998). As such, the Boy Scouts has a much stronger liberty interest protected by the Due Process Clause of the Fourteenth Amendment than did the Jaycees or the Rotary Club.

The primary unit of the Cub Scouts, the organizational division of the Boy Scouts for boys between the ages of 8 and 11, is the Den, consisting of between 6 and 10 boys. These boys meet weekly, often at the home of one of the boys, for various activities. Similarly, the Boy Scouts itself is organized into Troops of about 30 boys ages 11 to 17, and further organized into Patrols of about 8 boys. *Id.*, 29 Cal.Rptr.2d, at 598 The very smallness of the groups in which the boys interact and the location in people's homes demonstrate the intimate nature of the organizational units. Because they are such intimate units, the Boy Scouts must have great control over who participates in those units.[5]

[5] That the policies each of these units follow are set by a national organization does not in any way undermine the intimately private nature of the associations. As this Court stated in *Roberts*, the relevant unit for

It is out of recognition that interference with such associations amounts to a severe intrusion upon liberty that most, if not all, state public accommodations laws, as well as Title II of the federal Civil Rights Act of 1964, exempt private membership clubs. These textual exemptions have historically been viewed as constitutionally compelled. When Congress enacted Title II, for example, it explicitly excluded private membership organizations because it believed that the Constitution prohibited it from doing otherwise. *See, e.g., Cornelius* v. *Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1201 (D. Conn. 1974) ("Congress appears to have doubted the very constitutionality of legislation which *did not* exempt private clubs" (*citing* 2 U.S.Code Cong. & Admin.News (1964), at 2459-62 (Minority Report); 110 Cong. Rec. 2293 (Rep. Long)).

The reason for the private club exemptions, and for the constitutional protection afforded to private associations, is that "the formation and preservation of certain kinds of highly personal relationships" must be afforded "a substantial measure of sanctuary from unjustified interference by the State" if individual liberty is to be secured. *Roberts*, 468 U.S., at 618. Indeed, the description in *Roberts* of the right to intimate association reads almost as if it was written with groups such as the Boy Scouts in mind:

> [C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.

Id. The Boy Scouts not only fosters close relationships but, as described below, its whole purpose is to cultivate and transmit

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purposes of addressing the right to intimate association is not the entire organization, but the local unit only. 468 U.S., at 621 (1984); *see also Rotary*, 481 U.S., at 546.

shared ideals and beliefs; it is therefore easily entitled to the constitutional protection afforded other such intimate associations.

C. The Boy Scouts' Membership Criteria Is Directly Tied to its Moral Purpose

Finally, and perhaps most importantly, the membership criterion at issue in this case is not based on a stereotypical generalization such as was at issue in *Roberts,* where it was claimed that admitting women would force the club to alter its civic, political or business messages (apparently based on the stereotypical view that women have different positions on such matters than men). 468 U.S., at 627-28. The Boy Scouts is *not* claiming that homosexual adult leaders are less likely than heterosexual adult leaders to be trustworthy, or brave, or loyal, and thus less able to serve as role models for those aspects of the Scout Law. But the Boy Scouts *is* contending that an avowed homosexual adult leader is less able than other adult leaders to serve as a role model for the aspect of the Scout Oath that calls on boys to be "morally straight," a phrase which the Boy Scouts itself interprets as encompassing the belief that homosexual conduct is immoral. *Curran*, 17 Cal.4th, at 672, 952 P.2d, at 219.

By forcing the Boy Scouts to place in an adult leadership position someone who espouses by word and deed a position about the immorality of homosexuality inimical to that taken by the Boy Scouts, the New Jersey Supreme Court repudiated the principle articulated in *Roberts*, *Rotary Club*, and *New York State Club Ass'n* that a private association could not be forced to admit members whose views were contrary to those of the organization.

In *Roberts*, this Court upheld a decision requiring the Jaycees to admit women *only after* finding that the Minnesota public accommodations law did not require any change in the organization's creed or impose any restrictions on its "ability to exclude individuals or philosophies different from those of its existing members." 468 U.S., at 627. In *Rotary Club*, this

Court upheld a similar decision requiring the Rotary Clubs to admit women *only after* finding that the admission of women would not affect that organization's ability to carry out its purposes "in any significant way." 481 U.S., at 548-49.

And in *New York State Club Ass'n*, this Court specifically noted: "If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacles to this end." 487 U.S., at 13. Indeed, Justice O'Connor pointed out in her concurring opinion that the right to exclude individuals who do not share the organization's views exists even if the organization's purpose requires that membership be based—legitimately rather than stereotypically—on race, religion, or some other "suspect" classification. *Id.*, at 19 (O'Connor, J., concurring); *see also Wallace* v. *Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) ("the question whether racial or sex-based classifications communicate an *invidious* message [is] in large part a legal question to be answered on the basis of judicial interpretation of social facts" (emphasis added)). Invidious discrimination is simply not at work when, for example, the Knights of Columbus limits membership to Catholics.

Apparently recognizing the force of this distinction, the New Jersey court simply mischaracterized the Boy Scouts' own beliefs in order to avoid the force of this Court's precedents. In an opinion that can only be called Orwellian, the New Jersey court refused to accept that the Boy Scouts actually believes that homosexual conduct is immoral and therefore incompatible with the virtues the organization seeks to foster. *See Dale* v. *Boy Scouts of America*, 160 N.J. 562, 613 n.12 (1999) (rejecting the Boy Scout's position because nor expressly adopted until after homosexuality became an issue); *id.*, at 614-15 ("The words 'morally straight' and 'clean' do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral"). And it did so on its own initiative, without benefit of trial court factual findings.

In contrast, *trial* court factfinders that have considered the issue have recognized the obvious clarity and consistency of the Boy Scouts' position. As noted by the California Supreme Court in *Curran*, for example, the trial court in that case found, after a trial: "that sexual morality is addressed in the Boy Scout Oath and Law under the rubric of 'morally straight' and 'clean'"; "that the Boy Scouts of America as an organization has taken a consistent position that homosexuality is immoral and incompatible with the Boy Scout Oath and Law"; and that "this is the view that is communicated whenever the issue comes up." 17 Cal. 4th at 682. And the *trial* court in this case "found that Boy Scouts had always had a policy of excluding 'active homosexual[s].'" *Dale*, 160 N.J., at 580-81, 734 A.2d, at 1206 (citing *Dale* v. *Boy Scouts of America*, No. MON-C-330-92 (Ch. Div. Nov. 3, 1995)).

Respondent's *amici* assert that they sponsor Boy Scout troops to teach boys "values consistent with the *true* purposes of Scouting, such as loyalty, courage, kindness, cleanliness, obedience and reverence." Brief of *Amici Curiae* The General Board of Church and Society of the United Methodist Church, *et al.*, in Support of Respondent [at the petition stage], at 14 (emphasis added); *see also id.*, at 5 (defining "Scouting's *true* purposes" as including "trustworthiness, loyalty, kindness, respect for others, and bravery" (emphasis in original)). Tellingly, Respondent's *amici* never once mention the "morally straight" clause of the Scout Oath. Thus, the fact that some sponsoring organizations such as Respondent's *amici* might choose to highlight certain aspects of the Boy Scouts' purpose and not others does not alter the fact that teaching boys to be "morally straight," in all its ramifications, is an express part of Scouting's purpose.

Moreover, Respondent and his *amici* actually concede that the executive leadership of the Boy Scouts *does* have a "policy" of opposing homosexuality among scout members and adult leaders. *See, e.g.*, General Board *amici curiae* Brief in Opposition to Petition, at 11 (quoting Sept. 18, 1998 letter

from Rev. Dr. Paul H. Sherry, President of the United Church, to Jere B. Ratciffe, Chief Scouting Executive of the Boy Scouts, urging the Boy Scouts "to abandon [their] *policies* and practices" denying membership to avowed homosexuals (emphasis added)); Respondent's Brief in Opposition to Petition, at 14-16 (repeatedly referring to the Boy Scouts' exclusionary "policy"). The opposition to the Boy Scouts' "policy" by Respondent and his *amici* only serves to highlight what the *Curran* trial court explicitly found but the New Jersey Supreme Court refused to acknowledge: The Boy Scouts' purpose of fostering morality among its members includes the view that homosexuality is immoral. Forcing the Boy Scouts to admit avowed homosexuals is therefore a constitutionally impermissible restriction on the Boy Scouts' "ability to exclude individuals or philosophies different from those of its existing members." *Roberts*, 468 U.S., at 627.

The Gay and Lesbian Student Alliance, of which Respondent is a member, itself provides a striking example of the dangers inherent in intruding upon a membership organization's associational rights. Suppose, as happened not too long ago at an Ivy League college, that a student opposed to homosexuality joined the homosexual students' organization with the specific though unspoken purpose of "outing" its members or even the less nefarious purpose of trying to "cure" the homosexual students of their "disease." Surely our law must recognize the right of the organization *not* to associate with such an individual, whose very presence would undermine one of the purposes of the organization. And surely our law must so recognize even if the way in which the organization went about making that membership decision was to use religion or sexual orientation in its membership decisions.

What is prescriptive in this example as good policy is in fact constitutionally mandated. As this Court has repeatedly recognized, most recently in the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, "the choice of a speaker not to propound a particular point of view

[by excluding proponents of that view from participation in the speaker's expressive activities] is presumed to lie beyond the government's power to control." 515 U.S. 557, 575 (1995); *see also Curran*, 17 Cal.4th, at 727, 952 P.2d, at 255-56 (Kennard, J., concurring) (recognizing that, under *Hurley*, "an organization's right of expressive association allows it to exclude applicants with 'manifest views' at odds with those of the organization").

Dale and his *amici* would hardly tolerate a court order requiring the Gay and Lesbian Alliance to accept as a leader an evangelical Christian who was committed to "curing" or converting all of the homosexual members of the organization. Yet they seek to do much the same thing here—forcing the Boy Scouts to accept into its organization a person who disagrees with one of the principles of the organization and who would seek to "cure" the organization of its supposed wrong-headedness. Neither result is constitutionally permissible.

II. Forcing the Boy Scouts to Accept Dale as a Spokesman/Adult Leader Constitutes Constitutionally-Prohibited Compelled Speech.

Closely tied to the Boy Scouts' right of expressive association is its First Amendment right to free speech and the correlative right not to be compelled to convey messages with which it disagrees. As Justice Jackson, writing for the Court, noted more than fifty years ago, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U.S. 624, 642 (1943). The State's interest in disseminating an ideology "cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley* v. *Maynard*, 430 U.S. 705, 717 (1977).

This well-established constitutional prohibition against compelled speech was reconfirmed by this Court just five terms ago in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). In that case, this Court unanimously held that the private sponsors of a parade could not be compelled to include within their parade a group who sought to convey a message with which the organizer did not wish to be associated. Significantly, the Court neither inquired into the views of other parade participants nor demanded that the parade have an expressive purpose that was explicitly contrary to that offered by the excluded group. It was enough that the parade organizers did not wish to convey the group's message as part of their own. *Id.*, at 574; *see also id.*, at 569 ("a narrow, succinctly articulable message is not a condition of constitutional protection"); *id.*, at 569-70 ("a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech").

The New Jersey Supreme Court's attempt to distinguish *Hurley* by asserting that this case is not about speech denigrates the speech both of the Boy Scouts and of James Dale himself. Dale has become a staunch advocate for gay rights. Indeed, his activism is what led to the news article that brought his avowed homosexuality to the Boy Scouts' attention. Pet. at 6. Moreover, by his own reported admission, Dale seeks to re-join the Boy Scouts as an adult leader in order to persuade the Boy Scouts that its position on the immorality of homosexual conduct is wrong. Pet. at 7. Dale's purpose here is therefore clearly speech, and under *Hurley*, the Boy Scouts cannot be compelled to carry his message. *Hurley*, 515 U.S. at 573. This would be true even if the Boy Scouts did not have an explicit position about the immorality of homosexuality, for *Hurley* teaches that an organization need not have a particular or uniform message as

a condition precedent to exercising its constitutional right not to be compelled to speak a message with which it disagrees.[6]

Even if Dale could credibly claim that he would support the Boy Scouts' position about the immorality of homosexuality, the very fact that a known, avowed homosexual was donning a Boy Scout uniform as an adult Scout leader would send an unmistakeable symbolic message contrary to the position taken by the Boy Scouts. This Court has rejected a formalistic view that fails to recognize the significant speech component evident in such expressive conduct. *See, e.g., Tinker* v. *Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 505-506 (1969). Thus, while the New Jersey Supreme Court may technically have been correct in its assertion that Dale does not come to Boy Scout meetings "carrying a banner," 160 N.J. at 623, Dale clearly wears his homosexuality as a badge for all to see. It takes a blind eye to fail to recognize that the appointment by the Boy Scouts of Dale as an Assistant Scoutmaster would be the height of symbolic speech, severely undermining the Boy Scouts' own speech about the immorality of homosexuality.

III. Undermining the Boy Scouts' Mission Infringes the Constitutional Right of Parents to Direct the Moral Upbringing of their Children.

The Boy Scouts is not simply another after-school playtime organization. Its purpose, as the intermediate appellate court below recognized, is "to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime." *Dale* v. *Boy Scouts of America*, 308 N.J. Super. 516, 524, 706 A.2d 270, 274 (N.J. Super.,

[6] The contention by Respondent's *amici* that some groups that sponsor Boy Scout troops disagree with the Boy Scouts' position on homosexuality is therefore beside the point. So too is the "finding" by the New Jersey Supreme Court that the Boy Scouts does not really have an expressive purpose opposing homosexuality because its position statements on the subject were not widely disseminated to its membership. Under *Hurley*, it is enough that the Boy Scouts does not wish to convey symbolically the message that homosexuality is a perfectly acceptable lifestyle alternative.

App. Div., 1998) (quoting Boy Scouts Mission Statement). Many parents choose to have their children participate in Scouting precisely because of its moral mission. *See Randall* v. *Orange County Council*, 17 Cal.4th 736, 742, 952 P.2d 261, 265 (1998) ("Parents of Cub Scouts . . . testified that they hoped certain values, including religious ones, would be instilled through the Cub Scout program, as promised by the parent handbook for new Cub Scouts")

The ruling below thus severely undermines the right of parents to direct the moral upbringing of their children, a right recognized by this Court more than three-quarters of a century ago as constitutionally protected. *See Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

Of course, this parental right, like the rights of association and speech discussed above, is not absolute. *See, e.g., Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (upholding conviction of Jehovah's Witness for violating state's child labor law). But this Court has suggested that it is a fundamental right, which would render intrusions on the right subject to strict scrutiny. *See, e.g., Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965); *id.*, at 498 (Goldberg, J., concurring); *see also, e.g., Ohio* v. *Whisner*, 351 N.E.2d 750, 760 (Ohio 1976) ("it has long been recognized that the right of a parent to guide the education, including the religious education, of his or her children is indeed a 'fundamental right' guaranteed by the due process clause of the Fourteenth Amendment").

While the Boy Scouts may not provide the complete alternative to public education that was at issue in *Pierce*, there is no question that the organization fills a moral void in that education, and that, as the California Supreme Court recognized, many parents encourage their children to participate in the Boy Scouts precisely because it fills that moral void. The parents who participate in the Boy Scouts because they wish to impart certain moral views to their

children have a constitutionally protected fundamental right to do so.

IV. Because The Decision Below Interferes With The Moral Training Provided By The Boy Scouts, Training Which The American Founders Believed To Be Essential In A Republican Form Of Government, The State Cannot Have A Compelling Interest In Undermining That Training.

Recognizing that application of the New Jersey public accommodations law to the Boy Scouts infringes upon the Speech and Association rights of the Boy Scouts and upon the right of parents to direct the moral upbringing of their children does not entirely dispose of this case, of course. Even these constitutionally protected fundamental rights may in some contexts give way to a law that is narrowly tailored to further a compelling governmental interest.

In the context of the Boy Scouts' freedom of speech, however, this Court has repeatedly recognized that only the avoidance of imminent harm, amounting to a clear and present danger, is sufficiently compelling to warrant the restriction on this fundamental freedom. *See, e.g., Schenck* v. *United States*, 249 U.S. 47, 52 (1919); *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1966). Otherwise, the remedy for "bad" speech—if the Boy Scouts' position can even credibly be so characterized—is more speech. *See Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). And for compelled speech such as is at issue here, the protection is near absolute.

Similarly, this Court has repeatedly recognized that governmental limitations on the expressive associational rights of private membership organizations are only permissible when the limitation is unrelated to the organization's expressive purpose. *See, e.g., Roberts*, 468 U.S., at 627. The limitation imposed here by the New Jersey Supreme Court's interpretation of the New Jersey public

accommodations law, however, is directly related to the Boy Scouts' expressive purpose.

And in the parental rights context, this Court has carefully circumscribed the methods by which government may further interests that conflict with the right of parents to direct the moral upbringing of their children. In *Meyer*, for example, that State asserted that prohibiting instruction in the German language and ideals was necessary to promote civic development in American ideals. But the Court rejected that claim:

> That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. ... Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

262 U.S., at 401. The same is true here. Even if it would be "highly advantageous" for all Americans to adopt New Jersey's view about homosexuality, such uniformity of opinion cannot be coerced by methods which conflict with the Constitution—and preventing parents from fostering in their children, through association with the Boy Scouts, the traditional belief that homosexuality is wrong, is just such a conflict.

Even were these strict requirements to be relaxed in this case, there is an Alice-in-Wonderland quality to the claim that the government has a compelling interest here, ostensibly because the Boy Scouts' belief in the immorality of homosexuality is itself, in the government's view, contrary to the public welfare and morals. The Boy Scouts as an organization is almost synonymous with moral virtue. Indeed, if anything, the organization is sometimes lampooned

for being *too* moral, *too* good. *See, e.g.*, G. Cook, "As challengers bow out, Gore comes into the crosshairs," Agence Fr.-Presse, 1999 WL 2540136 (Feb. 4, 1999) (noting that Vice President "Gore has such a boy-scout image he's often derided as boring"); B. Wattenberg, "Bush may be popular, but McCain has more of right stuff," The Topeka Capital-Journal, 1999 WL 31519897 (Oct. 30, 1999) (referring to "goody-good boy scouts").

For nearly a century, the Boy Scouts has been singularly successful in its mission of instilling in young boys a sense of their moral obligations to God, country, and family. Such moral training was thought by our nation's Founders to be essential in a republican form of government. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "[t]hat no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, *and virtue*, and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec.15 (emphasis added). The Massachusetts Constitution of 1780 echoes the sentiment: "[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, *and morality* . . . ." Mass. Const. of 1780, Pt. 1, Art. 3 (emphasis added). And the Pennsylvania Constitution of 1776 went even further, asserting that "Laws for the encouragement *of virtue*, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution." Pa. Const. of 1776, Art. II, § 45 (emphasis added).

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers: "Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that

there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another." The Federalist No. 55, at 314 (Clinton Rossiter and Charles Kesler eds., Mentor 1999). In short, the Founders viewed a virtuous citizenry as an essential pre-condition of republican self-government.

The Founders were also fully cognizant of the fact that virtue must be continually fostered in order for republican institutions, once established, to survive. *See Welsh* v. *Boy Scouts of America*, 993 F.2d 1267, 1278 (CA7), *cert. denied*, 510 U.S. 1012 (1993) ("The Founding Fathers recognized that a republic cannot endure without a virtuous citizenry"). Most of the leading Founders, therefore, turned their attentions at one time or another to education. Perhaps the best example, but by no means the only one, of this sentiment is expressed in the Northwest Ordinance, adopted by Congress for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 3, 1 Stat. 51, 53 n. a; *see also*, *e.g.*, Mass. Const. of 1780, Ch. V, Sec. 2 ("wisdom and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties").

Because the fostering of moral excellence was, for the Founders, a task intimately tied to religion, *see*, *e.g.*, George Washington, *Farewell Address,* reprinted in *George Washington: A Collection* 521 (William B. Allen ed., Liberty Classics 1988) (noting that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle"), much of the moral education thought so essential by our Founders no longer can be provided in the public schools. *See, e.g., Everson* v. *Board of Education*, 330

U.S. 1, 16 (1947) (noting in *dicta* that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions"); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). As a result, the teaching of morality and virtue—so necessary to our republican form of government—is left largely to private associations, primarily churches and groups such as the Boy Scouts.

It is fortuitious, then, that the Founders did not rely on public institutions alone to foster a virtuous citizenry, but rather encouraged the development of private associations that, like the Boy Scouts, were devoted to the development of moral character. As Alexis de Tocqueville observed more than a century and a half ago, "[the intellectual and moral associations in America] are as necessary as the [political and industrial associations] to the American people, perhaps more so." Alexis de Tocqueville, *Democracy in America* 517 (J. P. Mayer ed. & George Lawrence trans., HarperPerrenial 1969) (1835).

Of course, respondent and his *amici* contest the claim made by the Boy Scouts that homosexual conduct is inherently *un*-virtuous (and therefore implicitly barred by a Scout's oath to be "morally straight"). Apparently, so does the New Jersey legislature (according to the interpretation given to its actions by the New Jersey Supreme Court). Indeed, the New Jersey Supreme Court rested its opinion in part upon the claim, grounded in moral relativism, that the Boy Scouts itself rejects the idea that there is any objective basis on which to make claims about the morality or immorality of homosexual conduct, or anything else, for that matter. *See*, *Dale*, 160 N.J., at 575, 734 A.2d, at 1203 ("Although one of BSA's stated purposes is to encourage members' ethical development, BSA does not endorse any specific set of moral beliefs. Instead, 'moral fitness' is deemed an individual choice"). The New Jersey court finds support for this astonishing conclusion in the following

passage from the Boy Scouts' Scoutmaster Handbook: "Morality ... concerns the 'principles of right and wrong' in our behavior, and 'what is sanctioned by our conscience or ethical judgment.'" *Id.* (quoting Scoutmaster Handbook, at 71). The New Jersey court's reading ignores the distinction between "good conscience," on the one hand (to which the passage clearly refers), and "bad conscience" and "unconscionable" conduct, on the other. The New Jersey court's reading of the Boy Scouts' code, therefore, cannot be more wrong, nor more at odds with the idea of virtue regarded by our Founders as a necessary prerequisite of republican government.

For two centuries, the people of this nation and their courts have had little difficulty recognizing the meaning of the term "virtue," as well as its opposite—at least in non-marginal cases. Certain actions, for example, have long been held to be *malum in se*—wrongful in and of themselves. *See, e.g.*, *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878) (describing polygamy as an "offence against society"); *Van Iderstine* v. *National Discount Co.*, 227 U.S. 575, 581 (1913) (describing fraudulent conveyances of property beyond the reach of creditors as "*malum in se*") *District of Columbia* v. *Colts*, 282 U.S. 63, 73 (1932) (driving recklessly so as to endanger lives and property desribed as as act "*malum in se*", entitling defendant to a jury trial); *Parker* v. *Levy*, 417 U.S. 733, 762-63 (1974) (Blackmun, J., concurring) (describing "engaging in sexual acts with a chicken, or window peeping in a trailer park, or cheating while calling bingo numbers" as contrary to "[f]undamental concepts of right and wrong" and therefore punishable under the Uniform Code of Military Justice as "conduct unbecoming an officer and a gentleman") ; *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 568 (1991) ("Public nudity was considered an act *malum in se*"); *see also Federal Trade Commission v. R.F. Keppel & Bro.*, 291 U.S. 304, 312 (1934) (defining even the phrase "unfair methods of competition" in the Federal Trade Commission Act as

"practices in business that are *contra bonos mores*"). As Justice Scalia noted in *Barnes*:

> Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, "*contra bonos mores*," *i.e.*, immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy.

Id., at 575 (Scalia, J., concurring in the judgment).

Certainly homosexual conduct has for centuries been included in the list of acts generally deemed *malum in se*. *See, e.g.*, *Bowers* v. *Hardwick*, 478 U.S. 186, 192-94 (1986); *id.* at 196-97 (Burger, C.J., concurring). Indeed, the view that homosexuality is immoral is still supported by criminal prohibitions against sodomy in many States and in the Uniform Code of Military Justice. *Id.* at 193-94; Jeffrey G. Sherman, "Love Speech: The Social Utility of Pornography," 47 Stan. L. Rev. 661, 698 (April 1995) (citing state statutes and Uniform Code of Military Justice); *see also Thomasson* v. *Perry*, 80 F.3d 915 (CA4 1996) (upholding Congressional ban on homosexuals serving in the military).

Even if society wants to relax that view, it requires a sort of logical gymnastics to move from the traditional view that homosexual conduct is *malum in se* to the view, effectively propounded by the New Jersey Supreme Court, that the government now has such a compelling interest in eradicating that long-held view that it may force the Boy Scouts to proclaim symbolically its very opposite—that there is nothing immoral about homosexual conduct.

While it may be true, as Justice Blackmun once noted, that "[r]elativistic notions of right and wrong, or situation ethics, as some call it, have achieved in recent times a disturbingly high level of prominence in this country . . . as a justification of conduct that persons would normally eschew as immoral

and even illegal," *Parker* v. *Levy*, 417 U.S. 733, 765 (1974) (Blackmun, J., concurring), we have not yet reached the day when the law is allowed to silence those who think otherwise. "The truth is that the moral horizons of the American people are not footloose, or limited solely by [the positive law]. The law should . . . be flexible enough to recognize the moral dimension of man and his instincts concerning that which is honorable, decent, and right." *Id.*

The Boy Scouts has always exemplified—and to many still exemplifies—that which is "honorable, decent, and right." As the Supreme Court of Kansas recently recognized, the Boy Scouts "tends to conserve the *moral*, intellectual, and physical life of the coming generation." *Seabourn*, 257 Kan., at 180, 891 P.2d, at 388 (emphasis added) (quoting Congressional Report in Support of Act to Incorporate Boy Scouts of America). The organization seeks to instill in the coming generation a key element of what our Founders thought necessary to republican self-government, namely, the ability to govern "oneself morally [by] controlling one's own tendency to indulge the selfish and violent passions unreasonably." T. West, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* 160 (Rowman & Littlefield 1997).

While the Boy Scouts position on homosexuality is not as universally accepted as it once was, it is a position that is both well grounded in our nation's laws and traditions and still regarded as correct by a large portion of the population. Almost by definition, then, the government's interest in silencing groups such as the Boy Scouts falls well short of "compelling," if that term is to retain any meaning.

To borrow again from Justice Blackmun's concurring opinion in *Parker*, for the Boy Scouts and their supporters, "what is at issue here are concepts of 'right' and 'wrong.'" 417 U.S., at 763 (Blackmun, J., concurring). These concepts are and have long been fostered by the Boy Scouts as part of the Scouts' oath to be "morally straight." The State of New

Jersey itself apparently agreed until 1979, when it repealed its law against sodomy. That New Jersey now holds a different position does not alter the fact that for the Boy Scouts and many others, "times have not changed in the area of moral precepts. Fundamental concepts of right and wrong are the same now as they [ever] were." *Id.* New Jersey may seek to persuade, but it cannot constitutionally compel, the Boy Scouts to alter its time-honored views, for in such compulsion lies intolerance, and tyranny.

CONCLUSION

The decision of the New Jersey Supreme Court should be reversed, and the grant of summary judgment entered by the New Jersey trial court in favor of the Boy Scouts should be reinstated.

Respectfully submitted,

JOHN C. EASTMAN
THE CLAREMONT INSTITUTE
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
250 W. First St., Suite 330
Claremont, California 91711
(909) 621-6825

EDWIN MEESE III
Counsel of Record
214 Massachusetts Ave., NE
Washington, D.C. 20002
(202) 546-4400

Counsel for Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence

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BOY SCOUTS OF AMERICA,

Petitioner,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

MICHAEL P. FARRIS*
SCOTT W. SOMERVILLE
Center for the Original Intent of the Constitution, at
Patrick Henry College
P.O. Box 1776
Purcellville, VA 20134
(540) 338-1776
* *Counsel of Record*

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QUESTION PRESENTED

Does State law requiring Boy Scout troop to appoint avowed homosexual and gay rights activist as assistant scoutmaster responsible for communicating Boy Scouting's moral values to youth members abridge First Amendment rights of freedom of speech and freedom of association?

TABLE OF CONTENTS

Question Presented ii

Table of Contents iii

Table of Authorities iv

Interest of the *Amicus* 1

Summary of Argument 4

Argument 5

New Jersey Law, As Applied, Violates the Fourteenth Amendment by Infringing Upon the Protected Privileges of American Parents 5

A. The Court Ignored the Parent's Federal Constitutional Right to *Direct* the Upbringing of the Parent's Child 5

B. Parental Rights at Common Law 6

C. Parental Rights in Constitutional Law 9

D. The Ruling Below Conflicts with this Court's Freedom of Association Cases 10

Conclusion 11

TABLE OF AUTHORITIES

Cases

Bethel School Dist. No. 403 v. Fraser,
478 U.S. 675 (1986) 9

Dred Scott v. Sandford,
60 U.S. 393 (1856) 2

Force v. Haines,
7 N.J.L. 385 (1840) 8

Meyer v. Nebraska,
262 U.S. 390 (1923) 6, 10

Parham v. J.R.,
442 U.S. 584 (1979) 7

Pierce v. Society of Sisters,
268 U.S. 510 (1925) ..... passim

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 10, 11

The Slaughterhouse Cases,
83 U.S. 36 (1872) 2

Thorpe v. Rankin,
19 N.J.L. 36 (1842) 8

Vernonia School Dist. v. Acton,
515 U.S. 646 (1995) 8, 9

Wisconsin v. Yoder,
406 U.S. 205 (1972) 6

Statutes

Civil Rights Act of 1866 2

Law Against Discrimination, N.J.S.A. 10:5-1 to –49 ..... 4, 5

Other Authorities

1 W. Blackstone, *Commentaries on the Laws of England* (1769). 7

Constitutional Provisions

U.S. Const. Amend. XIV, § 1, cl. 2 ..... 2, 6

U.S. Const. Preamble 2

INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the Founders is the only safe basis for the preservation of limited government and all rights including those important to our association. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

The Center has filed a number of briefs explaining how *federalism* enhances freedom. Our Founders understood that power should be exercised as close to home as possible, and our federal Constitution makes real their vision of decentralized and limited government. That vision is in danger of being lost, today.

Federalism was an important part of our Founders' original intent, but it was not their only concern. Federalism was one means to their overarching vision of liberty through law. That vision of liberty included those common law privileges

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[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

and immunities that they had fought to retain during their war with Great Britain.

Our Founders were so concerned that the new federal government could threaten the traditional "rights of Englishmen" that they wrote a Bill of Rights to make sure the new federal government did not become a new form of tyranny. Most of the first ten Amendments enshrine their commitment to protect recognized common law privileges from federal usurpation.

After the Civil War, our ancestors extended the federal guarantee of limited government to the States. They enacted the Fourteenth Amendment, which expressly protects the "privileges and immunities of citizens of the United States" from State infringement. U.S. Const. Amend. XIV, § 1, cl. 2. This *amicus* respectfully argues that this Court made a crucial mistake when it interpreted that clause in *The Slaughterhouse Cases*, 83 U.S. 36 (1872). The Fourteenth Amendment was originally intended to keep States from infringing those "civil rights" which had been denied to African-Americans in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), and which had been statutorily conferred by the Civil Rights Act of 1866.

This *amicus* believes the whole point of the Fourteenth Amendment was to protect the well-recognized privileges and immunities of the common law from State infringement, not to unleash a regime of purely subjective government by judiciary. This *amicus* hopes to see Fourteenth Amendment jurisprudence eventually placed upon a solid common-law foundation.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to

do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because they are ancient and deserve veneration, but because they were the elected representatives of the people.

Self-government demands that the intention of the elected Framers should always prevail over the views of unelected judges guided by floating notions of a "living Constitution." Our Founders made promises to the people that ratified the Constitution. Those promises are what are ultimately at stake in this case.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court devoted a mere two paragraphs to a discussion of whether its interpretation of the Law Against Discrimination, N.J.S.A. §§ 10:5-1 to 49, ("LAD"), infringed a parent's express statutory right to direct the education and upbringing of a child under his control. The court noted that parental rights could extend to persons, "like a step-parent," whose "intent it is to assume the parental relationship." But the court limited its analysis of parental rights, in effect, to a question of whether Scoutmasters *are* parents. New Jersey forced parental rights onto the bed of Procrustes, and then amputated the parental rights claim to make it fit. A quick review of this Court's cases proves that the problem here is New Jersey's cramped understanding of parental rights.

When this Court first articulated the right "to direct the education and upbringing of a child" in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), it was a right that was actually exercised in association with others. The only plaintiffs in *Pierce* were a Catholic school and a military academy. The parental right to "direct" the education of a child includes the right to have someone else do the actual teaching. According to *Pierce*, the parent's right to direct the destiny of a child goes to the very heart of our system of ordered liberty:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the

> right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce, 268 U.S. at 535.

The New Jersey court assumes parental rights vanish in association. The original intent of the Constitution, as reflected by the time-honored decisions of the Court, together with our common law tradition, does not agree with this truncated view of associational parental rights. Two fundamental rights—parental rights and the freedom of association—protect the parental liberty to bring up their young sons in an organization without homosexual activists for leaders.

Parents have both the right and the "high duty" to shape the values of their children, and that right is strengthened, not weakened, when citizens come together to inculcate shared values in a Boy Scout troop. The decision below undermines those constitutionally protected freedoms. The decision below should be reversed.

ARGUMENT

NEW JERSEY LAW, AS APPLIED, VIOLATES THE FOURTEENTH AMENDMENT BY INFRINGING UPON THE PROTECTED PRIVILEGES OF AMERICAN PARENTS

A. THE COURT IGNORED THE PARENT'S FEDERAL CONSTITUTIONAL RIGHT TO *DIRECT* THE UPBRINGING OF THE PARENT'S CHILD

The Law Against Discrimination, expressly affirms "the right of a natural parent or one *in loco parentis* to direct the

education and upbringing of a child under his control." N.J.S.A. 10:5-51. The New Jersey Court limited its inquiry to whether *Scoutmasters*, in and of their own right, have a right to direct the education and upbringing of a child. The court failed to consider whether its ruling might infringe the parent's *own* right to direct the upbringing of his or her child.

The lower court failed to consider whether the federal parental rights doctrine extends to associational exercise like the Boy Scouts. This is not a question of first impression: this Court's ground-breaking parental rights cases *only* involved parental rights in an assocation. This Court has consistently held that the Fourteenth Amendment prohibits States from depriving parents of such liberties, whether acting individually, *see*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), or together, *see, Pierce, supra; Meyer v. Nebraska*, 262 U.S. 390 (1923).

B. PARENTAL RIGHTS AT COMMON LAW

This Court has long relied on history and tradition as the text for parental rights analysis. As Chief Justice Burger noted:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).* See also

> *Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 400 (1923)....* The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries 447; 2 J. Kent, Commentaries on American Law 190.

Parham v. J.R., , 442 U.S. 584, 602 (1979)

Under the common law, parents had a right to direct the education and upbringing of a child, and there was never any doubt as to whether this right could be exercised in association with others. Groups of parents routinely hired schoolmasters to teach their children, just as individual parents hired tutors. These tutors and schoolmasters exercised the delegated authority of the parent himself. A parent could:

> delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

1 W. Blackstone, *Commentaries on the Laws of England* 441 (1769).

The schoolteacher was the very paradigm of the persons standing *in loco parentis*. Parents also sought apprenticeships for their children, and masters likewise stood *in loco parentis*. This was certainly what the New Jersey Supreme Court believed in 1842, when it said:

> The master, to a certain extent, stands in loco parentis, and it is of great importance, as well to society as to the parents and the apprentice, that he should be well instructed in the art or trade to which he has been bound; and that his moral conduct and character should be watched over and cultivated.

Thorpe v. Rankin, 19 N.J.L. 36, 40-41 (1842); *see also Force v. Haines*, 17 N.J.L. 385, 399 (1840) ("apprentices, towards whom the master is *in loco parentis*").

The common law notion of parental rights has not become irrelevant with the passage of time. Quite the contrary: this Court has recently relied upon concepts of *in loco parentis* to decide other constitutional questions. In *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995), for example, this Court allowed schools to conduct drug tests that would have been unconstitutional for law enforcement agents. Justice Scalia wrote:

> When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status.

Vernonia, 515 U.S. at 654-55.

Similarly, in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986), this Court noted the right of school authorities, acting *in loco parentis*, to govern school libraries in a way that would be otherwise impermissible under the First Amendment.

If parental rights can be limited to just those things the parents do themselves, then *Vernonia* and *Bethel* were wrongly decided. It was school officials, not parents, who conducted the drug tests and selected library books. These cases only make sense because parents can delegate their authority to others, who then stand in the place of the parents. But if parents can delegate their common law privileges and immunities to school officials, surely they can delegate them to Scoutmasters.

C. Parental Rights in Constitutional Law

The New Jersey court would only uphold parental rights when the parents, themselves, are shaping values, not when they seek help from others. As we have seen, this is not how parental rights operated at common law. It also flies in the face of the federal cases on the subject. This Court's watershed cases on parental rights makes it obvious how far the lower court missed the mark.

If the New Jersey court was right, then this Court was wrong in *Pierce, supra*. The New Jersey court limited parental rights to parents and step-parents, but the nuns who ran that Oregon school did not intend to *adopt* the children whose Catholic parents sent them there. Under the rule established below, Oregon would have been free to abolish secular private schools, although religious schools might be independently protected on free exercise grounds. But the other plaintiff in *Pierce* was Hill Military Academy, a secu-

lar private school. *Pierce* was decided on the basis of parental rights, not free exercise.

If New Jersey was right, then this Court was wrong in *Meyer, supra*. The teachers who taught German in the schools did not intend to *adopt* their students. Under the rule of the court below, Nebraska could have outlawed the teaching of German by anybody but a parent. But this Court struck down that Nebraska law.

D. THE RULING BELOW CONFLICTS WITH THIS COURT'S FREEDOM OF ASSOCIATION CASES

Both the common law and the constitutional cases confirm that parents have not only the right but a "high duty" to shape the values of their own children. Many parents recognize their need for help with such a task. That is why so many parents seek help in inculcating those values from other adults who share those values. This case will determine whether parents are still free to fulfill their parental responsibilities by associating with others.

The Boy Scouts of America is an association of like-minded people with a set of shared values. It is an *expressive* organization. Justice O'Connor hinted at the status of the Boy Scouts in her concurrence in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), when she wrote:

> It is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service. Cf *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The purposes of

> an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression. Lawyering to advance social goals may be speech, *NAACP v. Button*, 371 U.S. 415, 429-430 (1963), but ordinary commercial law practice is not, see *Hishon v. King & Spalding*, 467 U.S. 69 (1984). A group boycott or refusal to deal for political purposes may be speech, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912-915 (1982), though a similar boycott for purposes of maintaining a cartel is not. *Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.*

Roberts, 468 U.S. at 635-36 (O'Connor, J., concurring in part and in the judgment) [*emphasis supplied*].

Parental rights should grow stronger, not weaker, when citizens peacefully assemble. The freedom to associate should grow stronger, not weaker, when people gather to inculcate shared values, even values that may have become "politically incorrect" with the passage of time. But the New Jersey court has turned the First Amendment on its head. This Court must reverse that ruling to set it right again.

CONCLUSION

The New Jersey Supreme Court erred when it limited its parental rights inquiry to whether Scoutmasters, in and of themselves, could exercise parental rights. The unquestioned

rights of parents are *strengthened*, not *weakened*, when citizens join together to inculcate a set of shared values. The decision of the New Jersey Supreme Court violates the constitutional right to freedom of association, and it should therefore be reversed.

Respectfully Submitted,

MICHAEL P. FARRIS*
SCOTT W. SOMERVILLE
Center for the Original Intent of
the Constitution, at
Patrick Henry College
P.O. Box 1776
Purcellville, VA 20134
(540) 338-1776

* *Counsel of Record*

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In The

Supreme Court of the United States

Boy Scouts of America, *et al*,
Petitioners,

v.

James Dale,
Respondent

On Writ of Certiorari to the
Supreme Court
for the State of New Jersey

BRIEF OF THE LIBERTY LEGAL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

George B. Flint
Flint • Lambert, P.C.
Suite 1001
101 East Park Blvd.
Plano, Texas 75074
(972) 424-4004

Kelly Shackelford*
Suite 230
903 East 18th St.
Plano, Texas 75074
(972) 423-8889

Counsel for Amicus Curiae

February 25, 2000

*Counsel of Record

13pp

QUESTION PRESENTED

Whether a state law requiring a Boy Scout Troop to appoint an avowed homosexual and gay rights activist as an Assistant Scoutmaster responsible for communicating Boy Scouting's moral values to youth members abridges First Amendment rights of freedom of speech and freedom of association.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. There is no essential difference between the Boy Scouts of America and any large religious denomination or organization 3

II. If New Jersey is allowed to require acceptance and promotion of a particular viewpoint and to override the Boy Scouts of America's associational rights, it would have serious consequences for all religious institutions since the law being applied is arguably neutral and of general applicability 6

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed. 2d 876 (1990) 6

Hsu v. Roslyn Union Free School District No. 3, 85 F.3d 839 (2nd Cir.), *cert. den.* 519 U.S. 1040, 117 S.Ct. 608, 136 L.Ed.2d 534 (1996) 7-8

Roberts v. United States Jaycees, 468 U.S. 609, 622, 104 S. Ct. 3244, 3252, 82 L.Ed. 2d 462 (1984) 3,5

INTEREST OF THE AMICUS CURIAE[1]

Amicus Liberty Legal Institute is a legal organization specializing in the defense of religious freedoms and First Amendment rights. In its commitment to the protection of religious liberty of all faiths, the Institute represents religious institutions and individuals across the country. These rights and liberties are directly threatened by the New Jersey Supreme Court's imposition of state approved viewpoint regarding the morality of the homosexual lifestyle upon a voluntary association expressing a contrary viewpoint. If the State is allowed to supercede a voluntary association's right to define itself according to its own moral conscience, then all institutions, including religious organizations, are at substantial risk. Since the State's interest at issue before the Court is arguably neutral and of general applicability, religious institutions would have no protection under the Free Exercise Clause. The determination of this case therefore implicates religious freedom at its core. As an organization committed to the defense of religious liberty, therefore, the Institute has an exceptional interest in the continuing vitality of associational liberty as a bulwark against violation of religious freedom.

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[1]The parties have consented to the filing of this Brief. Letters of consent from Petitioner and Respondent accompany this Brief. This brief has not been authored in whole or in part by counsel for a party. No person, other than amicus, its members or its counsel, has made a monetary contribution to the preparation of submission of this brief.

STATEMENT OF THE CASE

Amicus hereby adopts the statement of the case presented in the Brief for Petitioners.

SUMMARY OF ARGUMENT

The Boy Scouts of America, although large, is a voluntary association with defining characteristics and principles similar to large religious organizations. Petitioners did not deny Mr. Dale a leadership position because he was a homosexual, but because he openly advocated a homosexual lifestyle before impressionable boys which was deemed contrary to Petitioners' particular viewpoint.

If the State is allowed to require a voluntary association to suppress its viewpoints, moral or otherwise, in favor of the State approved opinion *du jour* and to override a voluntary association's right to determine the content of its own speech, there could be serious consequences for the religious freedom of all religious institutions and associations. Any such State "interests" are arguably neutral and of general applicability, and would operate to require all religious institutions to abandon their religious conscience in favor of the State approved speech. An adverse ruling against Petitioners in this case could well begin a movement down the long, slow road of abandoning, slowly but surely, the freedom of religious organizations to define themselves.

ARGUMENT

I. There is no essential difference between the Boy Scouts of America and any large religious denomination or organization.

People organize together for a variety of reasons, including fraternal, charitable, and religious. This right of association is an essential element of the fundamental freedoms which form the bedrock of our constitutional compact.

> "... [W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S. Ct. 3244, 3252, 82 L.Ed. 2d 462 (1984)

Assuming, arguendo, that the Boy Scouts of America is not a "religious" association, it has many associative and organizational elements similar to religious organizations, as demonstrated by the following:[2]

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[2]For the "Generic Denomination," counsel has adopted the Episcopal Church as a model and has quoted from *The Book of Common Prayer* of The Episcopal Church, Copyright 1979, abbreviated in the Table as BCP. Because pronouncements of the Episcopal Church are, however, contained throughout several sources, these quotations and the use of the Episcopal Church as a model are illustrative only and are not intended to represent the official position of the Episcopal Church toward any of the matters presented.

Characteristic	Boy Scouts of America	Generic Religious Denomination
Size	Large	Large
Organization	National, with Council (Regional) Supervising Structure, Local Troops	National, with Diocesan (Regional) Supervising Structure, Local Churches
Openness to Public Participation	Invites all, but expects willingness to adhere to standards	Invites all, but expects willingness to adhere to standards
Written Statements of Beliefs	Scout Oath, Scout Law	Catechism, Nicene Creed and Apostles Creed
View Toward God	"duty to God" (Oath), as taught by family and religious leaders (explanation)	made in God's image, Father, creator; duty to God is to "believe and trust in him" (BCP 847)
Method of Teaching	Lecture, discussion, and demonstration by example	Lecture (sermon), discussion, and demonstration by example

Characteristic	Boy Scouts of America	Generic Religious Denomination
Collection of Beliefs	Boy Scout Handbook	Bible
Daily Values	"morally straight" (Oath), strong character, honesty, purity, justice, respect, clean, faithful, virtuous, self-reliant (explanation)	set forth in Ten Commandments, to demonstrate respect, be faithful (love and obey God), honesty, resist temptation (see BCP 847-848)

These common characteristics are expressive in that they represent and promote a particular viewpoint, way of thinking, and approach to life.[3]

For associational purposes, therefore, there is little, if anything, to separate the Boy Scouts of America from any large religious group.

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[3]Thus, it has been recognized that "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Roberts v. United States Jaycees*, 468 U.S. 609, 636, 104 S. Ct. 3244, 3259-60, 82 L.Ed. 2d 462 (1984) (O'Connor, J., concurring)

II. If New Jersey is allowed to require acceptance and promotion of a particular viewpoint and to override the Boy Scouts of America's associational rights, it would have serious consequences for all religious institutions since the law being applied is arguably neutral and of general applicability.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed. 2d 876 (1990), this Court held that the State could enforce laws against religious institutions without regard to the Free Exercise Clause if the laws were neutral and of general applicability. Therefore, if a State passes a neutral law of general applicability which challenges a religious institution's right to define itself in membership, leadership, or in public proclamation of opinion, the religious institution cannot rely upon the Free Exercise Clause but must, instead, rely upon its rights under the First Amendment protecting its and its members' freedom of association. Without the protection of the Free Exercise Clause and free speech associational rights, religious organizations stand defenseless against such a challenge.

No one has alleged (and no one could allege) that New Jersey has passed a law regarding homosexuals which is specifically targeted against the Boy Scouts of America. Instead, Respondent attempts to enforce an anti-discrimination law against Petitioners which is arguably a neutral law of general applicability, applied in a manner to require Petitioners to accept, permit, and, because of the context, participate in promoting viewpoints to impressionable youth with which it fundamentally disagrees.

Just as in the present case, most States will always present their "interest" in a neutral fashion, not aimed specifically at religious institutions. Without freedom of association protection from such "neutral" laws, religious institutions will be unshielded from the power of the State to dictate the very language and concepts used by those institutions to define themselves and their particular religious, moral, and political perspectives.

Such attempts are already being made. An instructive reported case in this regard is *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2nd Cir.), *cert. den.* 519 U.S. 1040, 117 S.Ct. 608, 136 L.Ed.2d 534 (1996). In this case, a student Christian group attempted to form a Christian club at school. In its proposed club constitution, the club stated that it would be open to all people "regardless of race, color, age, religion, sex, national origin, or physical handicap," but that the meetings would be gatherings of "Christians" and that elected officers (the leadership) would have to be "professed Christians." *Id.* at pg. 849. The school insisted that the club's constitution be changed to delete the word "Christian" and to remove any requirements that the club officers profess any particular faith, and then denied the club status when the club refused to make the changes because the requirement that the club's leadership be "professed Christians" constituted a violation of the school's anti-discrimination regulations. *Id.* at pg. 850. The club was subsequently granted permission to organize, but only on the condition that it remove the requirement that officers be Christian. *Id.* at pg. 851.

The District Court denied the club organizers' requests for relief, relying heavily upon *Smith*.[4] The District Court was reversed on appeal by the Second Circuit, but not based upon Free Exercise rights. Instead, the Court focused upon associational free speech rights in the context of the Equal Access Act. *Id.* at pgs. 856-859. Had it not been for the influence of freedom of association, the State would have been able to impose its own statement of values and constitution upon the "Christian" club, applying its "neutral" regulation of general applicability.

The Plaintiffs in *Hsu* are not alone. Amicus has represented in just the last year a college religious student association which was prohibited by a major university from having a Statement of Faith signed by its members because such a requirement allegedly violated the college's neutral regulation prohibiting discrimination based upon religion.

These two cases are but the tip of the iceberg, waiting to emerge if associational liberties are further weakened. Once the State is allowed to require a voluntary association to suppress its viewpoints, moral or otherwise, in favor of the State's approved opinions and is allowed to override a voluntary association's right to determine the content of its own speech, religious freedom of all religious institutions and associations is in jeopardy.

Ultimately, this case is about freedom of conscience, a concept crucial to religious liberty. Freedom of conscience is

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[4]876 F.Supp. 445, 462 (E.D.N.Y. 1995)

powerful. It is in fact a major reason for the existence of our religion clauses.

Removing associational protection from a religious landscape which already has no protection from neutral and generally applicable laws would be a mistake. Religious institutions would be forced to choose between following the State or their religious conscience, their God or their government. Historically, upon such choices have governments fallen.

The better approach is to respect freedom of conscience and allow a diversity of private groups, including religious groups, to flourish without State interference. Upon this fundamental freedom has this country risen to become a beacon for the world.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief of Petitioners, the decision below should be reversed.

Respectfully submitted,

George B. Flint
Flint • Lambert, P.C.
Suite 1001
101 East Park Blvd.
Plano, Texas 75074
(972) 424-4004

Kelly Shackelford*
Suite 230
903 East 18th St.
Plano, Texas 75074
(972) 423-8889

Counsel for Amicus Curiae

February 25, 2000

*Counsel of Record

Feb 28 2000

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IN THE
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BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF OF UNITED STATES CATHOLIC CONFERENCE AND NEW JERSEY CATHOLIC CONFERENCE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

MARK E. CHOPKO*
General Counsel

JEFFREY HUNTER MOON
Solicitor

UNITED STATES
CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300

*Counsel of Record

February 28, 2000

3288

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The New Jersey Definition of "Place of Public Accommodation" Eviscerates the Basic Rights of Private Organizations.	5
A. The Broad Definition of "Place of Public Accommodation" Transforms the Nature of Private Associations through Government Power.	5
B. If It Is Necessary to Reach the Constitutional Issues, Freedom of Association and of Expression Protect the Boy Scouts Against the Expansive Reading of State Public Accommodations Law. . .	11
II. A Private Association May Exclude From Leadership Those Who Do Not Share Its Mission and Purpose.	14
CONCLUSION	26

TABLE OF AUTHORITIES

PAGE

CASES:

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 9

Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410 (6th Cir. 1996) 20

Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987) 20

Curran v. Mount Diablo Council of the Boy Scouts of America, 17 Cal. 4th 670 (Cal. 1998) 25

Dale v. Boy Scouts of America, 160 N.J. 562 (1999) ..... *passim*

Dale v. Boy Scouts of America, 308 N.J. Super. 516 (N.J. App. 1998) 5

Democratic Party of United States v. Wisconsin, 450 U.S. 107 (1981) 23

Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929) 9

Gorsche v. Calvert High School, 997 F.Supp. 867 (N.D. Ohio 1998), *aff'd*, No. 98-3201 (6th Cir. April 13, 1999) 20

Hall v. Baptist Memorial Health Care Corp., 27 F.Supp.2d 1029 (W.D. Tenn. 1998) 20,22

Hart v. Cult Awareness Network, 13 Cal.App.4th 777 (1993) 22

Harvey v. Young Women's Christian Assoc., 533 F.Supp. 949 (W.D. N.C. 1982) 17,18

Hollenbaugh v. Carnegie Free Library, 436 F.Supp. 1328 (W.D. Pa. 1977), *aff'd*, 578 F.2d 1374 (3d Cir.), *cert. denied*, 439 U.S. 1052 (1978) 17

Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) ..... *passim*

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McGuire v. Marquette University, 814 F.2d 1213 (7th Cir. 1987) 19

New York State Club Association v. City of New York, 487 U.S. 1 (1988) 15

New York Times v. Sullivan, 376 U.S. 254 (1964) 9

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) 9,10

Randall v. Orange County Council, Boy Scouts,
17 Cal.4th 736 (Cal. 1998) 25

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 15

Rosario v. Rockefeller,
410 U.S. 752 (1973) 23

Streumph v. McAuliffe,
661 S.W.2d 559 (Mo.App. 1983) 15

United States Jaycees v. Iowa Civil Rights Comm.,
427 N.W.2d 450 (Iowa 1988) 7

United States Jaycees v. Richardet,
666 P.2d 1008 (Alaska 1983) 7

Watson v. Jones,
80 U.S. (13 Wall.) 679 (1871) 9,15

Welsh v. Boy Scouts of America,
993 F.2d 1267 (7th Cir.),
cert. denied, 510 U.S. 1012 (1993) 7

STATUTORY PROVISIONS:

Americans with Disabilities Act,
42 U.S.C. §12101, *et seq*. 20

Title VII of the Civil Rights Act of 1964,
42 U.S.C. §2000e, *et seq*. 20

MISCELLANEOUS:

Codex Iuris Canonici (1983 Code of Canon Law)
(Vatican City: Liberia Editrice
Vaticana 1983), c.747, §2 6

1 *Corinthians* 9:16 (New American Bible) 6

Phillipians 2:15 (New American Bible) 6

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

BRIEF OF UNITED STATES CATHOLIC CONFERENCE AND NEW JERSEY CATHOLIC CONFERENCE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The United States Catholic Conference ("USCC") is a nonprofit organization, the members of which are the active Catholic Bishops in the United States.[1] The USCC is a vehicle through which the Bishops can speak cooperatively and collegially on matters affecting the Catholic Church, its people and society in general. The USCC advocates and promotes the pastoral teaching of the Bishops in such diverse areas of the

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[1]Pursuant to Supreme Court Rule 37.6, counsel for these amici state that they authored this brief, in whole, and that no person or entity other than the amici made a monetary contribution toward the preparation or submission of this brief. Both parties have consented to the filing of this brief. Letters of consent from all parties have been filed with the Clerk of the Court.

Nation's life as the free expression of ideas, fair employment and equal opportunity, the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the USCC are the protection of the First Amendment rights of religious and associated organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

The New Jersey Catholic Conference is composed of the Catholic Bishops of New Jersey. The New Jersey Catholic Conference's major objective is to provide a means by which the Bishops may speak on matters of public policy. In expressing the views of the Church, the Conference addresses a wide range of issues in the areas of morality, health, welfare, education and human and civil rights.

The Catholic Bishops condemn unjust discrimination against all people. That issue, however, is not genuinely presented in this case, except in the way it has been publicly postured. We believe that this case implicates a more narrow, common sense proposition, namely, that private associations may not be ordered to retain a leader who has acted contrary to an association's mission and purpose. We write to give special emphasis to this principle. This principle finds application in both common law and constitutional law, for to penalize a private institution for terminating a leader who acts contrary to the institution's moral code offends the First Amendment. This case presents the Court with an opportunity to resist a broad and intentional intrusion of government into the internal operations of private entities, in a way that is workable and practical.

SUMMARY OF ARGUMENT

This case poses the question whether this Court will venture again into the constitutional labyrinth of deciding what relationships and behaviors are properly protected by the First

Amendment and which are not. If it decides to venture into this maze, these amici suggests that there is only one way out, and that is to decide that the Boy Scouts' associational and expressive freedoms are protected by the Constitution. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). The Boy Scouts of America, like many organizations, including many religious groups, teaches that homosexual conduct is wrong. That message is part of the moral code of Scouting as it is for many other organizations, especially religious groups. Whether one agrees with that message is irrelevant, as the First Amendment broadly protects the dissemination of messages, even those that some might think to be out of vogue.

For the judiciary effectively to direct the Boy Scouts to convey, through its Scout leadership, another and directly contrary message is indefensible and threatens the integrity of a wide range of American institutions. Churches and religious organizations and other groups that exist to promote strong social and moral messages, and take firm stands in support of those messages, are particularly at risk. Every moral message is, by its nature, a call to some value. In the process of implementing its values and conveying its message, through the choice of members, leaders, and others to act as exemplars, any organization that genuinely believes in its own values will select leaders who demonstrate those values in word and deed. The freedom to make those sorts of leadership decisions is part and parcel of the right to decide what the values of the organization are. Otherwise any organization would be at risk of being, as it were, "hijacked" by those with opposing views and turned to the service of the very concepts it most opposes. Whether the judiciary will countenance and enforce such stratagems is the primary question posed by the instant case. This Court should declare that such efforts, when aided by state law, are unconstitutional.

Constitutional issues, however, should not be decided by the courts when there is a sound, practical, and non-constitutional way that a case like the one at bar may be decided. This case should have been disposed of by operation of the common sense legal principle that private associations and institutions cannot be required to retain in a position of leadership a person who has acted contrary to the organization's own policies, purposes and values, and the messages it wishes to communicate to its members and the public. This principle applies when, as here, that person has attempted affirmatively and publicly to undercut one of the purposes of the organization because he thinks it is wrong.

ARGUMENT

The principal difficulty presented by the case at bar is that this Court has been placed in the position of either blessing the intrusive interpretation of a state public accommodation law or deciding that there are constitutional limits of degree on its reach. The Supreme Court of New Jersey has put this Court into a constitutional box -- defer or constitutionalize. If forced to decide that issue, the Court must decide that the federal Constitution bars the state intrusion. Here, however, the broad cast given the state statute threatens more than basic constitutional values. The expansive view taken below of the definition of a "place of public accommodation" implicates the association's constitutional rights, and would override one of the basic principles of employment and association law, namely that a private association may not be compelled to retain a leader who has demonstrated he does not share the institution's mission and purpose. That rule of law would apply if the Supreme Court of New Jersey had paid attention to the most basic rule of jurisprudence, that statutes should be construed to avoid constitutional problems.

The Boy Scouts of America, like many other private associations and religious institutions, holds that homosexual conduct is wrong. These amici hold that view. Although we recognize that others disagree, our view on the morality of homosexual conduct is part of our approach to the values that we teach and offer to this society. We might describe such conduct as sinful and to be avoided. For the Scouts, such conduct is not "morally straight." It therefore does not accept the volunteer services of those who would present themselves to Scouts as examples of the acceptability of homosexual conduct or behavior. Scout leaders are selected in order to provide a "'good example of what a man should be like'." *Dale v. Boy Scouts of America*, 308 N.J. Super. 516, 527 (N.J. App. 1998). An individual who publicly communicates the message that homosexual conduct is morally acceptable does not exemplify the values the Boy Scouts of America intends to convey.

I. The New Jersey Definition of "Place of Public Accommodation" Eviscerates the Basic Rights of Private Organizations.

A. The Broad Definition of "Place of Public Accommodation" Transforms the Nature of Private Associations through Government Power.

By definition, private associations are just that, "private" groups of like-minded citizens formed for limited purposes, to undertake a particular purpose or espouse a particular creed or mission. That a private association is organized for some purposes, again by definition, means it necessarily rejects those purposes outside of or antithetical to its charter. One may not always agree with the message or its appropriateness, but the First Amendment protects persons' rights to organize and profess what they believe without penalty from the government. By joining, a person says "I agree." By refusing to abide by the

standards of the organization, a person has effectively removed himself from the group. No organization may be ordered to retain a leader who affirmatively acts contrary to the beliefs and values of the organization. Every organization has the right to decide for itself the content of its own beliefs without having to submit to the sabotage of those who would challenge or undercut them. For a court to order private associations' policies and views to be overridden in such an instance implicates the courts in a potentially unconstitutional exercise.

Religious institutions are particularly vulnerable on this score. Christians, for example, are exhorted to live in the world, but not be part of it. *Phillipians* 2:15 (New American Bible). Christians are expected to be leaven for the world, to be part of the transformation of culture. Christian leaders are expected to preach the Gospel message in season and out of season, whether the world is agreeable to the message or not. 1 *Corinthians* 9:16 (New American Bible). The message of a religion may not always be in vogue, and those who practice seriously cannot be moved by the winds of the world to suppress or alter the message just because it is not popular. It is in the nature of religion to preach, and religious exercise and association for purposes of engaging in those exercises with like-minded believers is a basic human right. Code of Canon Law, canon 747, §2 (1983) ("To the Church belongs the right always and everywhere to announce moral principles, including those pertaining to the social order...."). At its heart a mission of the Church is the evangelization of culture.

The Supreme Court of New Jersey's interpretation of the "place of public accommodation" standard effectively imposes on a broad range of organizations that act by educating and evangelizing society and culture, as a matter of judicial fiat, purposes, goals, and obligations that they manifestly do not consider to be theirs. *Dale v. Boy Scouts of America*, 160 N.J. 562 (1999). The New Jersey court intentionally stretched words

beyond their ordinary meaning. While it recognized that the cases addressing the Boy Scouts or analogous organizations had decided they were not "places," *e.g.*, *Welsh v. Boy Scouts of America*, 993 F.2d 1267 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993); *United States Jaycees v. Iowa Civil Rights Comm.*, 427 N.W.2d 450 (Iowa 1988); *United States Jaycees v. Richardet*, 666 P.2d 1008 (Alaska 1983), the court below nevertheless extended the meaning of "place" to cover the Boy Scouts without regard to whether its activities took place at any particular geographic locations at all. *Dale*, 160 N.J. at 586-89. Moreover, the three factors that the court used to determine a "place of public accommodation" are so broad as to be applicable to almost any human enterprise -- including the religious ritual and conduct of religious denominations themselves.

First, the court said that Scouting engaged in "broad public solicitation" of new members. *Dale*, 160 N.J. at 583-91.[2] It is the nature of religious denominations to evangelize and invite the public to consider membership. But only those who would profess acceptance of those beliefs and avow them as their own may become members. In many religious bodies, actions contrary to the moral code may be subject to sanction, including excommunication or disfellowship. That such activity, rooted in religious belief, could be subject to review under a state antidiscrimination standard and be set aside

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[2]The court below took upon itself the role of deciding how genuine the Boy Scouts' standards are, and so whether they actually act as selectivity criteria. *Dale*, 160 N.J. at 599-601. It resolved this simply by asserting that they are not "real impediments," since few are excluded, ignoring entirely the issue whether many disagree with these standards in the first place. *Dale*, 160 N.J. at 599. And then it asserted with no apparent factual support that the "Boy Scouts does not limit its membership to individuals who . . . subscribe to a specific set of moral beliefs," *id.* at 600, in the face of the Boy Scouts' demonstrated requirement that all Scouts must subscribe to the Oath and Law.

threatens the essential nature of religious groups in this society. The court's "broad public solicitation" standard would particularly penalize those churches which actively proselytize. That the court's standard would invite the State to dictate leadership decisions is frankly untenable.

Second, the court found a "close relationship to governmental bodies," *Dale*, 160 N.J. at 591, because the Boy Scouts at times conduct activities on government property and may collaborate with governmental entities, including the U.S. military. In an era of pervasive government, every organization that collaborates with government or participates in public programs is, therefore, under the lower court's approach, potentially a "place of public accommodation." Given the degree to which religious entities collaborate daily with the government in the provision of education, charity, and health care, few organizations would be beyond the reach of this statute as the New Jersey court interpreted it, no matter what their own views of their purposes and goals might be.

The court's third standard is entirely subjective, whether the Boy Scouts "resembles" other recognized "place[s] of public accommodation." As to this amorphous factor, the court concluded that Scouting appeared to be similar to Little League or a day camp because Scouts engage in recreational activities. *Dale*, 160 N.J. at 594. This "resemblance" allowed the court below to discard the Boy Scouts' own self-understanding, that it is not merely a recreational group but one that teaches profound moral lessons, as reflected in the Scout Oath and Law, and embodies an affirmative religious component. The court below arbitrarily excised vital aspects of Scouting's nature and purposes.[3] It is for the Boy Scouts alone to decide its value

[3]Because the First Amendment is clearly at issue, this Court has "an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), quoting *New York Times v. Sullivan*, 376 U.S. 254, 284-86 (1964). In that review, no deference is due to the conclusions of the court below, including its conclusions about Scouting that Scouting itself contests as patently contrary to its mission and purposes. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995), this Court stated that "[t]his obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection...." Thus, "we are obliged to make a fresh examination of crucial facts." *Id.* This is "vitally important in cases involving restrictions on the freedom of speech protected by the First Amendment" as is asserted here. *Bose, supra*, 466 U.S. at 503. "Regarding certain largely factual questions in some areas of the law, the stakes -- in terms of impact on future cases and future conduct -- are too great to entrust them finally to the judgment of the trier of fact." *Id.* at 501, n. 17.

system and message and what they mean in practice, and to enforce them with the degree of vigor it believes proper consonant with its own objectives and goals.

The Supreme Court of New Jersey, however, purported to determine what the actual or genuine nature of the Boy Scouts was. The court's view of the nature of Scouting, however, was and is contrary to Scouting's statement of its values and beliefs. The court then imposed legal consequences on the Boy Scouts based upon its revisionist view of the organization. This approach presents particular dangers not only to the Boy Scouts of America proper, but also to the many religious entities that sponsor Scouting units, and threatens their First Amendment rights as well. The courts of this country can never interpret, much less impose judicially, religious doctrine. This Court, properly, has been particularly careful not to make decisions that would imply the adoption or rejection of particular religious standards. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Presbyterian Church in the United States v. Mary*

Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969). Courts may not interpret religious doctrine or determine its importance to a church. *Mary Elizabeth Blue Hull*, 393 U.S. at 450. Our Constitution allows religious entities the right to determine their own moral and religious standards without the interference of the state.

A variety of religious denominations sponsor thousands of Scouting units covering more than a million Scouts. These groups implement and convey their religiously based moral and social messages through their conduct and sponsorship of Scout units. Given Scouting's emphasis on traditional values, Catholic units consider Scouting a form of ministry to youth. Unless the decision below is reversed, not only Boy Scouts of America, but churches, synagogues, and other religious sponsors will be forced to provide tacit approval of Scout leaders whose conduct they find religiously and morally objectionable.

It is no answer to suggest that such religious groups could simply withdraw their sponsorship from all Scout units. The conduct of Scout units is an integral part of ministry for many denominations. The decision below presents religious entities with nothing but a "Hobson's Choice" -- either they must stop participating in Scouting as a way of teaching values and morals, or continue participating in Scouting under leadership that exemplifies the contrary of their moral teachings. Either way, damage inevitably results to the ability of religious entities to communicate religious and moral precepts. The Free Exercise implications of this decision, while not squarely presented in this particular case, are very real.

B. If It Is Necessary to Reach the Constitutional Issues, Freedom of Association and of Expression Protect the Boy Scouts Against the Expansive Reading of State Public Accommodations Law.

If the constitutional issues need to be reached, this case is clearly controlled by *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). In *Hurley*, this Court unanimously reversed a Massachusetts decision that had broadly interpreted the state "public accommodations" law to apply to decisions of the South Boston Allied War Veterans Council, regarding who would be included in its annual St. Patrick's Day/Evacuation Day Parade. The Court found that the Veterans Council's decision to exclude an Irish-American gay and lesbian group ("GLIB") from the parade was constitutionally protected against the application of a broad state statute. *Id.* Because the Veterans Council had the First Amendment right to "exclude an applicant whose manifest views were at odds with a position taken by the club's existing members," it was entitled to decide that GLIB could not participate in the parade. *Id.* at 581. Organizations may choose "not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Id.* at 575.

Extensive treatment of *Hurley* is beyond the scope of this brief and in any event will, properly, be offered by the Boy Scouts and other amici. But three particular facets of *Hurley* deserve discussion because they speak directly to the position these amici take here.

First, the Supreme Court of New Jersey asserted that Dale did not go to Boy Scout meetings "carrying a banner," has "never used his leadership position to promote ... any message inconsistent with Boy Scouts policies" and that Dale does not

want to participate in Boy Scout leadership " 'to make a point' about sexuality." *Dale*, *supra*, 160 N.J. at 623. This manifestly misconstrues the conduct involved here. Plaintiff's public statements to all who would listen or read newspapers (including, necessarily, individual boy scouts), voluntary assumption of a leadership position in an organization whose goals are diametrically opposed to the Scouts', and extensive use of the public media to criticize the Scouts are indeed precisely "carrying a banner" (like GLIB in *Hurley*). That "banner" promoted messages inconsistent with Scouting. Dale himself has said that it is, in fact, his goal to make a point about Scout policies -- that they are "bad and wrong." JA 513.[4]

Second, the plaintiff's conduct in the instant case is both far more expressive, and far more clearly contrary to the substantive ideas being urged by the defendants, than that of the plaintiff in *Hurley*. GLIB was formed simply to march in the parade, "to celebrate its members' identity as openly gay, lesbian and bisexual descendants of the Irish immigrants [and] to show that there are such individuals in the community...." *Hurley*, 515 U.S. at 570. GLIB merely proposed to "march behind a shamrock-strewn banner with the simple inscription 'Irish American Gay, Lesbian and Bisexual Group of Boston.'" *Id.* GLIB made no social or moral statements either for or against positions taken by any of the other groups marching in the parade or the Veterans Council itself.[5]

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[4]The New Jersey court's own analysis implicitly agrees that promoting opposing messages, taking leadership positions in support of them and making public that opposition as part of a campaign to change the Boy Scouts' views, is a fully legitimate reason for the Boy Scouts to decide not to use an adult's volunteer services as an Assistant Scoutmaster. *Dale*, 160 N.J. at 611, 623. That is precisely what is recognized by the cases discussed in Point II, below.

[5]For example, other marchers, but not GLIB, expressed positions on whether England ought to "get out of Ireland," or whether children ought to "say no to drugs." *Id.* at 569. That others were able to express views, while GLIB did not do so, was given no weight by this Court in its opinion. *Id.*

On the other hand, this plaintiff's avowed purpose in trying to become an Assistant Scoutmaster is to make a social, moral and political statement that *is contrary* to the Boy Scouts' position on the unacceptability of homosexual Scout leaders. Dale has repeatedly emphasized what he sees as a need for gay role models for gay teenagers, JA 517, 549, JA 497-98, and has said that he holds himself out as a role model for children. JA 502-3. Coupled with his unequivocal rejection of Scouting policy as "bad and wrong," JA 513, Mr. Dale's forced participation as a Scoutmaster would be as if this Court in *Hurley* had ordered the Veterans Council to include, in the parade, groups dedicated to proving that St. Patrick's Day and Evacuation Day were "bad and wrong" things to celebrate, or dedicated to opposing the multitude of other patriotic, religious, political and moral messages promoted by other participants. The Veterans Council could no longer decide what the messages of its parade would be.

Third, the New Jersey Supreme Court's decision intrudes upon private associations' rights to decide what their own missions and goals are, what positions they will espouse, and who will be retained as leaders within the organization. It does this by semantic "sleight of hand." The New Jersey court agrees that the Boy Scouts exist to teach moral values, and that it uses its activities to try to teach youth morally correct conduct. *Dale,* 160 N.J. at 613. But under cover of these comforting and unremarkable assertions, it also decides that the Boy Scouts cannot be permitted to determine the content or substance of these moral values. For example, it will not be allowed to interpret its own Scout Oath. It is not possible to teach moral values without teaching what those moral values are, any more than it is possible to teach American history without teaching what the history of America is.

The court below opined that Dale's termination as a Scoutmaster "appears antithetical" to Scouting's goals and philosophy, *Dale*, 160 N.J. at 618, but only because it had first effectively decided what goals and philosophy the Boy Scouts would be permitted to adopt. While the court claims that "the reinstatement of Dale does not compel the Boy Scouts to express any message," *id.* at 624, it ignores this Court's injunction that a "fundamental rule of protection under the First Amendment ... [is] that a speaker has the authority to choose the content of his own message," which necessarily incorporates the right to decide "what not to say." *Hurley*, 515 U.S. at 573 (citation omitted). The Supreme Court of New Jersey pays only lip service to the first part of this standard, and ignores the second entirely. In New Jersey the Boy Scouts of America is no longer permitted to decide what it "will not say" about who an appropriate person is to serve as a Scoutmaster. More importantly, the government, not a private institution, is determining who will lead a private association. That prospect, if the Court must decide it, is incompatible with the Constitution.

II. A Private Association May Exclude From Leadership Those Who Do Not Share Its Mission and Purpose.

A hallmark of private associations is that they exist by the joint commitment of their members. They are organized around a particular mission and purpose, and through the unity of the members who consent, implicitly or explicitly, to that mission and purpose. Those who do not consent, may withdraw. Normally, they may not use civil litigation as an agent for reform of the entity, its mission, or purpose.[6] The government

[6]This body of law is even more clear in regard to religious entities, whose members are united in a common bond of faith commitment. In *Watson v. Jones*, this Court said it would be a "vain consent" were members of a religious group able to litigate the terms and conditions of that membership in the civil courts. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871). A proper remedy would be to withdraw from membership. *See Struemph v. McAuliffe*, 661 S.W.2d 559 (Mo. App. 1983), *cert. denied*, 467 U.S. 1216 (1984).

cannot force a private association to retain a leader who acts contrary to its mission or purpose.

This fundamental principle is central to *Hurley*, discussed *supra*, 515 U.S. at 573. *Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984), and its associated cases support this view that state statutes would *not* be read to "impos[e] ... restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." Likewise, in *New York State Club Association v. City of New York*, 487 U.S. 1, 13 (1988), the Court wrote of a state human rights law that "[i]f a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the law erects no obstacle to this end."

The right of organizations to determine who will lead them has long been protected in the context of ordinary employment and voluntary associations. The instant case presents the archetypal situation which illustrates this principle. Mr. Dale has taken a public position contrary to that of the Boy Scouts. He made the matter known through his own participation in public events, interviews with news media, appearances on "talk shows" and news conferences. At relevant times he was an official or a representative of a group espousing beliefs contrary to those of the Scouts. More to the point, he stated that his intent in pursuing a voluntary leadership role with the Scouts was specifically to demonstrate his opposition to the goals, purposes, and beliefs of Scouting, and reform it. No organization is required against its will to welcome into its ranks

one who clearly intends, figuratively, to become the "monkey wrench" in its organizational "works." In such a situation, any organization is justified in concluding that such an individual's conduct, statements and other actions are a sufficient basis to deny even membership or participation -- let alone a meaningful leadership role.

This basic principle is well illustrated in the case law, outside of constitutional law. In *McConnell v. Anderson*, 451 F.2d 193 (8th Cir.), *cert. denied,* 405 U.S. 1046 (1972), a state university refused to hire a self-styled homosexual "activist" because his "personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University." *Id.* at 194. Particularly in view of plaintiff's actual conduct in using his application to work at the University as a platform to argue publicly about equality of rights for homosexuals, the Eighth Circuit held that the University had acted properly in rejecting his application:

> [I]t is at once apparent that this is not a case involving mere homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded from employment because of a desire ... to pursue homosexual conduct. It is, instead, a case in which something more than remunerative employment is sought; a case in which the applicant seeks employment on his own terms; a case in which the prospective employee demands, as shown both by the allegations of the complaint and by the marriage license incident as well, the right to pursue an activist role in *implementing* his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval [of his viewpoint] upon his employer .... We

> know of no constitutional fiat or binding principle of decisional law which requires an employer to accede to such extravagant demands.

Id. at 196 (emphasis in original). Although decided thirty years ago, it is significant that the issue arose in an employment context and in a public institution. There principles would apply even more strongly in a private association setting.[7]

In *Harvey v. Young Women's Christian Association*, 533 F.Supp. 949 (W.D. N.C. 1982), the plaintiff, very much like Mr. Dale, wanted to retain her position with the YWCA with the "expressed intent to represent to her youth groups a philosophy and social concept contrary to those of her employer and in violation of her agreement to espouse the purpose and philosophy of the YWCA." *Id.* at 954. Specifically, plaintiff was a YWCA Program Director, conducting community outreach programs for low-income girls. The YWCA's goals were to develop the "mind, body and spirit of young women," *id.* at 952, which it interpreted as being inconsistent with the plaintiff's situation as an unmarried pregnant woman, since the YWCA desired to help unmarried girls avoid premarital sex and pregnancy. *Id.*

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[7]To similar effect is *Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328 (W.D. Pa. 1977), *aff'd*, 578 F.2d 1374 (3d Cir.), *cert. denied,* 439 U.S. 1052 (1978), which upheld the firing of two library employees, for "living together in a state of 'open adultery.'" The issue for the court was not the "rightness or wrongness" of the conduct involved or of the employer's reaction to it, *id.* at 1332, but whether the library Board could be compelled to reinstate them. "Like the Board of Regents in *McConnell* ... the defendants could reasonably conclude that by retaining plaintiffs as employees they would be giving 'tacit approval' to their conduct," which the court found was not legally required. *Id.* at 1333.

In entering judgment for the YWCA, the *Harvey* court wrote that its function was simply:

> to decide whether under the law the defendant would be required to retain in its employment a person who has made a conscious decision to bear a child while unwed and who felt that she could advocate or otherwise represent to the teenagers in the program she developed and maintained under the auspices of the defendant, an "alternative lifestyle" that is incompatible with the principles and goals of the defendant YWCA. This Court is not willing to require that an organization such as the YWCA, which according to the evidence is a movement rooted in the Christian faith, and which has ideals and goals to which the plaintiff apparently does not subscribe, to employ a person to teach teenagers in a program under its auspices "an alternative lifestyle," a lifestyle which is abhorrent to the ideals and goals of the defendant YWCA.

Id. at 955. Like the plaintiff here, whose goal it is to be an Assistant Scoutmaster as part of his program as a "gay activist" to prove how "bad and wrong" the Scouts' policies are, the plaintiff in *Harvey:*

> sought to remain in the employ of the defendant on her own terms; [presenting] a case in which the employee intended to pursue an activist role in implementing her unconventional ideas concerning societal status to be accorded unmarried mothers and thereby to foist tacit approval of this status upon an organization to which such conduct is contrary to its goals and

> principles; in this instance, the Young Women's Christian Association.

Id. at 956. The court found that no binding principle of law, including Title VII, required the YWCA to continue to employ plaintiff under those circumstances. *Id.*

Organizations are particularly free to reject those whose views and public positions are contrary to theirs, when it relates to the selection of leaders or teachers. In *McGuire v. Marquette University*, 814 F.2d 1213 (7th Cir. 1987), a teacher with a Ph.D. in Religious Studies applied repeatedly for an Associate Professor's position in the Theology Department at Marquette University, a Catholic university operated under the auspices of the Society of Jesus and in accordance with its principles. She was not selected for the position because of her publicly voiced opposition to Catholic Church policy on abortion, described by the university as a "perceived hostility to the institutional church and its teachings, and to the goals and missions of Marquette." *Id.* at 1217. Plaintiff's own pleadings affirmed the dramatic distinctions between pro-abortion positions she advocated, and the policies of the university, and affirmed that the reason plaintiff desired to teach at Marquette was in order to point out and critique these differences. Plaintiff saw this as part of her personal effort to move Catholic moral teaching in a direction she desired. *Id.* at 1215-1217. The Seventh Circuit properly affirmed the dismissal of plaintiff's claims simply because she could not possibly have proven that discriminatory intent was the "but for" cause of the refusal to hire her. *Id.* at 1216. Rather, because plaintiff clearly opposed Catholic teaching as it was provided by Marquette, it could not be forced to allow plaintiff to teach there. *Id.*

It is especially important to permit youth-oriented organizations to decide for themselves what values are to be exemplified by those whom the organization puts forward as

"role models." In *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 411 (6th Cir. 1996), the court upheld the termination of an unmarried pregnant teacher for violating her religious school's policy requiring staff to present a "Christian example." Likewise, in *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 701 (8th Cir. 1987), the court affirmed the termination of a pregnant, unmarried instructor who, the Club determined, presented a "negative role model" to girls club members aged 8 to 18.[8] *Boyd* and *Chambers* support the right of organizations to permit only those who agree with their beliefs and values to become leaders charged with the exemplification and communication of those values to others, and also support the larger concept that it is for the organization alone to determine what its rules mean in practice.

Direct conflicts between an organization's beliefs and those of an individual who wishes to participate in it are all the more important where the individual has taken on a public leadership role in a group which opposes the values and principles of the organization he wishes to join. A prime example of this concept is presented in *Hall v. Baptist Memorial Health Care Corp.*, 27 F.Supp.2d 1029 (W.D. Tenn. 1998). Plaintiff in *Hall* was hired as a Student Services Specialist at the Baptist Memorial College of Health Services. Part of her job was to interpret school policy to ensure that student activities were congruent with the College's goals and objectives. The College was affiliated with the Southern Baptist Convention and adhered to its views that homosexuality was sinful and wrong. At the same time, plaintiff began to attend a church that accepts and is oriented to serving the religious needs of practicing gay

[8]To similar effect is *Gorsche v. Calvert High School*, 997 F. Supp. 867 (N.D. Ohio 1998), *aff'd*, No. 98-3201 (6th Cir. April 13, 1999), holding that an individual guilty of adultery, committed contrary to her obligation to behave in conformity with "values of the Catholic Church," could not make out even a *prima facie* case of discrimination under Title VII, 42 U.S.C. §2000e, *et seq.*, or of the Americans With Disabilities Act, 42 U.S.C. §12101, *et seq.*

and lesbian members, and thereafter was ordained a minister of that church. When this came to the attention of College authorities, plaintiff was removed from her job because of what the College concluded was an obvious conflict between that job, where she exercised influence over students and their behavior in order to bring them into line with the religious and other positions of the College, and her role as a leader of a church which openly espoused contrary views.

Plaintiff's Title VII claim failed "for failure to prove that Defendant's articulated reason for terminating her was pretextual. Defendant asserts that it terminated Plaintiff because she had assumed a leadership role in an organization espousing beliefs diametrically opposed to those held by the College itself." *Id.* at 1038. In fact, plaintiff's supervisors:

> perceived a conflict between Hall's leadership position in an organization which publicly embraced and supported homosexuals and her employment at the College founded by and affiliated with those who consider homosexuality to be a sin and perversion in the eyes of God.... Plaintiff has not offered any evidence to rebut Defendant's claim that it terminated Plaintiff because of her assumption of a leadership position in an organization which publicly expressed beliefs about homosexuals contrary to those held by the Defendant.

Id. The court noted that it made no difference whether the conflict between Hall's actions and the College's beliefs meant that plaintiff had failed to establish a *prima facie* case of discrimination, or was more properly seen as constituting a legitimate nondiscriminatory reason for her termination. *Id.* at 1038. The court said summary judgment for the College would have been entered even without the College's exemption from

Title VII coverage for religious discrimination. *Id.* at 1037. However verbalized, it is the right of an organization to decide not to embrace those who act in a way calculated to demonstrate their opposition to the organization's tenets.[9]

This legal principle is applicable to widely differing sorts of organizations. In *Hart v. Cult Awareness Network*, 13 Cal. App.4th 777 (1993), a California appellate court upheld a limiting construction of a state civil rights statute, so as to permit the Cult Awareness Network ("CAN-LA") to exclude from its membership an adherent of the Church of Scientology. CAN-LA existed to alert people to what it said were dangers posed by Scientology. Membership in CAN-LA was limited to former members of Scientology, and others, who opposed their beliefs and practices. *Id.* at 781-784. Under a broader reading of the statute, CAN-LA would have been a "business establishment" and so would have been required to permit plaintiff to join. This, the court held, would infringe upon CAN-LA's and its members' constitutional rights to promote and disseminate their views of Scientology. Quoting *Roberts*, 468

[9]The court in *Hall* understood the plaintiff's arguments to pose constitutional risks as well. Plaintiff argued that the College's asserted reason for removing her, that she had assumed a leadership role in a church with beliefs contrary to the College's, was pretextual because another College employee had also been ordained -- in a different religion -- and the College did not remove that employee although the ordination of women was itself a practice with which the College did not agree. *Id.* The *Hall* court rejected plaintiff's suggestion that a civil court could second-guess an organization's decisions about what principles they should uphold, or how strongly, or who should serve in their leadership positions. The court wrote: "the most troubling aspect of Plaintiff's argument is that it places the federal courts in a role contrary to the spirit of the First Amendment. In essence, the Plaintiff is requesting this court to tell the Defendant that it must be opposed to the ordination of women with the same degree of conviction and intensity it has expressed in its opposition to the gay and lesbian lifestyle, or suffer liability under Title VII." *Id.* at 1039. As noted above in Point I, the constitutional consequences of interfering with the Boy Scouts' expressive and associational freedoms are of similar dimension.

U.S. at 622-23, and using language that directly applies to the instant controversy, the court in *Hart* held that:

> implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends .... There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Hart, 13 Cal.App. 4th at 790. In the end, appellant "plainly admits that *his purpose is to inform CAN-LA about Scientology so as to challenge, if not change*, CAN-LA's belief that Scientology is a destructive cult. This purpose is incompatible with CAN-LA's work in counseling and providing support for ex-cult followers and the families of current cult followers." *Id.* (emphasis supplied.) That principle would seem dispositive of the case at bar.[10]

Mr. Dale's conduct was clearly calculated to make his disagreement with the fundamental values of Scouting as plain

[10]This Court has also recognized that even political parties have the right to prevent their ranks from being intruded upon by those with differing political principles. *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107 (1981); *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973). Organizations that exist, like the Scouts, to promote shared value systems also have "the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party, supra*, 450 U.S. at 122.

as possible. Mr. Dale decided to take on a leadership position as Co-President of the Lesbian/Gay Alliance of Rutgers University, and gave media interviews in that capacity referring to what he described as a need for gay "role models" for gay teenagers to focus on. JA 515-18. He described his participation in "gay politics" at Rutgers as "very active" and said that he "took up leadership roles" in that regard. JA 468-69. He intentionally "maintained a high profile on campus" representing gay interests. JA 503. And the reason he gave at deposition for pursuing litigation to secure an Assistant Scoutmaster position, was "to point out to [the Boy Scouts] how bad and wrong" their policy was, not to teach or model the values of Scouting as the organization conceived of them. JA 513. His goal is simply to change the policies of the Boy Scouts to make them more congruent with his ideas, not to participate in Scouting as it is currently oriented.[11] Mr. Dale should not be permitted to secure this Court's assistance to "foist tacit approval" of his views on an organization that rejects them. *McConnell, supra*, 451 F.2d at 186.

Mr. Dale had "promised to live by the Scout Oath," had agreed to uphold the Scout Law, and stated that he tried to live in accordance with them. JA 113-14. But he desires to decide for himself how those standards should be interpreted and enforced, and to continue to participate as a leader on his terms, not Scouting's. Dale may no more do this than the plaintiff in *Harvey* could legitimately subvert the goals of the YWCA by "modeling" for young girls the "alternative lifestyle" of being an

---

[11]Mr. Dale was well aware, before he participated in the media interviews reported in the July 8, 1990 newspaper article, as Co-President of the Lesbian/Gay Alliance and took the policy positions enunciated there, JA 515-8, that his views on homosexuality were contrary to those of the Boy Scouts. In a subsequent interview Mr. Dale said, "I realized I'd be risking things, and I knew that this [his role in Scouting] would be one of them," JA 510-12, referring to his appearance in the July 8, 1990 article and his participation in the gay youth conference upon which it reported.

unwed mother, *Harvey, supra*, 533 F.Supp. at 951-955, or the plaintiff in *McGuire* could teach theology from "the perspective of the Roman Catholic tradition" by teaching alternative views on abortion. *McGuire, supra*, 814 F.2d at 1215, 1217. The institution involved, whether the YWCA, Marquette University or the Boy Scouts of America, is entitled to decide the content of its own values and principles.

Indeed, the two most closely analogous opinions, *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal.4th 670 (Cal. 1998), and *Randall v. Orange County Council, Boy Scouts of America*, 17 Cal.4th 736 (Cal. 1998), turn fundamentally on this same theory. In *Curran*, the California Supreme Court held that that state's public accommodations statute did not apply to the Scouts because its "primary function is the inculcation of a *specific set* of values." *Curran*, 17 Cal. 4th at 697 (emphasis supplied). As here, "plaintiff does not share the views promoted by the organization he seeks to join; to require the Boy Scouts to accept him as an assistant scoutmaster would restrict the organization's ability to exclude an individual with a contrary ideology or philosophy." *Id.* at 725-26 (Kennard, J., concurring). The Boy Scouts in *Curran* and *Randall* were not required to embrace a leader or member who rejected precisely the "specific set" of values in which the Scouts believed. *Id.* at 697. The conceptual underpinning of all of these cases -- that no organization can be required to embrace, as a member or a leader, one who espouses beliefs contrary to the organization -- is largely the same, whether the defendants are schools, colleges, libraries, girls clubs, political groups or networks organized to pursue particular social policies, or even, as here, the Boy Scouts.

CONCLUSION

The decision of the Supreme Court of New Jersey threatens the ability of a broad range of social, political, and

religious groups to define their own missions and purposes and retain leaders willing to implement them. It defies common sense to force a group to retain a leader who has publicly stated he wants to change the group because he believes its views are wrong. If a State nonetheless asserts it has that power, then the exercise of that power must be restrained by the Constitution.

The decision below should be reversed.

Respectfully submitted,

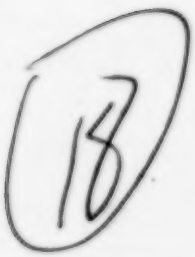
MARK E. CHOPKO*
General Counsel

JEFFREY HUNTER MOON
Solicitor

UNITED STATES CATHOLIC CONFERENCE
3211 Fourth Street, N.E.
Washington, D.C. 20017
(202) 541-3300

February 28, 2000

*Counsel of Record



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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL,
BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari
to the Supreme Court of New Jersey

BRIEF OF AMICI CURIAE
EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND,
CATO INSTITUTE,
TEXAS JUSTICE FOUNDATION,
SOUTHEASTERN LEGAL FOUNDATION,
ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS,
INDEPENDENT WOMEN'S FORUM, AND
CENTER FOR INDIVIDUAL RIGHTS
IN SUPPORT OF PETITIONERS

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

35pp

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF AMICI CURIAE 1
SUMMARY OF ARGUMENT 4
ARGUMENT 6
I. A Robust Private Sphere Is a Bedrock Presupposition of the Constitution and Requires Broad Protection for Freedom of Association. 6
A. The Role of Private Ideation and Value Transmission in a Republican Democracy 9
B. Private Sovereignty Requires a Broad Definition of Private Expressive Association and a Narrow Vision of Public Accommodation. 11
II. The Boy Scouts Is a Private Expressive Association Possessing Undiluted First Amendment Rights. 14
A. The Boy Scouts Is a Private Expressive Association. 14
B. State Law Criteria Defining a Public Accommodation Do Not Establish Public Character under the Constitution. 15
C. Compelled Association with a Person Who Does Not Share One of the Boy Scouts' Values Violates the First Amendment. 23
III. Preventing Private Discrimination Is Not a Compelling State Interest Sufficient To Trump First Amendment Rights. 27
CONCLUSION 30

TABLE OF AUTHORITIES

Pages

Cases

Abood v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) 7
Alden v. *Maine*, -- U.S. --, 19 S. Ct. 2240 (1999) ... 8, 9, 10, 12
Atascadero State Hospital v. *Scanlon*, 473 U.S. 234 (1985) 20
Blatchford v. *Native Village of Noatak*, 501 U.S. 775 (1991) 8
Board of Directors of Rotary Int'l v. *Rotary Club of Duarte*, 481 U.S. 537 (1987) 24
Clay v. *United States*, 403 U.S. 698 (1971) 13
Curran v. *Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218 (Cal. 1998) 15
Dale v. *Boy Scouts of America*, 160 N.J. 562, 734 A.2d 1196 (1999) ..... passim
Hans v. *Louisiana*, 134 U.S 1 (1890) 7
Herbert v. *Lando*, 441 U.S. 153 (1979) 9
Hurley v. *Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) ..... passim
Marsh v. *Alabama*, 326 U.S. 501 (1946) 29
NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958) 7, 15
New York State Club Ass'n, Inc. v. *City of New York*, 487 U.S. 1 (1988) 10, 13, 24, 27
Pacific Gas & Electric Co. v. *Public Utilities Comm'n of Cal.*, 475 U.S. 1 (1986) 25, 26
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 (1980) 9, 10

Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) passim
Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995) 3, 22
San Francisco Arts & Athletics, Inc. v. *United States Olympic Comm.*, 483 U.S. 522 (1987) 20, 28
Seminole Tribe of Florida v. *Florida*, 517 U.S. 44 (1996) 8
Shelley v. *Kraemer*, 334 U.S. 1 (1948) 28
Thornhill v. *Alabama*, 310 U.S. 88 (1940) 7
Watson v. *Jones*, 80 U.S. (13 Wall.) 679 (1872) 13, 18
Welsh v. *Boy Scouts of America*, 993 F.2d 1267 (CA7 1993) 19
West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 9, 11, 27

Statutes

36 U.S.C. § 153101 20

Other Authorities

A. Meiklejohn, Political Freedom: The Constitutional Powers of the People (1965) 10
Federalist No. 39, The Federalist Papers (Rossiter & Kesler eds. 1999) 8
Scoutmaster Handbook (1972) 15

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INTEREST OF AMICI CURIAE[1]

Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is an Illinois nonprofit corporation organized in 1981. It stands for, among other things, the fundamental right of parents to guide the education of their own children. Eagle Forum ELDF's mission is to enable conservative and pro-family men and women to participate in the process of self-government and public policy making so that America will continue to be a land of individual liberty, respect for family integrity, public and private virtue, and private enterprise. The freedom of private citizens to associate for the ad-

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

vancement, promotion, and transmission to the next generation of such values is a fundamental prerequisite of self-government that Eagle Forum ELDF zealously defends through education and participation in significant legal cases.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case raises squarely the question of the right of association under the First Amendment and thus is of central interest to Cato and the Center.

The Texas Justice Foundation is a charitable nonprofit organization that has as part of its mission the protection of those private mediating structures which provide a bulwark of freedom for the individual against excessive intrusion of government. The private ordering of affairs should represent the greatest sector of decision making in any healthy and free country. The Foundation believes in individual rights, in limited government, and that in a pluralistic society it is the duty of individuals, not government, to determine the values and skills to be taught to the next generation. The Foundation seeks to protect, through litigation and education, those fundamental freedoms, such as the freedom of association, essential to the preservation of American society.

The Southeastern Legal Foundation is a nonprofit public interest organization concerned with the proper construction and enforcement of the laws and Constitution of the United States. In addition to initiatives and promulgation of programs designed to inform and educate the public, the Foundation endeavors to influence public policy through litigation. The Southeastern Legal Foundation opposes all efforts by

governments to abridge the freedom of American citizens to speak or associate. While the Southeastern Legal Foundation takes no position on the wisdom of Boy Scouts' decisions, the Foundation stands with the Boy Scouts against this attempt by judicial fiat to weaken a Constitutional guarantee.

The Association of American Physicians & Surgeons ("AAPS") is a nonprofit organization dedicated to defending the private practice of medicine. Founded in 1943, AAPS publishes a newsletter and journal and participates in litigation in furtherance of its goals of limited government and the free market. Central to the interests of AAPS are the First Amendment rights of association and speech at issue in the case at bar, which are essential to limiting government encroachment on the marketplace of ideas, values, and health.

The Independent Women's Forum ("IWF") is a nonprofit, nonpartisan organization founded by women to foster public education about legal, social and economic policies, particularly those affecting women and families. IWF supports policies that promote individual responsibility, limited government, and economic opportunity. IWF believes that freedom of association is the cornerstone of self-government in a democratic society. Further, IWF believes that the central duty of every society is to protect the expression and transmission of the traditional moral virtues on which the freedom, security, and survival of its people depend.

The Center for Individual Rights ("CIR") is a nonprofit public interest law firm founded in 1989. Through its litigation activities, CIR seeks to advance respect for individual rights. Many of the cases in which CIR has participated have involved the First Amendment. *E.g.*, *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). CIR believes that, in recent years, governmental entities have increasingly circumscribed fundamental First Amendment freedoms in the pursuit of political objectives.

SUMMARY OF ARGUMENT

By adopting an overbroad interpretation of the concept of "public accommodation," the New Jersey Supreme Court did more than just stretch state law. It used the "public" label as a weapon to degrade the scope and value of the First Amendment interests it would credit to the Boy Scouts of America (hereinafter "Boy Scouts"). It also used the misapplied "public" label as a lever to elevate the State's declared interest in fighting certain types of discrimination. But on both sides of the constitutional equation, the mislabeling of the Boy Scouts as a "public" entity leads to the wrong result. The Boy Scouts is a private expressive association entitled to undiluted First Amendment protections. And the State's interest in eradicating *private* discrimination unrelated to specific commercial activity is not constitutionally "compelling" enough to outweigh the Boy Scouts' First Amendment rights.

Amici will address the constitutionally required line distinguishing entities with a "public" character and private expressive associations. Both the text and structure of the Constitution presuppose a viable and robust private sphere for the creation, transmission, and evolution of values and beliefs. Just as federal authority may not be construed to undermine the constitutional presupposition of viable and sovereign States, no government – state or federal – has the power to redefine the private sphere down into irrelevance. For it is only the freely developed private viewpoints of individuals and groups that, when periodically aggregated, constitute the free consent of the People to the current regime.

To ensure that government remain subject to the freely renewed consent of the People, rather than impose the views of a temporary regime upon the People, the Constitution offers its most steadfast and unflinching protection to a broadly defined sphere of private association. Private expressive associations should include, at a minimum, all nonprofit, noncommercial entities that have some expressive purpose and

limit membership in any manner related to that purpose. A nonprofit form and the self-described purposes and policies of an organization should provide *prima facie* evidence of the relevant private expressive qualities. The burden should then be upon the State to prove, through compelling evidence, that such entity nonetheless can be categorized as a public accommodation having restricted associative rights.

Once the constitutionally proper scope of private expressive association is recognized, it readily follows that the Boy Scouts and its local affiliates are fully protected by the First Amendment. The Boy Scouts is a nonprofit, noncommercial association with the declared purpose of developing in boys its private and particular vision of morality. By choosing to advance its views through both speech and noncommercial example, and by selecting its membership in a manner related to those views, the Boy Scouts represents a private expressive association regardless of how large or how popular it may be. Its ability to limit membership – and especially leadership – to those who agree with each of its views, in word and through example, goes to the very heart of the freedom of private expressive association.

Finally, once the constitutional difference between entities having some "public" character and private expressive associations is recognized, the anti-discrimination interest asserted by the State cannot be categorized as compelling. The State's strong interest in nondiscriminatory access to publicly offered goods and services does not extend into an interest in unlimited access to the alleged advantages of noncommercial private expressive association. And insofar as the State claims an interest in altering the values and beliefs of the Boy Scouts as an organization, or of society in general, such an interest is illegitimate. The ultimate acceptance or rejection of particular views or beliefs is a matter reserved exclusively to citizens in their private capacities, inheres in the very notion of the People's sovereignty, and may not be imposed through the compulsions or prohibitions of government.

ARGUMENT

The New Jersey Supreme Court rejected the Boy Scouts' claim to freedom of expressive association by stating that the New Jersey Law Against Discrimination ("LAD") does not have a significant impact on the Boy Scouts' expressive association or speech. *Dale* v. *Boy Scouts of America,* 160 N.J. 562, 612, 734 A.2d 1196, 1223 (1999). The court concluded that, "State laws against discrimination may take precedence over the right of expressive association" because where access "to publicly available goods, services, and other advantages" is concerned – *i.e.*, public accommodations – the State has a "compelling interest" to prevent discrimination. *Id.*

The court below unduly diminished the scope of First Amendment protections by assuming that its expansive *state law* definition of a "public" accommodation likewise cabined the *constitutional* scope of private expressive association. But the text and structure of the Constitution place significant constraints on what a State may redefine as a "public" accommodation receiving lesser First Amendment protections. The Boy Scouts is an expressive association well within the broad private sphere entitled to full constitutional protection. And its membership policies are a direct, inevitable, and protected result of those values that it chooses to express.[2]

I. A Robust Private Sphere Is a Bedrock Presupposition of the Constitution and Requires Broad Protection for Freedom of Association.

At the inception of this Nation, the Founders declared that "Governments are instituted among Men, deriving their just powers from the consent of the governed." Declaration of

[2] Amici offer no collective opinion on the Boy Scouts' views or policies regarding homosexuality. Rather, they believe that the merits of the Boy Scouts' beliefs are wholly irrelevant to the First Amendment question of whether it is a private expressive association with the right to promote and transmit values of its own choosing.

Independence. By this simple statement, the relative places of private persons and public government were recognized: Government exists solely upon the *consent* of the people, and as servant of the People.[3]

The Constitution reflects this sentiment in myriad ways, both express and structural. For example, at the very outset, the Constitution is ordained and established by "We The People of the United States." U.S. Const., preamble. The fundamental role of the People as the foundation, rather than the wards, of government, is likewise reflected in the republican form of the national government and in the constitutional requirement that the "United States shall guarantee to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, sec. 4. And most notably for this case, there is the First Amendment (applied here through the Fourteenth Amendment), which this Court has recognized as the premier safeguard of the freedoms of private thought, value formation, and communication essential to genuinely free political decisions and free consent of the People. *See NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 460-61 (1958); *Thornhill* v. *Alabama,* 310 U.S. 88, 95-96 (1940); *see also Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977) ("at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State").[4]

[3] Indeed, the signatories of the Declaration of Independence made that declaration as "the representatives of the united States of America ... in the Name, and by Authority of the good People of these Colonies."

[4] This Court has recognized the superior sovereignty of the People in other contexts as well. *See, e.g., Alden* v. *Maine,* – U.S. –, –, 119 S. Ct. 2240, 2268 (1999) ("the Constitution begins with the principle that sovereignty rests with the people"); *Hans* v. *Louisiana*, 134 U.S 1, 11 (1890) (referring to "the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts").

Like the constitutional language referring to the States, the language referring to the role of the People stands not merely for what it says, "'but for the presupposition ... which it confirms.'" *Seminole Tribe of Florida* v. *Florida,* 517 U.S. 44, 54 (1996) (quoting *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 779 (1991)). With respect to the People, that presupposition is that true sovereignty forever rests in the hands of the People, and passes in trust to the government for its use only at the continuing and periodically renewed free choice of the People. That presupposition was amply described by James Madison, in Federalist No. 39, discussing the nature of republican government:

> [W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.

The Federalist Papers, at 209 (Rossiter & Kesler eds. 1999). As Madison correctly recognized, we have "rest[ed] all our political experiments on the capacity of mankind for self-government." *Id.* at 208.

In addition to the political sovereignty of the States, therefore, the Constitution presumes a more fundamental private sovereignty of the People. The various characteristics "inherent in the nature of sovereignty" serve as "postulates which limit and control" the proper scope of government authority. *Seminole Tribe,* 517 U.S. at 54, 68 (citations and quotation marks omitted). The People, like the States, are reserved a "vital role" in the "constitutional design" and the "[v]arious textual provisions of the Constitution assume [a free People's] continued existence and active participation in the fundamental processes of governance." *Alden* v. *Maine,* -- U.S. --, --, 119 S. Ct. 2240, 2247 (1999). What this Court recently has said concerning Congress and the States, so too it might say concerning the relationship between *all* republican government and the People: Government "may not treat these sovereign entities as mere prefectures or corporations," but rather must accord "the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty" in the People. *Id.* at --, 119 S. Ct. at 2268.[5]

A. The Role of Private Ideation and Value Transmission in a Republican Democracy

Because the legitimacy of republican government depends upon the consent – direct or indirect – of the private citizenry, it is essential that such consent be freely formed and given.

> There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

West Virginia State Bd. of Educ. v. *Barnette,* 319 U.S. 624, 641 (1943). The pervading constitutional requirement that public opinion not be controlled by government is reflected in the "structural role" of the First Amendment "in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555, 587 (1980); *see also Herbert* v. *Lando,* 441 U.S. 153, 185 n. 3 (1979) (Brennan, J., dissenting in part) ("'[T]he freedom of speech springs from the necessities of the program of

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[5] While the Constitution's structure and assumptions protect the States against the national government's Article I powers, the Constitution's structure and assumptions protect the People against *both* the national and state governments. Direct Supreme Court enforcement of the First and Fourteenth Amendments as shields against government power thus is not the imposition of federal authority upon the States, but rather is the use of the People's authority to deflect improper government impositions. This case does not involve a clash between two separate sovereigns within the federal system, but rather a clash between the true sovereign – the People speaking through the Constitution – and a subsidiary sovereign.

self-government. ... It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.'") (quoting A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 27 (1965)).

The free formation of opinion so essential for valid popular consent to republican government has long been recognized to require protection for the "ability and the opportunity to combine with others to advance one's views." *New York State Club Ass'n, Inc.* v. *City of New York*, 487 U.S. 1, 13 (1988). Such protected association ensures the free formation of private views by "preserving political and cultural diversity and ... shielding dissident expression from suppression by the majority." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984). The structural role of the First Amendment thus offers protection not only for the act of communication itself "but also for the indispensable conditions of meaningful communication." *Richmond Newspapers*, 448 U.S. at 588. And the free formation of views and beliefs is an "indispensable condition" not just of meaningful communication, but of every aspect of the People's sovereignty. The People must be left free to discover their will, rather than be directed and coerced, as subsidiary creatures, into a manufactured will that might be more to the liking of the current regime. "Such plenary [government] control of [private self-]governmental processes denigrates the separate sovereignty of the" People. *Alden*, -- U.S. at --, 119 S. Ct. at 2264.[6]

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[6] The Founders required limited and regularly renewed election of representatives in order to guard against the tendency of any given regime to try to project its authority forward in time. The proscription against titles of nobility, U.S. Const., Art. I, sec. 9, similarly eschewed the type of hereditary authority that projected forward without regard to the regularly renewed assent of a sovereign People. Where a regime passes laws to entrench the present majority's viewpoint and to hinder the possible rise of competing viewpoints, the governors are merely seeking to pass power down to their intellectual, rather than their physical, heirs. Both forms of hereditary power are antithetical to the Constitution. And a government-imposed self-perpetuating orthodoxy is by far the worse of the two.

B. Private Sovereignty Requires a Broad Definition of Private Expressive Association and a Narrow Vision of Public Accommodation.

Just as a textual and structural understanding of the role of the States calls for a more limited view of federal power under Article I, so too such an understanding of the role of the sovereign People calls for a more limited view of *all* government power as it relates to belief, expression, and association. While courts have allowed greater government authority over entities with a certain historically defined "public" character, the constitutional role of private sovereignty demands vigilance against creeping encroachment of government power through broad redefinition of the "public" realm.[7]

In order to preserve the constitutionally presupposed role of the People, the Court should recognize undiluted First Amendment protection for, at a minimum, nonprofit private expressive associations. A nonprofit entity should be deemed a constitutionally "private" expressive association when it: (1) is noncommercial; (2) has an educational, inculcative, or communicative purpose of any type whatsoever; and (3) restricts its membership in a manner related to some aspect of that purpose.[8]

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[7] This concern is particularly salient given the expansion of government and its insinuation into all aspects of daily life. As "social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls," and as the "laissez-faire concept or principle of non-interference has withered at least as to economic affairs," *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 640 (1943), the need for private sovereignty over ideation and expression becomes even more acute. With so many other bulwarks against government overreaching battered or broken, the "majestic generalities of the Bill of Rights" remain among the few safeguards of "the pattern of liberal government" and the sovereignty of the People envisioned by the Founders. *Id.* at 639.

[8] Amici do not address the constitutional protection that should be accorded commercial or non-expressive entities for their various associative activities. Regardless of how this Court might view such associations, full

The nonprofit form should constitute *prima facie* evidence of a noncommercial character. And the statements and views of the body with authority to speak for the organization should constitute *prima facie* evidence of the nature of any expressive purpose and the relation of any membership criteria to such purpose. Thereafter the burden should be upon the State to rebut the association's private expressive character if the State seeks to reduce First Amendment constraints by characterizing the group as a "public" accommodation.[9] As with the "structural principle" acknowledging the sovereign immunity of the States, the People's sovereignty of thought, expression, and association should not be diluted absent "compelling evidence" that an association has voluntarily placed itself in the public realm and surrendered its private status and protection. *Alden,* -- U.S. at --, 119 S. Ct. at 2255 (citation and quotation marks omitted).

Insulating private expressive associations from recategorization as public accommodations is consistent with this Court's treatment of the issue in earlier cases. In *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston,* this Court noted the common-law rule that "innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer," and that it was by making a profession of an activity and taking on customers that they came to be considered "'a sort of public servants.'" 515 U.S. 557, 571 (1995) (quoting old English cases). Similarly in *Roberts,*

First Amendment protection should extend, at a minimum, to all noncommercial private expressive associations.

[9] *Roberts* and its progeny, of course, involved non-profit entities nonetheless viewed as "commercial" in nature. *See, e.g., Roberts,* 468 U.S. at 626 (referring to "various commercial programs and benefits"). And one can imagine non-profit commercial cooperatives, trade schools, or industry associations having regulatory authority that might well be characterized as commercial or even "public" in some senses. But the burden should be on the State to prove any potentially relevant commercial qualities.

Justice O'Connor contrasted freedom of expressive association and "freedom of commercial association." 468 U.S. at 634 (O'Connor, J., concurring in part and concurring in the judgment); *see also New York State Club Ass'n,* 487 U.S. at 20 (O'Connor, J., concurring) (distinguishing "[p]redominately commercial organizations"). Regardless whether the Court is correct in affording lesser protection to commercial entities, private noncommercial expressive associations surely are entitled to full First Amendment refuge.

Determining an expressive purpose and the relationship of membership policies by looking to the association's own interpretations of those matters is likewise consistent with the principle that "the speaker has the right to tailor the speech." *Hurley,* 515 U.S. at 573. And deferring to an expressive association's governing body on such matters accords with the First Amendment aversion to government debate over matters of private faith, doctrine, or morals. *See Clay* v. *United States,* 403 U.S. 698, 700 (1971) (Selective Service System must focus on the beliefs of the prospective conscientious objector and not on "its own interpretation of the dogma of the religious sect"); *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679, 733-34 (1872) (in matters concerning "the conformity of the members of the church to the standard of morals required of them," every religious denomination has "the right of construing their own church laws").

The proposed broad definition of private expressive association and the presumptions used in applying that definition reflect the proper place of government relative to the People, and the need to jealously guard against government's tendency toward self-aggrandizement. Any narrower approach would unduly restrict the private sphere and invite government to expand the so-called "public" sphere or to impose its own views on what an association actually believes in order to enforce the latest prescribed orthodoxy. Indeed, that is precisely what happened in this case.

II. The Boy Scouts Is a Private Expressive Association Possessing Undiluted First Amendment Rights.

The New Jersey Supreme Court justified its disregard for the Boy Scouts' First Amendment rights in part by characterizing it as a "public" accommodation supposedly having fewer rights and implicating more compelling regulatory interests than would otherwise be the case with a private expressive association. The court also redefined the Boy Scouts' views in a manner contrary to how the Boy Scouts itself defines those views. Both tactics are unacceptable distortions of constitutional law.

A. The Boy Scouts Is a Private Expressive Association.

Applying the test set forth in Part I, the Boy Scouts easily qualifies as a private expressive association entitled to undiluted First Amendment protection. At both the national and local levels, the Boy Scouts and its units are nonprofit, noncommercial associations, and no court has suggested otherwise.

Regarding the purpose of the organization, the Boy Scouts' Mission Statement provides:

> It is the mission of Boy Scouts to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential. The values we strive to instill are based on those found in the Scout Oath and Law.

State Court Record JA2238. This purpose falls well within the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts*, 468 U.S. at 622. Indeed, at least one member of this Court has cited the Boy Scouts as an example

of an expressive association. *Id.* at 636 & n.* (O'Connor, J., concurring in part and concurring in the judgment).[10]

Further, the national organization having authority to speak for the Boy Scouts has identified homosexuality as incompatible with its view of moral behavior and the values it seeks to instill. *See Curran* v. *Mount Diablo Council of the Boy Scouts of America,* 952 P.2d 218, 225-26 & n. 7 (Cal. 1998); *cf.* Scoutmaster Handbook (1972) (disapproving "the practices of a confirmed homosexual") (State Court Record JA2072-74). Pursuant to this view, the Boy Scouts thus excludes avowed homosexuals. *Curran,* 952 P.2d at 225-26. Based upon the Boy Scouts' authoritative interpretation of its own purposes and values, its membership criteria directly relate to one of the specific values bound up in its purpose.

Under a constitutionally appropriate test, therefore, the Boy Scouts is a *prima facie* private expressive association entitled to full First Amendment protection. None of the factors cited by the State in its interpretation of the LAD is sufficient to establish, under the Constitution, that the Boy Scouts is "public" in character and subject to State interference with its membership policies.

B. State Law Criteria Defining a Public Accommodation Do Not Establish Public Character under the Constitution.

Although the New Jersey court's finding that the Boy Scouts is a public accommodation was done as a matter of state law, that finding also impacted the court's First Amendment analysis. This Court therefore should consider whether the factors relied upon by the court below – broad public solicitation, close relations with government or public

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[10] *Cf. NAACP* v. *Alabama ex rel. Patterson,* 357 U.S. 449, 459 (1958) ("The Association, which provides in its constitution that '(a)ny person who is in accordance with (its) principles and policies * * *' may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views.").

accommodations, and similarity to state-defined public accommodations – compellingly rebut the Boy Scouts' private expressive character for First Amendment purposes.

As applied by the court below, these various elements of "publicness" are inadequate and, if accepted, would redefine as public far too much protected activity to be acceptable constitutional measures. Thus, regardless of whether the Boy Scouts is "public" in the eyes of New Jersey, it is a private expressive association under the Constitution.

Conditional Solicitation of Membership. According to the court below, the Boy Scouts' solicitation of members from a broad diversity of groups renders it a public accommodation. 160 N.J. at 590-91, 734 A.2d at 1211. But the court discounted the conditional nature of this solicitation: only those persons willing to adhere to the Scout Oath and Law – as interpreted by the Boy Scouts – are sought for membership. *See id.* at 599, 734 A.2d at 1216 (acknowledging that "Boy Scouts' membership application requires members to comply with the Scout Oath and Law"). The court instead proclaimed that the mere breadth of the population solicited – through advertisements, recruiting, and otherwise – converted the conditional invitation to an unconditional one. Whatever the merits of such logic as a matter of New Jersey law, it is inconsistent with the logic of the Constitution.

Numerous expressive associations seek potential new members from among the population at large, but that does not mean persons are invited to become members *regardless* of whether they meet the criteria for membership. The invitation to join, while broad, contains a basic minimum condition of shared views and a willingness to comport oneself in a manner consistent with such views. Likewise with political clubs, religious groups, or affinity organizations (People for the Ethical Treatment of Animals, Greenpeace, NARAL, or the National Right to Life Committee), the fact that they seek to recruit broadly has no bearing on whether membership is conditioned on agreement with their principles. It is that es-

sential condition on membership that is among the hallmarks of a "private" expressive association.

As concerns the Boy Scouts, therefore, its trolling a large sea of candidates in no way implies that every person is welcome *regardless* of compatibility with the self-defined values of Scouting. Any "invitation" by the Boy Scouts, either express or implied, is necessarily conditioned on the invitee's willingness to accept, in word and deed, the values the Boy Scouts professes for itself. The reasoning by which the court below ignored this fundamentally conditional nature of the solicitation is not only wrong, it borders on the surreal.

In one of its more Orwellian moments, the court below argued that there is a "symbolic invitation extended by a Boy Scout each time he wears his uniform in public." 160 N.J. at 591, 734 A.2d at 1211. The Boy Scouts, of course, would suggest a different meaning for its own symbol: An affirmation of the values held by the organization including, presumably, its opposition to homosexuality and atheism. The court below sought to coopt the symbolic speech of the Boy Scouts and imbue it with a message of unlimited invitation that most assuredly was never intended by the Boy Scouts. While the Boy Scouts uniform may well "invite[] the curiosity and awareness of others in the community," 160 N.J. at 591, 734 A.2d at 1211, the same is true of *all* group symbols, such as a priest's Roman collar or a Shriner's fez. But the fact that people become aware of a group through its symbols and speech, and may even want to join the group, is not an unrestricted invitation by the group. Under the New Jersey court's skewed theory, every recognizable group symbol would suddenly become an open and unlimited invitation, rendering the symbolized group a public accommodation.[11]

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[11] The court below seems to suggest that the invitation extended by the Scouts is somehow misleading by not adequately revealing its condition, and that members of the public may "be subjected to the embarrassment and humiliation of being invited[,] ... only to find [the] doors barred to

A related example of the court below reinterpreting private expression is its rejection of the Scout Oath and Law as constituting genuine selectivity criteria for membership. 160 N.J. at 599-601, 734 A.2d at 1216-17. No matter how an outside observer *might* interpret Scouting's primary statements of belief, it is not up to such an outside observer – and most certainly not the government – to tell the Boy Scouts that it incorrectly understands its own tenets. The governing body for Scouting has determined that its moral views and primary statements of belief are opposed to homosexuality. That is the end of the matter. It is not for the New Jersey Supreme Court to resolve doctrinal disputes for Scouting any more than it may validly impose upon the Pope a particular construction of the Gospels. *See Watson*, 80 U.S. (13 Wall.) at 727 ("whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them"). The sheer presumption of the New Jersey court on this point highlights the need for a resilient barrier against government restrictions on private values formation, education, and expression.[12]

The court below also made the dubious assertion that "the size of the Boy Scouts organization certainly implies an open membership policy." 160 N.J. at 599, 734 A.2d at 1216.

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them." 160 N.J. at 591, 734 A.2d at 1211 (citation and quotation marks omitted). Even if some may have mistaken the Boy Scouts' invitation in the past, there is certainly no confusion now as to its conditional nature. The Boy Scouts has been defending its exclusion of homosexuals, agnostics, and atheists in the courts for nearly 20 years. No member of those groups could reasonably believe that the Scouts has "invited" them to join.

[12] A similar reinterpretive effort took place in the lower courts in *Hurley*, where the trial court claimed that the position of the parade organizers "was not only violative of the public accommodations law but 'paradoxical' as well, since 'a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness.'" 515 U.S. at 562. The tactic gained no traction in *Hurley* and should likewise fail in this case.

That many people may agree with an organization's message and therefore join does not thereby deprive the organization of control over its message or its membership. To hold otherwise would "punish[] the Boy Scouts for its success in recruiting," *Welsh* v. *Boy Scouts of America*, 993 F.2d 1267, 1277 (CA7 1993), and would render illusory the freedom of expressive association.

While the New Jersey court found the Boy Scouts insufficiently selective to qualify as "private," the proper constitutional test is satisfied so long as an organization is selective on any grounds related to its expressive or educational views and values. That the Boy Scouts' selectivity criteria is in many respects "rather lenient" and allows "multifarious voices" on many topics other than sexual morality or basic belief in a supreme being "does not forfeit constitutional protection." *Hurley*, 515 U.S. at 569-70; *see also id.* at 574 ("[T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.").

Interaction with Government and Public Accommodations. According to the court below, the Boy Scouts is a "public" accommodation "because it maintains close relationships with federal and state governmental bodies and with other recognized public accommodations." 160 N.J. at 591, 734 A.2d at 1211. The most serious problem with this reasoning is that the court relied upon interactions which, if relevant, would render virtually every citizen, much less every group, public in nature. That the Boy Scouts was chartered by Congress, for example, is meaningless as to the constitutional determination of its public or private status. Every nonprofit corporation is chartered by some government, yet that does not convert all nonprofit corporations into public

accommodations.[13] In this case there is no allegation that Congress, or any other government entity, maintains control over the Boy Scouts or otherwise directs its activities via the charter. The Boy Scouts thus is not an agent of the federal government, but rather is a free agent setting its own policies and directions. *See San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 543-44 (1987) ("[T]hat Congress granted it a corporate charter does not render the USOC a Government agent. All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character.").

The various materiel and other resources provided the Boy Scouts by the federal government likewise do not render the Scouts "public" in character. Such resources are simply gifts to an organization that the government favors. They come with no strings attached, and the Boy Scouts make no particular claim of right to such beneficence. While New Jersey might complain to the federal government if it dislikes the object of this charity, the gift-giving itself does not alter the character of the Boy Scouts. To hold otherwise would necessarily convert every recipient of federal largess into a public accommodation or some other "public" entity subject to heightened regulation by the State. *Cf. Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 246-47 (1985) ("[T]he mere receipt of federal funds cannot establish that a State has consented to suit in federal court.") Such result would be absurd – imagine a State forbidding interpersonal discrimination by individuals who receive federal health or welfare benefits on the theory that federal subsidization renders them "public"

[13] Indeed, even were we to focus only on congressionally chartered entities, the New Jersey court's reasoning would render a group such as the Daughters of the American Revolution, 36 U.S.C. § 153101, a public accommodation that presumably then could not limit its membership to women. Furthermore, even if, contrary to reason, a congressional charter *did* impart some "public" character to the chartered entity, it would be a *federal* public character, putting state regulatory authority in doubt.

actors. It also raises a troubling conflict between state and federal law for a State to impose adverse and burdensome conditions on the receipt of federal benefits.[14]

Similarly, the sponsorship of individual Scouting units by local government entities may raise issues concerning the propriety of government sponsoring private expressive associations, but it does not convert the Boy Scouts into a public agent. Rather, it is quite the opposite: those various entities have agreed to be agents for the Boy Scouts, and have agreed to conduct themselves and to instruct their charges according to the rules and values of the Scouts. At no time was the Boy Scouts ever given as a condition of accepting such sponsorship the requirement that it alter its membership practices. Had it been confronted with such a condition it would have been up to the Scouts whether to accept the condition or to reject the erstwhile sponsor. But the Scouts having never accepted such a condition *ex ante*, a court cannot use the current sponsorship to impose the condition *post hoc*.

Finally, the court's reliance upon the Boy Scouts' activities in places of public accommodation is particularly disingenuous. That the Boy Scouts makes use of genuinely public places merely shows it to be like every other private entity or person that has general access to public areas. In this respect the Boy Scouts is no different from any other club or group that may hold meetings in a school or elsewhere. Again, the private use of public facilities does not alter the private char-

[14] It would be a different – though not necessarily constitutional – situation if the federal government conditioned its benefits on the Boy Scouts' acceptance of various anti-discrimination obligations. In such circumstances the Boy Scouts would at least be free to reject the condition and the benefits rather than alter its protected association. But the federal government has imposed no such condition on its benefits, and the State may not indirectly impose its own such condition on federal benefits by using their receipt to invalidate the private status of the Boy Scouts.

acter of the user, particularly when the group has not accepted any pre-existing condition placed on the use of the facilities.[15]

Analogies to Recreational and Educational Facilities. Finally, the court below stated that the "Boy Scouts' educational and recreational nature" supports its being categorized as a "public" accommodation. 160 N.J. at 594, 734 A.2d at 1213. But from a constitutional perspective, it is the very educational nature of the Boy Scouts that, in part, renders its association "expressive" to begin with. The Boy Scouts seeks to educate youth in the particular values of the Scouting organization. In this respect it is more similar to various religious instructional programs such as Hebrew school or Confraternity of Christian Doctrine (CCD) classes than it is to standard primary or secondary schools. That the Boy Scouts instills a more general set of non-sectarian values rather than specific religious beliefs is simply a difference in the content of the expression, not the fact of expression.

Finally, the private expressive character of the Boy Scouts is not diminished by its resort to various camping and athletic activities to help hold the attention of its members. That is just a matter of method. Nowhere is it decreed that education and values transmission may only take place inside the sometimes stifling confines of a classroom. As Justice O'Connor has recognized, association organized around such activities may still be expressive when the activity constitutes the medium and opportunity for conveying the overall organizational message. *Roberts,* 468 U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment).

Overall, the various factors relied upon by the court below for purposes of state law do not provide compelling evidence

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[15] And even such a condition – you may not hold your meetings at school unless you alter your expressive association in a manner to our liking – would in all likelihood be a viewpoint-based unconstitutional condition. *Cf. Rosenberger* v. *Rectors and Visitors of the University of Virginia,* 515 U.S. 819, 829 (1995) (regarding access to a limited forum, the State may not "discriminate against speech on the basis of its viewpoint").

of a "public" character for purposes of the First Amendment. Indeed, they sweep so broadly that, if adopted, they would drastically reduce the scope of constitutionally protected private expressive association. The court's reasoning is thus incompatible with the constitutional presupposition of a broad and sovereign private sphere.

C. Compelled Association with a Person Who Does Not Share One of the Boy Scouts' Values Violates the First Amendment.

The Boy Scouts as an organization has plainly and definitively declared its views concerning the morality of homosexuality. Forcing the Boy Scouts to accept as an adult member and leader an avowed homosexual would inherently conflict with the Scouts' stated moral position and with its ability to convey that position through words and by the example of its leaders. And because the Boy Scouts holds out its adult leaders as role models, forcing the organization to accept Respondent also amounts to compelled speech by forcing the Scouts to place its imprimatur on a person who exemplifies particular values and behavior that the Boy Scouts rejects.

Compelled Expressive Association. The Boy Scouts has chosen to limit its membership to persons who agree with, and are willing to follow, the Scout Oath and Law as the Boy Scouts interprets them. The organization is unwilling to accept as members persons who reject, by word or deed, its interpretation of the Scout Oath and Law as they concern homosexuality, regardless of whether such person agrees with Scouting's views concerning some or all other matters. That associational choice is protected under the First Amendment. As this Court has made abundantly plain, "[f]reedom of association therefore plainly presupposes a freedom not to associate." *Roberts,* 468 U.S. at 623. Where a private expressive association is involved, the desire to exclude should all but end the inquiry. Justice O'Connor correctly noted that "the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that

voice." *Roberts,* 468 U.S. at 633 (O'Connor, J., concurring in part and concurring in the judgment).

Indeed, even were a commercial association or public accommodation involved, the entity *still* would be entitled to exclude members on the basis of viewpoint or ideology. *See Hurley,* 515 U.S. at 580-81 (even assuming the nature of the parade "would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members."); *cf. New York State Club Ass'n,* 487 U.S. at 13 (1988) ("If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end."). That the Boy Scouts lacks the commercial or public character of the entities considered in *Roberts* or *New York State Club Association* only makes its entitlement to protection that much less debatable.

Unlike the law at issue in *Roberts,* which imposed "no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members," 468 U.S. at 627, the New Jersey LAD forbids exclusion of certain persons with ideologies or philosophies regarding homosexuality different from those of the Boy Scouts. And unlike the Jaycees' frequent formal association with women, which undermined any symbolic significance of its membership restrictions, *id.*, the Boy Scouts as an organization is consistent in its disassociation from avowed homosexuals. Compelled association through membership, therefore, *would* "impair a symbolic message conveyed by the very fact that [homosexuals] are not permitted" to join. *Id.*; *see also Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 541 (1987) (exclusion of women only alleged to advance an "aspect of fellowship," not a particular expressive purpose, and Rotary Club as an organization associated with women in numerous contexts).

Compelled Speech. In addition to the problem of compelled association, the application of the New Jersey LAD in this case goes one step further and effectively compels speech. It is undisputed that adult members of the Boy Scouts must act as educators and role models for conveying the principles of Scouting. Who such leaders are and what they do is as significant an expression as is their direct speech. Respondent has declared to all his sexual orientation and sexual activity. If the Boy Scouts accepts him as a leader and a role model, his "participation would likely be perceived as having resulted from the [Boy Scouts'] customary determination about a [leader] admitted to" Scouting – that it believed him to be a role model "worthy of presentation and quite possibly of" emulation as well. *Hurley,* 515 U.S. at 575. Respondent's mere presence as a Scouting leader – after having come out and declared his sexual orientation and activity – would, like the presence of the prospective marchers in *Hurley*, suggest a variety of facts and views regarding homosexuality and Scouting that the Boy Scouts prefers not to assert or support.

It is well-established First Amendment law that the State "may not compel affirmance of a belief with which the speaker disagrees." *Hurley,* 515 U.S. at 573. This principle is a facet of the "general rule[] that the speaker has the right to tailor the speech," which applies to "expressions of value, opinion, *or endorsement.*" *Id.* (emphasis added). Because "all speech inherently involves choices of what to say and what to leave unsaid," there "is necessarily ... a concomitant freedom not to speak." *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion) (citation and internal quotation marks omitted) ("*PG&E*"). The Boy Scouts has its own reasons for declining to have certain views on homosexuality literally or symbolically expressed by one of its members or leaders. But, just as with the parade organizers, "whatever the reason, it boils down to the choice of a speaker not to propound a particular

point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley,* 515 U.S. at 575.

While the court below suggested that the Boy Scouts would remain free to express its own views concerning homosexuality, at a minimum Respondent's presence as a leader would cause confusion or dissonance in the message. If "the government [were] freely able to compel ... speakers to propound political messages with which they disagree, ... protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *PG&E*, 475 U.S. at 16. If the Scouts are forced to "endorse" Respondent by presenting him as a role model, its ability also to contradict – though not retract – that symbolic endorsement provides little help.

Furthermore, the Boy Scouts may prefer to advance its own views in a more restrained manner, not raising the issue unless the need to do so specifically arises. But if it felt that Respondent's presence as a leader would send the opposite message, it "may be forced either to appear to agree with [Respondent's] views or to respond." *PG&E*, 475 U.S. at 15 (citation omitted); *id.* at 18 ("Such forced association with potentially hostile views ... risks forcing appellant to speak where it would prefer to remain silent."). Such compelled speech burdens core First Amendment rights, particularly where "there is no customary practice whereby [the Boy Scouts] disavow 'any identity of viewpoint' between [itself] and the selected participants." *Hurley,* 515 U.S. at 576; *see also, PG&E,* 475 U.S. at 15 n. 11 ("a disclaimer ... does not suffice to eliminate the impermissible pressure on appellant to respond").

In sum, once the private expressive character of the Boy Scouts is recognized, the LAD can be seen to impose an unacceptable burden on First Amendment rights. That burden cannot be discounted by attaching a "public" accommodation label that fails to comport with the constitutional role of private expressive activity and the sovereignty of the People.

III. Preventing Private Discrimination Is Not a Compelling State Interest Sufficient To Trump First Amendment Rights.

Regardless of what one thinks of the merits of the New Jersey LAD and its application in this case, the interests advanced by that law are not compelling in the constitutional sense. When addressing matters at the heart of the First Amendment, a speech restriction or compulsion is prohibited "except in so far as essential operations of government may require it for the preservation of an orderly society." *Barnette,* 319 U.S. at 645 (Murphy, J., concurring); *see also Roberts,* 468 U.S. at 623 (restrictions allowed only where there are "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

Prior cases discussing the importance of a government interest in preventing discrimination all dealt with discrimination by entities with a particular "public" character. Certainly when practiced by government itself, or by public accommodations, properly categorized, the government may assert a significant and potentially compelling interest in prohibiting certain types of discrimination. Thus, in *Roberts*, the State's interest recognized was in "assuring its citizens equal access to publicly available goods and services." 468 U.S. at 624; *see also id.* at 632 (O'Connor, J., concurring in part and concurring in the judgment) (referring to the "goal of ensuring nondiscriminatory access to commercial opportunities"). Likewise in *New York State Club Association*, the interest was described as providing all persons "'a fair and equal opportunity to participate in the business and professional life of the city.'" 487 U.S. at 5 (quoting the city law).

But in the case of *private* expressive associations, there is no equally strong justification for government imposition of a similar equality of access or participation. While private discrimination may in many instances be condemned or subject

to social disapprobation by those who disagree with it, such discrimination is generally not the proper province of government ukases.[16] As but a simple example, while government generally may not discriminate against persons on the basis of political belief, it is absurd to suggest that private citizens may not do so. If a dyed-in-the-wool Democrat wishes never to socialize with an equally and oppositely dyed Republican, he is free to so discriminate in the broad private sphere where most people conduct their lives. If a Jew desires never to dine with a member of the Nazi party, she may privately so discriminate to her heart's content. While the government might be forbidden from discriminating on the basis of such political affiliations, the principle does not carry over into the private sphere. *Cf. Hurley,* 515 U.S. at 566 ("the guarantees of free speech and equal protection guard only against encroachment by the government and 'erec[t] no shield against merely private conduct'") (quoting *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948)); *United States Olympic Comm.*, 483 U.S. at 547 ("Because the USOC is not a governmental actor, [Petitioner's] claim that the USOC has enforced its rights in a discriminatory manner must fail.").

The point remains valid even as regards discrimination that some might deem irrational. It simply does not matter whether a private actor has a good reason, a bad reason, or no reason at all for its choices regarding its associates or its beliefs. Private decisions are not subject to the rational basis test and may not be reviewed by the courts to see if they are arbitrary and capricious. The only review of private irrationality or arbitrariness comes from the responsive decisions of other private parties. People can disagree with, object to, and even shun those committing what they view as invidiously

[16] That the speech or views of private actors might offend or insult is no basis for a state interest in avoiding the "dignitary" harm to those so offended or insulted. The very "point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley,* 515 U.S. at 574.

discriminatory acts. But that is where it ends. The government has no compelling role in penalizing such private acts.[17]

The state interest concerning discrimination thus turns not on the discrimination alone, but on the public or private character of the entity discriminating. The court below overestimated the State's interest for the same reason it underestimated the First Amendment interests at stake: It mischaracterized the Boy Scouts as a "public" entity. By doing so the court erroneously framed the discrimination at issue as the denial of a publicly available good or service. Such is not the case. The only thing denied is Respondent's ability to associate with the Boy Scouts and participate in the Scouts' expressive activities. But as this Court held in *Hurley*, the First Amendment forbids characterizing expressive activity itself to be the public accommodation. 515 U.S. at 573.[18]

Discrimination based upon conduct and belief also differs in a significant respect from discrimination based upon certain other characteristics. Thus, while judgments based on race or sex can often merely involve "unsupported generalizations" or "stereotyping" regarding the actual factor to be measured, *Roberts,* 468 U.S. at 628, the Boy Scouts' stated position is not based upon such stereotyping. Rather, the Boy Scouts puts forth an irreducible value statement itself: The view that avowed or practiced homosexuality is immoral.

[17] This case does not involve discrimination based upon race, where the federal government, and by analogy the States, might potentially turn to the Thirteenth Amendment to demonstrate a constitutionally compelling interest even as to private behavior.

[18] There is likewise no State interest in ensuring access to a monopolistic resource for expressive activity, as in the example of a "company town." *Marsh* v. *Alabama,* 326 U.S. 501 (1946). While it may be true that "the size and success" of the Boy Scouts "makes it an enviable vehicle for" Respondent's expressive association, "that fact, without more, would fall far short of supporting a claim that petitioners enjoy an abiding monopoly of access to" an audience for Dale's views expressed by word or by personal example. *Hurley,* 515 U.S. at 577-78.

Sexual orientation thus is not being used as a proxy for some other judgment, but is itself the very quality to which the Scouts object. Regardless of whether one agrees with that view, it is an expression of a particular set of values, not a stereotype. Furthermore, a particular avowed and acted upon sexual orientation also is related to one's views *regarding that sexual orientation.* While homosexuality may not properly be used to predict one's views regarding the trade deficit or patriotism, it is certainly a valid indicia of at least *some* views about homosexuality. There is simply no finessing the fact that Respondent's acknowledged views and conduct are contrary to the values the Scouts holds and would convey.

Upon reviewing the particular interest that the court below claims is compelling, we see that it is really an interest in altering the way people think and the values they hold by interfering with their ability to express contrary values. Because the LAD is being "used to produce thoughts and statements acceptable to some groups," it therefore

> grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. ... [The law] is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Hurley, 515 U.S. at 579.

The State's interest in this case is neither compelling nor valid. The mere desirability or political support for anti-discrimination goals does not trump First Amendment rights. The People's sovereignty demands protection of those rights.

CONCLUSION

For the foregoing reasons, the decision of the New Jersey Supreme Court should be reversed.

Respectfully submitted,

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

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IN THE SUPREME COURT OF THE UNITED STATES

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

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Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

ABBA COHEN
AGUDATH ISRAEL OF AMERICA
1730 Rhode Island Ave., NW
Washington, D.C. 20036
(202) 835-0414

DAVID ZWIEBEL*
EYTAN A. KOBRE
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, NY 10038
(212) 797-9000

Attorneys for Amicus Curiae
Agudath Israel of America

* Counsel of Record

15100

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE..... 1

ARGUMENT:

I. A GENEROUS READING OF THE FIRST AMENDMENT'S FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION CLAUSES MAY BE NECESSARY TO PROTECT RELIGIOUSLY-AFFILIATED PROGRAMS FACED WITH CONFLICTS BETWEEN CIVIL RIGHTS LAWS AND THEIR RELIGIOUS TENETS 3

II. WHEN EVALUATING A PROSPECTIVE SCOUTMASTER'S SUITABILITY AS A ROLE MODEL LEADER, IT IS CONSITUTIONALLY PROPER FOR BOY SCOUTS TO CONSIDER HIS STATUS AS A PRACTICING HOMOSEXUAL..... 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Ambach v. *Norwick*, 441 U.S. 68 (1979).....10

City of Boerne v. *Flores*,
521 U.S. 507 (1997) 3

Curren v. *Mount Diablo Council of the Boy Scouts of America*,
952 P. 2d 218 (1998)..... 8

Dale v. *Boy Scouts of America*,
734 A. 2d 1192 (1999)..... 2

Employment Division, Dept. of Human Resources of Oregon v. *Smith*,
494 U.S. 872 (1990) 3

Gay Rights Coalition v. *Georgetown University Law Center*,
536 A.2d 1 (D.C. App. 1987)..... 4

Hurley v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*,
515 U.S. 557 (1995)..... 5

Roberts v. *United States Jaycees*,
468 U.S. 609 (1984)..... 5

Thomas v. *Anchorage Equal Rights Commission*,
165 F.3d 692 (9th Cir. 1999)..... 5

Other Authorities

Jacobson, *A Coalition With a Liberal-Leave Policy*,
The National Journal (Oct. 30, 1999) 4

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BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Agudath Israel of America is a national Orthodox Jewish organization with constituents, and constituent religious bodies, across the United States. Many of Agudath Israel's constituent congregations and other Orthodox Jewish religious bodies, as well as Agudath Israel itself, sponsor youth

programs. Some of these programs are religious in nature, some are social, some educational, some recreational -- but all of them are under control of a religious denomination that regards sexual activity outside the context of marriage as sinful, and whose attitude toward homosexual conduct specifically is shaped by the biblical description of such conduct as "*to'eivah*", an abomination (*Leviticus* 20:13). Further, all of them would regard a homosexual activist as an inappropriate role model for children under his leadership and care.

As previously indicated in Agudath Israel's November 26, 1999 *amicus curiae* submission in support of the petition, and as elaborated below, our interest in this case is substantial -- for while this particular dispute may not involve a "bona fide religious or sectarian institution," 734 A. 2d at 1217,* it could well be that the long term impact of the decision below, if it is allowed to stand, will be felt acutely -- perhaps even most acutely -- in traditional religious communities like ours. We respectfully make this *amicus curiae* presentation, upon the consent of the parties, to expand upon why this is so (Point I of the Argument below); and to urge the Court to recognize the heightened level of constitutional protection for decisions by groups like the Boy Scouts on an individual's suitability to serve in a position of role model leadership (Point II below).

Pursuant to Rule 37.6 of the Rules of this Court, the undersigned counsel for Agudath Israel represent that they are the sole authors of this brief, and that no person or entity other than Agudath Israel made any monetary contribution toward the preparation or submission of this brief. (Counsel acknowledge the significant assistance of Moshe Klein, a third-year student

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* All citations to the decision below are to *Dale* v. *Boy Scouts of America*, 734 A. 2d 1196 (N.J. 1999).

at the Columbia Law School, in the research and preparation of this brief.)

ARGUMENT

I.

A GENEROUS READING OF THE FIRST AMENDMENT'S FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION CLAUSES MAY BE NECESSARY TO PROTECT RELIGIOUSLY-AFFILIATED PROGRAMS FACED WITH CONFLICTS BETWEEN CIVIL RIGHTS LAWS AND THEIR RELIGIOUS TENETS

The starting point of our concern is the current state of free exercise jurisprudence. In the aftermath of this Court's rulings in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990) (positing that a religious practice that is indirectly burdened by government enjoys no First Amendment free exercise protection), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act, Congress' effort to respond to *Smith* by establishing a statutory compelling interest standard for indirect burdens on religious exercise), religious practitioners are especially vulnerable to anti-discrimination provisions that conflict with their religious tenets. Civil rights laws are, after all, laws of general applicability, and the burdens they may impose on religious individuals or organizations are only indirect. The free exercise clause thus offers scant comfort to the person or entity whose faith demands that he or it engage in conduct that in the eyes of secular law constitutes unlawful discrimination.

Comfort, if it is to be had, will often come in the form of legislation expressly exempting certain types of religious practitioners from generally applicable anti-discrimination

provisions. *See Employment Division* v. *Smith, supra,* 494 U.S. at 890. However, such exemption provisions are by no means universal features of all anti-discrimination laws; *see, e.g., Gay Rights Coalition* v. *Georgetown University Law Center*, 536 A.2d 1 (D.C. App. 1987). Some legislative bodies, apparently, are not prepared to grant religious entities the authority to practice their faith in a manner that would infringe on the civil rights of others. Indeed, current congressional efforts to enact the Religious Liberty Protection Act, a federal statute designed to restore the free exercise compelling interest test in a manner consistent with this Court's decision in *City of Boerne, supra,* are now enmeshed in fierce debate over whether the law should extend to conflicts that may arise between civil rights and religious practice. (*See* Jacobson, *A Coalition With a Liberal-Leave Policy*, The National Journal (Oct. 30, 1999).)

Moreover, even where a legislature does deem it appropriate to exempt religious bodies from anti-discrimination laws, the exemption is often narrowly drawn and narrowly construed. The instant case is a good example. New Jersey's Law Against Discrimination exempts "educational facilit[ies] operated or maintained by a bona fide religious or sectarian institution." N.J.S.A. 10:5-5l. As determined by the court below, 734 A.2d at 1217 & n.10, Boy Scouts of America does not fit the category of an "educational facility" -- despite the Boy Scouts' close affiliation with public schools and school-affiliated groups, described in detail at 734 A.2d at 1212-13; and despite the organization's express purpose of "teach[ing]" its members "patriotism, courage, self-reliance and kindred virtues", *id.* at 1202. Nor does it fit the category of a "bona fide religious or sectarian institution" -- despite a scout's Oath "to do [his] duty to G-d" and the Scout Law that requires a scout to be "reverent toward G-d [and] faithful in his religious duties." *Id.* The court's back-of-the-hand, "deserves little discussion," rejection of the Boy Scouts' efforts to claim the statutory religious educational facility exemption, *id.* at 1217,

would appear to flow directly from the court's rule of statutory construction that "exemptions from remedial statutes should generally be narrowly construed." *Id.* at 1213.

There is no statutory refuge, therefore, for religiously inspired or affiliated entities in New Jersey deemed to fall beyond the narrowly construed confines of the exemption statute -- or for religious institutions across the country in jurisdictions where there is no statutory exemption altogether.

However, there still may be *constitutional* refuge: the First Amendment's freedom of speech and freedom of association provisions, whether viewed independently or "in conjunction" with a free exercise claim under the *Smith* Court's "hybrid situation" doctrine, 494 U.S. at 881-82. (*See, e.g., Thomas* v. *Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999).) Like-minded religious practitioners are entitled to band together "for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 618 (1984). And their freedom of speech includes "the autonomy to choose the content of [their] own message," including "what not to say." *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). If the decision of the court below is allowed to stand, though, these avenues of potential protection against efforts to compel a religious group's compliance with religiously objectionable anti-discrimination provisions may also be foreclosed.

Several aspects of the constitutional analysis below portend jeopardy for religious groups that sponsor youth programs like those described in the first paragraph of this brief: the court's refusal to accept Boy Scouts' own interpretation of its own requirement that scouts be "morally straight" and "clean", *see* 734 A.2d at 1224 & n.12; the

court's scornful disdain and legal rejection of the traditional view that homosexual conduct is immoral (*id.* at 1226-28; see also, and especially, Justice Handler's concurring opinion, *id.* at 1242-45); the court's bald conclusion that Boy Scouts' acceptance of a prominent homosexual activist in a role model position of scout leadership would not be "symbolic of Boy Scouts' endorsement of homosexuality", and that compelling Boy Scouts to do so does not constitute "forced speech". *Id.* at 1229.

The impact of these conclusions on the many religiously-sponsored Boy Scout programs across the nation will surely be substantial. Already one major denomination has declared its intention to withdraw from Scouting if its Boy Scout units are legally compelled to accept openly homosexual leaders, and other major denominations may arrive at the same conclusion. *See* Brief of National Catholic Committee on Scouting, *et al.*, As *Amici Curiae* In Support of the Petition, at 11-12. In fact, if the Court embraces the reasoning and conclusions of the New Jersey Supreme Court, the impact on religiously-sponsored programs could well be felt considerably beyond the confines of Scouting.

Consider, for example, the case of a religiously-affiliated summer camping program that refuses to hire as a counselor, or a synagogue-sponsored youth group that refuses to engage as a leader, a person whose individual lifestyle may conform to contemporary notions of personal morality but flies in the face of the religious teachings of the sponsoring faith group. The camp and the youth program may have a hard time persuading a court following the New Jersey Supreme Court's lead that the purpose of their members' association is to disseminate messages about the religious propriety or impropriety of any given lifestyle. They might have a similarly hard time pointing to any specific language in their bylaws that

speaks about such lifestyles. They may, in short, face legal hurdles substantially identical to the ones the Boy Scouts faced here.

To be sure, legal arguments may well be available for the proposition that religiously-affiliated youth programs should be entitled to greater autonomy than that enjoyed by Boy Scouts in determining who should serve as role model leaders. It is possible that the religious program may employ membership criteria sufficiently selective as to avoid being considered a place of public accommodation. Or perhaps the sponsoring denomination's unambiguous condemnation of a particular lifestyle would be seen as infusing all of the programs it sponsors with an expressive purpose that would trigger greater First Amendment speech and association protection. Or perhaps the scope of free exercise protection will one day be extended, either through constitutionally acceptable legislative action or through the Court's judicial reconsideration of *Employment Division v. Smith, supra*, to cover situations where a law of general applicability impinges upon a religious entity's ability to practice its faith. All of these are possibilities -- but no more than that.

Stated simply, the dangers of disallowing private entities like Boy Scouts of America from embracing their own notions of moral propriety and role model fitness could have ramifications, especially in this era of limited free exercise protection, that threaten the religious independence of countless programs and institutions across the country.

Indeed, if current social trends are any indication, there may come a time when groups like the Boy Scouts may alter their perspective on the morality of homosexual or other non-traditional sexual conduct. Religious denominations like Orthodox Judaism, though -- and the numerous other faith groups across this nation that are not prepared to concede the irrelevancy of *Leviticus* -- are likely to remain stubborn

holdouts. Our stake in an America that allows orthodox faiths to dissent from the secular orthodoxies of the day is substantial and enduring, and merits special consideration in this case.

II.

WHEN EVALUATING A PROSPECTIVE SCOUTMASTER'S SUITABILITY AS A ROLE MODEL LEADER, IT IS CONSTITUTIONALLY PROPER FOR BOY SCOUTS TO CONSIDER HIS STATUS AS A PRACTICING HOMOSEXUAL

When Boy Scouts first notified Mr. Dale that his position as an Assistant Scoutmaster was being terminated, they informed him by letter dated August 10, 1990 that "[t]he grounds for this membership revocation are the standards for leadership established by Boy Scouts of America, which specifically forbid membership to homosexuals." Pouncing on this letter in the legal equivalent of a triumphant declaration of "Gotcha!", the court below gave no credence to subsequent letters from the Boy Scouts in which the organization indicated that Dale's avowed homosexuality was at odds with Boy Scouts' views of the immorality of homosexual conduct, concluding instead that "[t]he original termination letter expresses Boy Scouts' real concern: Dale's status as a homosexual." 734 A.2d at 1225.

In his concurring opinion, Justice Handler emphasizes the point even more forcefully. Drawing a contrast between this case and *Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 952 P. 2d 218 (1998), in which membership was denied to an individual whose interest in becoming a Boy Scout leader was motivated by his personal belief in the homosexual lifestyle and his desire "to make sure that other kids understood that," 952 P. 2d at 254 (Kennard, J., concurring), Justice Handler points to the fact that Mr. Dale has merely stated his identity as a homosexual and has not

"express[ed] a view about homosexuality generally or specifically advocate[d] that homosexuality is moral." 734 A. 2d at 1240 & n.5 (Handler, J., concurring). This leads to the conclusion that "Boy Scouts excluded Dale based on his status as a homosexual." *Id*.

The glaring flaw in both the majority and concurring opinions is their failure to acknowledge the role model position a Boy Scout leader occupies. Scoutmasters are expected to provide their adolescent charges affirmative guidance and advice on the most sensitive personal issues. Thus *The Boy Scout Handbook* advises a Scout: "If you have any questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your...Scoutmaster." [A. 2532, cited in Petition, at 6.] *The Scoutmaster's Handbook* furnishes a corresponding instruction to Scoutmasters: "Be accepting of their concerns about sex. Be very open and clear when talking with them" [A. 2692, cited in Petition, at 6]; as well as the advice, in a section of the *Handbook* on "Sexual Curiosity," that "[i]f Scouts come to you to ask questions or seek advice, you would give it within your competence." [A. 3588-89, cited in Petition, at 17.]

In determining the suitability of declared homosexual to serve as a role model leader, it is thus entirely reasonable for the Boy Scouts to consider how his personal lifestyle might affect his ability to guide his youthful charges when they raise questions concerning issues of human sexuality. If, instead of being a declared homosexual, Mr. Dale were a notoriously promiscuous heterosexual, or if he were known to be abusive toward his companions, surely Boy Scouts would be within their authority to deny him a position of leadership – irrespective of whether he had declared his intention of promoting a promiscuous or abusive lifestyle as a Scoutmaster. His personal status alone would provide sufficient basis for Boy Scouts to reject him as a suitable role model.

The Court's description of a teacher in *Ambach* v. *Norwick*, 441 U.S. 68, 78-79 (1979) -- "a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and attitudes" -- is an equally apt description of a Boy Scouts leader. And just as courts have recognized the rights of private educational institutions to consider personal status in rejecting teachers they deem to be inappropriate role models for their students (see cases cited in Petition, at 15-16 n.7), so too should the Court recognize the right of an organization like Boy Scouts to consider personal status in rejecting a person it deems to be an inappropriate role model for their adolescent charges.

CONCLUSION

> "One particular stereotype we renounce today is that homosexuals are inherently immoral. That myth is repudiated by decades of social science data that convincingly establish that being homosexual does not, in itself, derogate from one's ability to participate in and contribute responsibly and positively to society... In short, a lesbian or gay person, merely because he or she is a homosexual, is no more or less likely to be moral that a person who is a heterosexual." 747 A. 2d at 1242-43 (Handler, J., concurring).

Were Justice Handler's morality lecture directed at those who regard persons with a homosexual *orientation* as inherently immoral, it would hardly be worthy of note. But it appears that His Honor has more on his mind, offering his comments in a case involving a sexually active homosexual for whom homosexual orientation is a license for homosexual conduct. Justice Handler's "renunciation" notwithstanding,

millions of Americans still cling to the "myth" that sexual activity between two persons of the same gender -- or for that matter any sexual activity outside the traditional marital relationship -- is immoral, and that persons who engage in such conduct are not proper role models for youngsters. That is the view of Boy Scouts of America, that is the view of numerous faith communities across the Untied States, and the law ought not compel its abandonment.

Amicus curiae Agudath Israel of America respectfully urges the Court to reverse the decision of the court below.

Respectfully submitted,

ABBA COHEN
AGUDATH ISRAEL OF AMERICA
1730 Rhode Island Ave., NW
Washington, D.C. 20036
(202) 835-0414

DAVID ZWIEBEL*
EYTAN A. KOBRE
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, NY 10038
(212) 797-9000

Attorneys for Amicus Curiae
Agudath Israel of America

* Counsel of Record

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BRIEF FOR THE INSTITUTE FOR PUBLIC AFFAIRS OF THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

NATHAN J. DIAMENT
INSTITUTE FOR PUBLIC AFFAIRS
THE UNION OF ORTHODOX JEWISH
CONGREGATIONS OF AMERICA
1640 Rhode Island Avenue, NW
Washington, DC 20036
(202) 857-2770

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION AND INTEREST OF *AMICUS* 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF ASSOCIATION PROTECTS THE RIGHT OF PRIVATE ASSOCIATIONS TO DETERMINE THEIR MEMBERSHIP AND LEADERSHIP CRITERIA 6

II. RELIGIOUS ASSOCIATIONS MUST BE GRANTED A SAFE HARBOR FOR THEIR ACTIVITIES; THUS, SHOULD THIS COURT AFFIRM, THIS COURT MUST REVISIT EMPLOYMENT DIVISION v. SMITH, 494 U.S. 872 (1990) 9

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Cantwell v. Connecticut, 310 U.S. 296 (1940) 11

City of Boerne v. Flores, 521 U.S. 507 (1997) 11

Dale v. Boy Scouts of America, et. al., 160 N.J. 562 (1999) ..... *passim*

Hurley v. Irish- American Gay, Lesbian & Bisexual Club of Boston, 515 U.S. 557 (1995) 7

Employment Division, Dept. of Human Svc.s of Oregon v. Smith, 494 U.S. 872 (1990) ..... *passim*

Roberts v. Jaycees, 468 U.S. 609 (1984) 4,7

Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 8

West Virginia v. Barnette, 319 U.S. 624 (1943) 10

Wisconsin v. Yoder, 406 U.S. 205 (1972) 11

STATUTES

N.J.S.A. 10:5-1 ..... *passim*

42 U.S.C. 2000e-2(e) 9

LEGISLATIVE MATERIALS

Cong. Rec. H5580-H5608 (daily ed. July 15, 1999) Consideration of H.R. 1691, Religious Liberty Protection Act) 12

Religious Liberty Protection Act: Hearing on H.R. 1691 Before the Subcomm. On the Constitution of the House Comm. on the Judiciary, 106th Cong. (May 12, 1999) 12

Religious Liberty Protection Act: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. On the Judiciary, 105th Cong. (June 16, 1998) 12

S.1276, 106th Cong. 1st Sess. (1999) (Cong. Rec. S7596 (daily ed. June 24, 1999) (Introduction of "Employment Non-Discrimination Act of 1999") 9

OTHER AUTHORITIES

The Federalist, (Lodge ed. 1908) 10

McConnell, *Accommodation of Religion*, 1985 S.Ct.Rev. 1 10

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BRIEF FOR THE INSTITUTE FOR PUBLIC AFFAIRS of the UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

INTRODUCTION AND INTEREST OF *AMICUS*

This case raises the question of whether a state law compelling a Boy Scout troop to appoint an avowed homosexual and gay rights activist as an assistant scoutmaster abridges the First Amendment rights of freedom of speech and freedom of association. The court below held that the Boy Scouts' First Amendment rights were not abridged. *Dale v. Boy Scouts of America et. al.*, 160 N.J. 562 (1999).

Amicus believes that the New Jersey Supreme Court has misread this Court's precedents, and that the First Amendment rights of America's many civic, cultural and religious associations have been placed at risk by the decision below.

The Union of Orthodox Jewish Congregations of America[1] (the "U.O.J.C.A.") is a non-profit organization composed nearly 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The U.O.J.C.A. has filed, or joined in filing, briefs with this Court in many of the important cases which affect the Jewish community and American society at large. *See, e.g., Vacco v. Quill*, 521 U.S. 793 (1997); *Bd. of Ed. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

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[1] Pursuant to Rule 37.6 of this Court, we represent no party or party's counsel authored this brief in whole or in part and no person or entity other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

Of particular relevance to the case at bar, the U.O.J.C.A. is the parent organization of the National Conference of Synagogue Youth ("NCSY"). One of the world's most successful Jewish youth movements, NCSY provides educational, religious and social programming for over 40,000 American teenagers annually through weekend retreats, summer trips and after-school clubs. NCSY's mission is one that is religious, but invites any Jewish teen, regardless of their level of affiliation or observance, to participate. Clearly, the case at bar has grave implications in the long term for youth organizations such as NCSY, as it may impact upon their future ability to develop and apply criteria for the selection of youth groups leaders and members.

We are supporting the petitioners in this case because we believe that this Court must protect the First Amendment rights of those private associations which form the fabric of our civil society and that the decision below is at odds with this Court's precedents in this area. Moreover, we believe that should this Court uphold the ruling of the court below, it must simultaneously provide a clear safe-harbor for the activities of America's religious associations and institutions by revisiting this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990).

We have obtained the consent of the parties to file this brief. We acknowledge that the opinions of the lower courts and the briefs of the parties to this case have raised many of the arguments which this Court must consider in rendering its decision herein. *Amicus* offers this brief to the Court with the purpose of clarifying the position of the mainstream Orthodox Jewish community in this case.

SUMMARY OF ARGUMENT

1. The Court should reverse the holding of the Supreme Court of New Jersey. This Court's precedents recognize the fundamental nature of the First Amendment's guarantee that Americans may gather together, informally or through civic organizations, for the purpose of forming an "expressive association." In *Roberts v. Jaycees, Rotary International v. Rotary Club of Duarte* and *Hurley v. Irish-American Gay, Lesbian & Bisexual Club of Boston*, this Court has further recognized that part and parcel of the right of expressive association is the determination of the form and content of the message to be expressed. Moreover, this Court has recognized that this determination rests in the hands of the association itself; that for a law, regulation or court edict to manipulate the membership of a private association by compelling the inclusion of those who dissent from the message to be expressed is exactly the same as compelling the association to alter its expression. The decision below runs counter to these precedents and should, therefore, be reversed.

2. Should this Court affirm the ruling of the Supreme Court of New Jersey, *Amicus* respectfully submits that this Court must simultaneously provide a clear safe-harbor for the activities of America's religious associations and institutions by revisiting this Court's decision in *Employment Division v. Smith*. There is no question that the state statute that his given rise to this entire controversy is properly characterized as a "general law of neutral applicability" which has not singled-out religious free exercise as a target of discriminatory treatment. In fact, New Jersey's Law Against Discrimination contains a religious educational facility exception. But the very need for that exception and the holding of the court below highlights the risk religious associations are exposed to should the decision

below be affirmed and this Court not revisit its decision in *Employment Division v. Smith*. Religious associations will be at the mercy of local legislatures and their devotion to popular fashion. While some legislatures will provide exceptions within their gay rights laws for the activities of religious institutions and associations, others will not. In the absence of a robust protection for the free exercise of religion – one which insists that state laws or regulations that infringe upon that "first freedom" may only do so when serving a compelling state interest via the means least restrictive to religious liberty – nothing stands in the way of religious associations being coerced to disband or violate their tenets.

ARGUMENT

I. THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF ASSOCIATION PROTECTS THE RIGHT OF PRIVATE ASSOCIATIONS TO DETERMINE THEIR MEMBERSHIP AND LEADERSHIP CRITERIA.

Amicus is keenly aware that petitioner's counsel will provide the Court with a comprehensive argument as to the Free Association and Free Speech rights implicated in this case and why, under this Court's precedents, the ruling below should be reversed. *Amicus*, therefore, associates itself with petitioner's argument on these points and will only briefly highlight those aspects of this line of analysis that directly implicate the interests of *amicus*.

A. FREEDOM OF EXPRESSIVE ASSOCIATION IS IMPERILED WHEN A LEGISLATURE OR COURT MAY DETERMINE THE MEMBERSHIP CRITERIA AND MISSION STATEMENT OF A PRIVATE ASSOCIATION

In ruling below that petitioners do not enjoy the First Amendment's guarantee of freedom of expressive association and are subject to New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 *et. seq.*, the New Jersey Supreme Court resorted to two lines of analysis that imperil any civic association that would enjoy this basic freedom.

First and foremost, the court below took it upon itself to substitute its interpretation of the Boy Scout Oath and Law for that offered by the very association that produced it and lived under that Oath and Law for its entire history. 160 N.J. at 613-616. This assertion by the lower court seems to run squarely

counter to this Court's recent statements on this freedom. In *Hurley v. Irish-American*, 515 U.S. 557, 573 (1995) this Court recognized that "under the First Amendment...a speaker has the autonomy to choose the content of its own message."

This basic understanding is also contained in Justice O'Connor's concurrence in *Roberts v. Jaycees*, 468 U.S. 609, 633 (1984): "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." In the instant case, the New Jersey Supreme Court has taken it upon itself to form the voice of the Boy Scouts of America.

The New Jersey's court's conduct, in this regard, is quite striking. In assessing the Scout Oath and Law, the court first quoted extensively from the Boy Scout Handbook's interpretive comments on that document. 160 N.J. at 614. Then, rather than accept the interpretation of these documents offered by the Scouts, the court marshaled evidence from *amicus* briefs to establish the proposition that "[o]n the record before [the court], it appears that no single view on this subject functions as a unifying associational goal of the organization." 160 N.J. at 615.

If the Boy Scouts choose to couch their position on homosexuality in terms more subtle than a no-holds-barred explicit assault on that lifestyle, that is for the Boy Scouts to choose, not the state court. The Boy Scouts may also wish to create affiliations with other civic organizations that disagree with their view on this issue, for any number of reasons – that too, is a choice for the Scouts. If the lower court's action in this regard is upheld, it will essentially force every association – civic and religious – that may otherwise wish to finesse a

highly-charged issue such as its attitude toward those who engage in homosexual conduct into crafting its own internal "legislative history" in preparation for possible litigation. Private associations should not be forced to so blatantly choose sides in this debate if they do not so desire.

The second line of analysis employed by the court below relies upon this Court's decision in *Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), a case that is clearly distinguishable from the case at bar. In *Rotary*, this Court held that a California law requiring civic associations, including Rotary Clubs, to admit women did not violate Rotary's First Amendment rights. In relying upon *Rotary*, the New Jersey Supreme Court focused particularly upon this Court's determination that inasmuch as "Rotary Clubs do not take positions on 'public questions,' including political or international issues" their expressive association rights are not infringed by the state compelling them to alter their membership policy (in that case, to include women). *See* 160 N.J. at 615 (citing *Roberts*, 481 U.S. at 548; "[Dale's] 'inclusion would not affect in any significant way Boy Scouts existing members' ability to carry out their various purposes.'")

This lynchpin in the New Jersey Supreme Court's argument is inherently flawed. While the Boy Scouts of America as an entity, might be so large and so open to recruiting many members as to remove it, like Rotary Clubs, from the category of those entities afforded the freedom of intimate association, that is where the similarity ends. The Boy Scouts have promulgated a Scout Law and Oath which clearly sets forth, albeit subtly, statements of moral and civic principles which form the core of its expressive, associative message. While local legislatures and courts might not agree with this component of their expressive message, they must

respect the right of the Boy Scouts and other associations to choose their message. That is what the First Amendment requires.

II. RELIGIOUS ASSOCIATIONS MUST BE GRANTED A SAFE HARBOR FOR THEIR ACTIVITIES; THUS, SHOULD THIS COURT AFFIRM, THIS COURT MUST REVISIT *EMPLOYMENT DIVISION v. SMITH*, 494 U.S. 872 (1990).

The decision of the New Jersey Supreme Court highlights the great risk to which private religious associations will be exposed should this Court affirm. Thus, if this Court rules for Respondent Dale, it should simultaneously revisit its holding in *Employment Division v. Smith*, 494 U.S. 872 (1990), and provide a safe-harbor for religious associations and their activities.

A. THE RULING BELOW HIGHLIGHTS THE EXPOSURE OF RELIGIOUS ASSOCIATIONS AND THEIR FIRST AMENDMENT FREE EXERCISE RIGHTS TO THE WHIM OF LEGISLATURES

Petitioners below asserted that they were exempt from the provisions of the LAD under its religious institution exemption. 160 N.J. at 601. That exemption simply states that the LAD's provisions do not apply to an "educational facility operated or maintained by a bona fide religious or sectarian institution." N.J.S.A. 10:5-5l. While it has traditionally been the case that religious institutions are provided with exemptions from various civil rights laws enacted, *see e.g.* 42 U.S.C. 2000e-2(e) and proposed, *see e.g.* S.1276, 106th Cong. 1st Sess. (1999) (Cong. Rec. S7596 (daily ed. June 24, 1999) (Introduction of "Employment

Non-Discrimination Act of 1999"), this practice is by no means guaranteed. It places religious communities and their institutions in the position of being dependant upon the mercy of legislatures or amassing sufficient political power to force the inclusion of such exemptions. Neither of these are prospects that religious communities relish, nor are they consistent with the Framers' concerted effort to ensure that religious liberty was removed from the political bargaining table.

Of the many important insights America's founders possessed was their appreciation of the risks of majoritarianism. James Madison succinctly expressed this insight by propounding the need to foster a "multiplicity of sects" to secure religious liberty in America. *The Federalist*, No. 51, at 326 (Lodge ed. 1908). To safeguard the flourishing of a religiously pluralistic society and especially ensure that minority religions would not find themselves at the mercy of the adherents of the majority religion (or non-religion), the Framers enshrined religious liberty in the First Amendment's Free Exercise Clause. Through the clause's handful of words, the Framers sought to "single out religion for special protections." McConnell, *Accommodation of Religion*, 1985 S.Ct.Rev. 1, 9.

As Justice Jackson recognized in overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940): "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials... One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia v. Barnette*, 319 U.S. 624, 638 (1943).

To understand the current risks now faced by our nation's religious associations, one need only consider what any bona fide religious organization might confront if the New Jersey Legislature had not included the "religious educational facility exemption" in the LAD. This scenario is easily imaginable. It is easy to contemplate in the current political environment that the proponents of the LAD, or similar legislation in another state or locality, might oppose such an exemption and insist that all institutions – public and private, secular and sectarian – comply with its demands. In such a circumstance, any religious organization which continues to believe in the unfashionable notion that homosexual conduct is sinful, *see Leviticus* (20:13), and that openly gay individuals are inappropriate leaders or members of its institution will face the simple choice of violating the law, disbanding, or violating the tenets of their religious faith. Any of these choices is unacceptable and should not be compelled by this Court's jurisprudence which currently places law and religion at loggerheads.

B. REVISITING *EMPLOYMENT DIVISION v. SMITH*'S HOLDING IS THE ONLY WAY TO PROVIDE RELIGIOUS ASSOCIATIONS WITH THEIR CONSTITUTIONALLY MANDATED SAFE HARBOR

This Court is well aware that local and state legislatures can be insensitive to the needs of religious minorities, *see Cantwell v. Connecticut*, 310 U.S. 296 (1940) *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Yet, under *Emp. Div. v. Smith, supra*, and then again in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court has cast the fate of religious associations into the hands of state legislatures and city councils.

The abuse that religious institutions and individuals have suffered at the hands of state and local

laws and regulations insensitive to religious liberty concerns has been well documented. *See*, Cong. Rec. H5580-H5608 (daily ed. July 15, 1999) (Consideration of H.R. 1691, Religious Liberty Protection Act); *Religious Liberty Protection Act: Hearing on H.R. 1691 Before the Subcomm. On the Constitution of the House Comm. on the Judiciary*, 106th Cong. (May 12, 1999); *Religious Liberty Protection Act: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. On the Judiciary*, 105th Cong. (June 16, 1998).

Justice O'Connor, and the dissenters who joined her in *Smith*, recognized the troubling nature of the Court's holding in that case and that it would inevitably lead to the circumstances we are bringing to the Court's attention herein. Similarly, in *City of Boerne*, Justice O'Connor called upon the Court to "correct the misinterpretation of the Free Exercise Clause set forth in *Smith*...put [the Court's] First Amendment jurisprudence back on course and allay the legitimate concerns of [those] who believe[] that *Smith* improperly restricted religious liberty." 521 U.S. at 545. We respectfully request the Court to do so here in light of the risks to religious associations outlined above.

Justice O'Connor properly noted in *Smith* that "there is nothing talismanic about neutral laws of general applicability...for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." 494 U.S. at 901. Inasmuch as the ruling of the New Jersey Supreme Court in the instant case highlights for this Court yet another concrete context in which such coercion may be easily directed at religious associations through a seemingly innocuous general law of neutral applicability, this Court should find compelling the need to reinstate the

safe harbor for religious liberty the Free Exercise Clause was intended to be. For this Court to fail to take up this cause is to continue to turn its back on one of the cornerstones upon which the United States was constructed.

CONCLUSION

In its ruling below, the New Jersey Supreme Court substituted its interpretation of the Boy Scouts' mission and tenets for that asserted by the Boy Scouts itself; it dismissed any suggestion that the Boy Scouts ought to be able, as a private association, determine its membership and leadership criteria and enjoy the First Amendment protections this Court's properly understood precedents afford private associations. Moreover, the New Jersey Supreme Court's opinion exposed the risk now borne by America's private civic and religious associations under current First Amendment jurisprudence.

For the foregoing reasons, the judgments of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

NATHAN J. DIAMENT
(Counsel of Record)
INSTITUTE FOR PUBLIC AFFAIRS, U.O.J.C.A.
1640 Rhode Island Ave., NW
Washington, DC 20036
(202) 857-2770

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IN THE
SUPREME COURT OF THE UNITED STATES

BOY SCOUTS OF AMERICA,
Petitioner,

v.

JAMES DALE,
Respondent.

ON WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

BRIEF OF AMICI CURIAE BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM (BALIF), *ET AL.* IN SUPPORT OF RESPONDENT

(Additional *Amici Curiae* Listed Inside Cover)

JEROME C. ROTH
MUNGER, TOLLES & OLSON
33 NEW MONTGOMERY ST.
SAN FRANCISCO, CA 94105
(415) 512-4000

EDWARD W. SWANSON
Counsel of Record
SWANSON & MCNAMARA
550 KEARNY ST., SUITE 505
SAN FRANCISCO, CA 94108
(415) 392-2677

PAULA A. BRANTNER
600 HARRISON ST., SUITE 535
SAN FRANCISCO, CA 94107
(415) 227-4655

Counsel for *Amici Curiae*
BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM (BALIF), *ET AL.*

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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ADDITIONAL *AMICI*:

THE BAR ASSOCIATION FOR HUMAN RIGHTS OF GREATER HOUSTON, INC., (BAHR);
THE BAR ASSOCIATION OF SAN FRANCISCO (BASF);
THE CENTER FOR LESBIAN AND GAY CIVIL RIGHTS;
THE COLORADO LESBIAN AND GAY BAR ASSOCIATION;
GAY AND LESBIAN LAWYERS OF PHILADELPHIA (GALLOP):
GAYLAW;
THE LESBIAN AND GAY LAW ASSOCIATION OF GREATER NEW YORK, INC. (LEGAL);
LHR: THE LESBIAN AND GAY BAR ASSOCIATION (LHR);
THE MASSACHUSETTS LESBIAN AND GAY BAR ASSOCIATION (MLGBA);
THE MINNESOTA LAVENDER BAR ASSOCIATION (MLBA):
THE NATIONAL LESBIAN AND GAY LAW ASSOCIATION (NLGLA);
WASHINGTON LEGALS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

A. THE PROFOUND NEXUS BETWEEN THE BSA AND THE GOVERNMENT AND THE BSA'S CHOICE TO ENLIST THE GOVERNMENT IN ADVOCATING ITS MESSAGE ARE INCONSISTENT WITH THE BSA'S EXPRESSIVE ASSOCIATION CLAIM 5

1. The Relationship between the BSA and the Government Provides a Wide Range of Mutual Benefits 7

2. The Relationship between the BSA and the Government Has Created a Profound Connection Between the Two In the Public Eye 10

3. The BSA and the Government Have Close Financial And Legislative Links 11

4. States Have A Compelling Interest in Preventing Joint Government Partners From Engaging in Invidious Discrimination And Conscripting State and Local Entities Into Disseminating A Discriminatory Message Antithetical to State Policy And Practice 12

B. THE BSA's PARTNERSHIP WITH THE GOVERNMENT IN ADVOCATING ITS PHILOSOPHY BELIES ITS CLAIM THAT DISCRIMINATING AGAINST GAY PERSONS IS A CENTRAL TENET OF ITS PHILOSOPHY 14

C. THE BSA HAS OVERLOOKED ITS CLOSE NEXUS WITH THE GOVERNMENT IN EXAGGERATING THE CONSEQUENCES OF THE DECISION OF THE COURT BELOW 15

CONCLUSION 16

APPENDIX 1a

TABLE OF AUTHORITIES

Cases

Board of Dir. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 2

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 8, 10

Dale v. Boy Scouts of America, 734 A.2d 1196 (1999) 8, 14, 15

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 2

Roberts v. United States Jaycees, 486 U.S. 609(1984) 2,3

Romer v. Evans, 517 U.S. 620 (1996) 12, 13

San Francisco Arts & Athletics v. United States Olympic Committee, 483 U.S. 522 (1987) 6, 7, 10, 14

Shelley v. Kraemer, 334 U.S. 1 (1948) 6, 7

Statutes

10 U.S.C. § 2544 8
16 U.S.C. § 539f 8
36 U.S.C. § 30905 . . . . . 8, 11

36 U.S.C. § 380 11
N.J. Stat. Ann. § 23:2-3 8
N.J. Stat. Ann. § 39:3-27 8

Pursuant to this Court's rule 37.3,[1] *amicus curiae* Bay Area Lawyers for Individual Freedom (BALIF), and various other *amici*, representing a number of bar associations nationwide, respectfully submit this brief urging this Court to affirm the judgment of the Supreme Court of New Jersey. In particular, *amici* request that the Court find that a State's application of its anti-discrimination laws to prohibit sexual orientation discrimination by an organization like the Boys Scouts of America ("BSA"), which has sought and obtained endorsement and leadership by governmental agencies and has enlisted the joint participation of the government in promulgating its viewpoints, does not infringe upon the organization's First Amendment rights of expressive association.

INTEREST OF THE *AMICI CURIAE*

BALIF is a minority bar association of over 500 lesbian, gay and bisexual members of the San Francisco Bay Area legal community. Founded in 1980, BALIF promotes the professional interests of its members and the legal interests of the gay, lesbian and bisexual community at large. As part of that mission, BALIF actively participates in public policy debates concerning the rights of lesbians, gay men and bisexuals. BALIF frequently appears as *amicus curiae* in cases where it can provide perspective and argument that will

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[1] Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, the *amici* state that this brief was not authored in whole or part by counsel for any party and that no party or entity, other than the *amici* and their counsel, made any monetary contribution to its preparation or submission.

inform a court's decision on a matter of broad public importance, such as this case. BALIF is joined by — other *amici* which are also minority and local bar associations around the country.

The interests of the other *amici curiae* are detailed in the Appendix to this brief.

BALIF and the other *amici* have long been concerned about the discrimination that many of our nation's citizens face based solely on characteristics such as their sexual orientation. *Amici* believe that States may constitutionally protect their citizens against discrimination in public accommodations, as New Jersey and other States have done. *Amici* further believe that organizations like the BSA, which have voluntarily sought and obtained extensive governmental sponsorship and endorsement and have enlisted governmental participation in dissemination of the organization's message, have no First Amendment associational right to engage in discrimination in violation of State law.

SUMMARY OF ARGUMENT

This brief is submitted in response to the argument by the BSA that application of State anti-discrimination laws to prohibit exclusion of gay members based solely on their sexual orientation infringes upon its expressive association rights under the First Amendment. The BSA's claim, which relies wholly on the attempt to distinguish the *Roberts* trilogy of cases,[2] misses the mark because it entirely overlooks the

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[2] *See New York State Club Ass'n v. City of New York*, 487 U.S. 1, 108 S.Ct. 2225 (1988); *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 107 S.Ct. 1940 (1987); *Roberts v.*

extraordinary degree of financial, legislative and symbolic interconnection between the organization and both the federal and State governments. Unlike the organizations in the cases on which the BSA relies, the BSA has actively and successfully obtained the endorsement, sponsorship and imprimatur of all levels of our government, from the President and Congress of the United States to State-run public schools and local fire and police departments. The organization's profound nexus with the government, its voluntary enlistment of federal and State participation in disseminating its message of positive moral values to our nation's youth, and the resulting public perception of government endorsement of the organization's viewpoints undercut the BSA's expressive association claim for three reasons.

First, where an organization actively enlists the sponsorship, leadership and joint participation of the government to express its viewpoints, as the BSA has done for decades, and thereby chooses to benefit from its close identification with the government, it cannot invoke its expressive association rights to engage in discrimination in a manner that its government partner would itself be prohibited from engaging in. Moreover, where a State has affirmatively prohibited discrimination based on sexual orientation, the BSA's decision to enlist the agencies of that State as leaders of the organization is wholly inconsistent with any claim that the organization's core purposes require exclusion of

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United States Jaycees, 486 U.S. 609, 104 S.Ct. 3244 (1984). In these cases, this Court upheld application of State and local anti-discrimination laws to prohibit various private organizations from excluding female members.

members who do not agree with its purported anti-gay message.

Second, as an evidentiary matter, the long history of joint participation by BSA and the government in promulgating BSA's message of positive moral values to youngsters — a message that traditionally has been silent with respect to questions of sexual orientation but that has advocated "tolerance of all persons," Brief for Petitioners 5 — belies the BSA's claim that its core expressive purpose is inconsistent with gay membership. In fact, to find otherwise would suggest that the governmental agencies that have sponsored the BSA have in fact known about and endorsed the organization's purported "philosophy" against gay members — a notion that finds absolutely no support in the record and that could raise serious issues under both State and federal law. On the contrary, were the BSA genuinely concerned about advocating a position condemning homosexuality as its core expressive purpose and requiring the exclusion of gay members, it could not logically enlist as its troop leaders the agencies and officials of a State that advocates a policy prohibiting discrimination based on sexual orientation.

Finally, the "parade of horribles" that the BSA posits would result from affirmance of the decision below is wholly without basis. The unique relationship between the BSA and the government, based in large part on their joint promulgation of a message advocating positive values to young people, distinguishes the organization from other private noncommerical associations which do not solicit or receive similar endorsement, leadership and symbolic support from the government. There is therefore no danger that affirmance will lead down a "slippery slope" of excessive government intrusion into all private organizations' membership policies. On the contrary, the BSA has actively

encouraged government participation in its expressive activities, is therefore not wholly private, and cannot be heard to complain when its governmental partner seeks to enforce its own laws against discrimination.

As the New Jersey Supreme Court found, the BSA's voluntary, substantial and widely-touted connections with the government have rendered it a public accommodation within the meaning of the State's anti-discrimination statute. Likewise, the organization's active enlistment of all levels of government, including the State that enacted the anti-discrimination prohibition at issue, to assist in communicating its core message, cannot be reconciled with its claimed right to discriminate. Under these circumstances, and in light of the State's compelling interest in preventing unfair and irrational discrimination against its citizens based on sexual orientation, application of the State's anti-discrimination law to the BSA does not infringe upon its expressive association rights.

ARGUMENT

A. THE PROFOUND NEXUS BETWEEN THE BSA AND THE GOVERNMENT AND THE BSA'S CHOICE TO ENLIST THE GOVERNMENT IN ADVOCATING ITS MESSAGE ARE INCONSISTENT WITH THE BSA'S EXPRESSIVE ASSOCIATION CLAIM

The BSA argues that, under the First Amendment, private noncommercial associations retain the right to exclude any individual or group they choose from membership and especially from leadership positions, regardless of whether the exclusion is discriminatory and in violation of State law. The BSA claims that the *Roberts* trilogy of cases, prohibiting

certain private clubs from discriminating against women, are distinguishable on their face because those clubs were "quasi-commercial" and they "did not have any moral code or philosophy that was logically related to their challenged membership criteria." Brief for Petitioner 34.

But the right of wholly private organizations to refuse membership to those whose participation necessarily conflicts with the group's philosophical stance is not at issue here. The BSA's expressive association claim, and its heavy reliance on the *Roberts* trilogy, disregard the reason that the State's anti-discrimination law applies to its membership policies in the first place. Unlike the organizations at issue in those cases, the BSA has long maintained and has substantially benefited from voluntary, profound and widely-publicized connections with all levels of government, and has partnered with those governmental units in communicating its message advocating moral virtues to the nation's young. This well-established BSA/government partnership works to endow the BSA's discriminatory membership practices with the "clear and unmistakable imprimatur of the State." *Shelley v. Kraemer*, 334 U.S. 1, 20, 68 S.Ct. 836, 845 (1948). In fact, unlike the private associations to which the BSA tries to compare itself, the core expressive purpose of the organization — to teach young boys wholesome character virtues — has been intentionally represented by the BSA, and is reasonably perceived by the public, as a message shared, encouraged and advocated by the government.

Under such circumstances, an organization which holds itself out as a joint participant with the government, especially for purposes of conveying its message to the public, may be limited in its otherwise constitutionally-protected conduct. *See, e.g., San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522, 548, 107 S.Ct.

2971, 2987 (1987) ("*SFAA*") (O'Connor, J., concurring and dissenting in part) (applying equal protection scrutiny to United States Olympic Committee's refusal to grant permission to use the word "Olympics" to gay athletic group where the Committee and the government are "joint participants in the challenged activity"). In fact, focus of the four *SFAA* dissenters detailing the close relationship between the federal government and the Olympic Committee, a non-governmental organization, is instructive here. As described below, both the BSA and the Olympic Committee have substantially entwined themselves with the government to the extent that they both have a governmental relationship that "confers a variety of mutual benefits." *Id.*, U.S. at 556-57, S.Ct. at 2991-92 (Brennan, J., dissenting); *see also id.*, U.S. at 548, S.Ct. at 2987 (O'Connor, J., dissenting in part "largely for the reasons explained by Justice Brennan in Part I-B of his dissenting opinion"). Moreover, "in the eye of the public, both national and international, the connection between the [government and the organization] is profound." *Id.*, U.S. at 557, S.Ct. at 2992 (Brennan, J., dissenting). Finally, there is a "close financial and legislative link" between the "challenged conduct," here the BSA's claims with respect to its articulated "code" or "philosophy," and the government. *Id.*, U.S. at 558, S.Ct. at 2992.

1. The Relationship between the BSA and the Government Provides a Wide Range of Mutual Benefits.

As the four dissenters in *San Francisco Arts & Athletics* recognized, where an organization and the government enter into a "symbiotic relationship" to their mutual benefit, there may arise a "sufficiently close nexus" that "action of the [private] entity . . . may fairly be treated as that of the State itself." *Id.* (quotations omitted); *see also*

Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856 (1961) (applying equal protection analysis to prohibit discrimination by private restaurant where its relationship with public parking facility contained in the same building "confer[red] on each an incidental variety of mutual benefits"). As the record in this case establishes, that is precisely the nature of the relationship between the BSA and the government.

The BSA is a federally chartered organization. At the federal level, Congress has conferred a broad range of legal, financial and symbolic benefits on the BSA. These include the exclusive right to use emblems, badges, and descriptive marks and words, *see* 36 U.S.C. § 30905, the right to use without charge United States government equipment, property and services, *see* 10 U.S.C. § 2544, and the free use of designated lands within the National Forest System, *see* 16 U.S.C. § 539f. Moreover, as the BSA widely publicizes in order to communicate to the public that its core philosophy and message are shared by the government, "[o]ne of the causes contributing to the success of the [BSA] has been the thoughtful, wholehearted way in which each President of the United States since William Howard Taft in 1910 has taken an active part in the work of the movement." JA 46. As the record demonstrates, each such President has lent to BSA the extraordinary prestige and esteem of the office of the Chief Executive by serving as the organization's "Honorary President" during his term in office. JA 46.

This profound government nexus is equally broad at the state and local levels. New Jersey, like most States, confers substantial tax and in-kind benefits on the BSA. *See Dale v. Boy Scouts of America,* 734 A.2d 1196, 1212 (citing N.J.S.A. 23:2-3 and N.J.S.A. 39:3-27). Most significant is the role that State-run public schools and such local agencies

as fire and police departments play as so-called "charter organizations" or sponsors of BSA activities. JA 57. These local government agencies and their officials are "responsible for leadership, the meeting place, and support for troop activities," JA 57-58, an undertaking that involves both the use of public funds and resources and the invocation of the moral stature of the government to promote the philosophy and moral code of the BSA.

Moreover, the government has long acknowledged the advantages it enjoys from its endorsement of, and links to, the BSA and from its participation in promoting the message of encouraging positive values among young people. As Congress observed in 1916, the Boy Scout movement "tends to conserve the moral, intellectual, and physical life of the coming generation, and in its immediate results does much to reduce the problem of juvenile delinquency in the cities." JA 319. Congress has further noted that "Boy Scouts have demonstrated the value of the education and training they received as an auxiliary force in the maintenance of public order and the administration of first-aid and practical assistance in times of great public emergencies." JA 319. In response to a 1934 appeal from President Franklin D. Roosevelt to help "the needy," Scouts contributed "by collecting nearly 2 million articles of clothing, household furnishings, and other articles for family needs." JA 49-50. President John F. Kennedy observed that, "the principles learned and practiced as Boy Scouts add to the strength of America and her ideals." JA 52. With respect to the "government agencies" that sponsor Boy Scout Troops, the BSA asserts that "[s]couting helps them achieve their objectives." JA 79. President Richard M. Nixon commended the BSA for teaching "good citizenship" and developing the potential of young citizens "for public service and [to] become effective leaders in their communities and in our nation." JA

48. President Gerald Ford expressed his "confiden[ce] that [the BSA's] ability to bring ideals, values, and leadership training to millions of our young people will help to bring about a new era—a time in which not only our Republic will progress in peace and freedom, but a time in which the entire world shall be secure, and all its people free." JA 48. President Ronald Reagan observed that "the Scouts strengthen the cornerstone of individual freedom in our nation." JA 46.

2. The Relationship between the BSA and the Government Has Created A Profound Connection Between the Two in the Public Eye.

The portion of Justice Brennan's opinion in *SFAA* in which Justice O'Connor concurred also relied on the observation that "in the eye of the public . . . the connection between the decisions of the United States Government and those of the United States Olympic Committee is profound." *SFAA*, 483 U.S. at 557 &. n.14, 107 S.Ct. at 2992 & n.14 ("In *Burton* the Court also found significant evidence that would link the two actors in the public's eye.") (Brennan, J, dissenting). This conclusion was based in part on the fact that "[t]he President of the United States has served as the Honorary President of the USOC," and "[t]he national flag flies both literally and figuratively over the central product of the USOC, the United States Olympic Team." *Id.; see also Burton*, 365 U.S. at 720; 81 S.Ct. at 859 (finding close link in public eye based in part on the fact that "the Authority located at appropriate places [on the facility] official signs indicating the public character of the building, and flew from mastheads on the roof both the state and national flags").

For the better part of the past century, the BSA has cultivated, with recognized success, an equally strong

association in the public's mind between the government and its own activities and message of encouraging the physical, moral and mental development of young boys. By accepting not only the resources of the government but also its leadership — symbolic at the presidential level and actual at the local "charter organization" level — the BSA has joined with the government in promoting that perception. Like the Olympic Committee, the BSA has enlisted the United States President as its Honorary President, and the flag of the United States adorns every scout uniform and flies over scout activities. Confronted with scout meetings sponsored by local schools, led by local police and fire departments and supervised by local officials, held on government property with government monies and materials, and symbolically presided over and encouraged by the United States President, no member of the public could conclude other than that the BSA's message enjoys the full support of the government.

3. The BSA and the Government Have Close Financial and Legislative Links.

Also, as the four dissenters noted in *SFAA* with regard to the USOC, the BSA's promotion of its message maintains close financial and legislative links to the government. Like the USOC, the BSA enjoys special federal legislative protection of its name and associated symbols such as badges and insignia, beyond the scope of ordinary patent law. *Compare* 36 U.S.C. §30905 ("The [BSA] corporation has the exclusive right to use emblems, badges, descriptive or designating marks, and words or phrases the corporation adopts.") *with* 36 U.S.C. § 380 (restricting use of the words and symbols associated with the Olympics). Congress has justified these special legislative benefits as a protection against "those who are seeking to profit" from the popularity of the BSA. *See* JA 321. Moreover, each governmental

entity that undertakes to sponsor a Boy Scout troop is required by BSA Bylaws to provide "adequate facilities, supervision and leadership." JA 375. The support provided by governmental "charter organizations" is intended to and does have the effect of deeply involving governmental officials in affirmatively teaching the BSA's moral code and philosophy.

4. States Have A Compelling Interest In Preventing Joint Governmental Partners From Engaging In Invidious Discrimination And Conscripting State And Local Entities Into Disseminating A Discriminatory Message Antithetical To State Policy And Practice.

In light of this joint partnership between the government and the BSA in promulgating the organization's philosophy and code, and the resulting governmental imprimatur stamped on the organization and its message, the BSA cannot invoke its First Amendment rights to avoid anti-discrimination provisions in a way that would run afoul of the Equal Protection provisions of the Fifth and Fourteenth Amendments. Like the discriminatory law struck down by this Court in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620 (1996), the BSA's claimed membership policy pursuant to which Respondent was excluded — a rule which "specifically forbid[s] membership to homosexuals," JA 137 — "is a status-based [provision] divorced from any factual context from which [one] could discern a relationship to legitimate state interests." *Romer*, 517 U.S. at 635, 116 S.Ct. at 1629. As this Court held in *Romer*, a status-based restriction on gay participation in an organization as profoundly connected to the government as is the BSA cannot rest on the rationale of "respect for other citizens' freedom of association, . . . in particular the liberties of [others] who have personal or

religious objections to homosexuality." *Id.* Yet, despite having enlisted governmental participation in its expressive activities, the BSA attempts to rationalize its discriminatory membership practices by relying precisely on the impermissible purposes — associational freedom to exclude gay members and a moral or philosophical objection to homosexuality — explicitly condemned in *Romer*. Like the statute invalidated there, the BSA's purported membership policy "identifies persons by a single trait and then denies them [access] across the board." *Id.*, 517 U.S. at 633, 116 S.Ct. at 1628. Accordingly, the BSA's discriminatory membership policy bears no rational relation to any legitimate end and given the BSA's ties to the government can support no legitimate expressive purpose protected by the First Amendment.

Moreover, the BSA's enlistment of the State of New Jersey as a sponsor and leader of its activities, despite that State's (and other sponsoring States') antidiscrimination policy, is entirely inconsistent with any expressive association claim based on exclusion from leadership positions of those that do not share the organization's purported stance on homosexuality. It makes no sense to seek and accept supervision, leadership and support from a State that affirmatively condemns sexual orientation discrimination, on the one hand, while simultaneously challenging the prohibition on the ground that it interferes with the organization's associational right to select leaders that share its views favoring the discrimination. While the churches, synagogues, and charitable youth organizations cited by the BSA, *see* Brief for Petitioner 32 & n.8, may be afforded the discretion to discriminate in selecting their leadership, none of those wholly private associations voluntarily invites leadership, sponsorship and supervision by State agencies

which both administer and are subject to anti-discrimination laws — as the BSA has done here.

In short, as in *SFAA*, "[i]t would certainly be irony amounting to injustice," 483 U.S. at 558, 107 S.Ct. at 2992 (quotation omitted), to permit a group like the BSA, incorporated "for the purpose of establishing through the boys of today the very highest type of American citizenship," JA 319, which enlists governmental entities into leadership positions, to teach prejudice and discrimination by example.

B. THE BSA'S PARTNERSHIP WITH THE GOVERNMENT IN ADVOCATING ITS PHILOSOPHY BELIES ITS CLAIM THAT DISCRIMINATING AGAINST GAY PERSONS IS A CENTRAL TENET OF ITS PHILOSOPHY

As an evidentiary matter, the BSA's claim that its core message, moral code or philosophy cannot be reconciled with gay membership is undercut by its extraordinarily close relationship with the government and the gay-neutral message advocating positive moral values that it has espoused for decades in order to cement that government sponsorship. As the Supreme Court of New Jersey found, the record does not support the BSA's claim that a "shared goal[] of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral." *Dale*, 734 A.2d at 1224 (quotation omitted). This conclusion is bolstered by evidence of the organization's extensive relationship with the government. None of the Congressional or State legislation, presidential endorsements or state and local sponsorship directed at supporting the BSA even remotely refer to any anti-gay purpose or message. In light of the organization and government's long and shared history of promulgating a

message of wholesome ethics and values for young people, a message that always has been silent on sexual orientation, the BSA's present claim now that its message inherently conflicts with gay membership is wholly pretextual.

In fact, it is doubtful that the association could ever have solicited or obtained the governmental sponsorship it enjoys had it openly advanced its purported discriminatory message. Open exclusion of gay members would raise serious questions about the ability of the States with anti-discrimination laws like New Jersey's to continue to sponsor, lead and otherwise participate in BSA activities. In any event, the BSA cannot be heard to claim that it condemns homosexuality and excludes gay members as part of its core expressive purpose when, at the same time, it actively enlists as its leaders the agencies and officials of States that have espoused the contrary policy and have banned discrimination based on sexual orientation. As result, the New Jersey Supreme Court's finding that the respondent's "membership" does not violate the BSA's right of expressive association because his inclusion would not "affect in any significant way the BSA's existing members' ability to carry out their various purposes," *Dale*, 734 A.2d at 1225 (quotation omitted), should be upheld.

C. THE BSA HAS OVERLOOKED ITS CLOSE NEXUS WITH THE GOVERNMENT IN EXAGGERATING THE CONSEQUENCES OF THE DECISION OF THE COURT BELOW

Finally, the BSA's dire warnings that affirmance of the New Jersey Supreme Court's opinion will trample on the associational rights of wholly private associations and will fundamentally change the face of America are without merit.

Contrary to the BSA's admonition that "any organization could find itself the target of a state's desire to enforce conformity to its ideas of desirable social change," Brief for Petitioners 37, the New Jersey decision does not reach nearly so far. The BSA's long-standing and entrenched links with the government make clear that the organization is not wholly private. The decision below simply permits States to serve their compelling interest in prohibiting irrational discrimination against their citizens by organizations which have voluntarily chosen to enmesh themselves — their finances, sponsorship, supervision, leadership, and most critically, their expressive purpose — with the government and have actively sought the imprimatur of the government for their articulated message. Such a result is hardly the "extraordinary limitation on freedom of association as it is commonly understood," that the BSA conjures. *See* Brief for Petitioners 37.

On the contrary, the Constitution is far more offended by the government's joint partnering with a private association in expressive conduct that advocates discrimination against, and exclusion of, a class of citizens, in contravention of the laws of many States. The expressive association rights of an organization to discriminate are reasonably limited where the organization has voluntarily joined forces to promote its message with a government that condemns — and is constitutionally prohibited from endorsing — the discrimination, and where the discrimination, like the policy the BSA attempts to defend here, is related to no rational state interest.

CONCLUSION

For the reasons stated herein, *amici* respectfully request that this Court affirm the decision of the New Jersey

Supreme Court and hold that the expressive association rights of the BSA are not infringed by application of the State's anti-discrimination laws to prevent the BSA from excluding members based solely on their sexual orientation.

Respectfully submitted,

EDWARD W. SWANSON
Counsel of Record
SWANSON & MCNAMARA
550 Kearny Street, Suite 505
San Francisco, CA 94108

JEROME C. ROTH
MUNGER, TOLLES & OLSON
33 New Montgomery Street
San Francisco, CA 94105
(415) 512-4000

PAULA A. BRANTNER
600 Harrison Street, Suite 535
San Francisco, CA 94107
(415) 227-4655

Counsel for Amici Curiae[3]

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[3] Counsel wish to acknowledge the assistance of Eric O. Bravin, an associate with Munger, Tolles & Olson, in the preparation of this brief.

APPENDIX

DESCRIPTIONS OF *AMICI CURIAE*

The Bar Association for Human Rights of Greater Houston, Inc. (BAHR) is a local bar association and is a Texas non-profit corporation serving lesbian, gay, bisexual, and transgendered lawyers, law students and legal professionals in the greater Houston, Texas area. BAHR sponsors educational seminars and assists lawyers in communicating with one another to better serve the citizens of Houston.

The Bar Association of San Francisco (BASF) is the second-largest voluntary bar association in California, numbering over 9,500 members. BASF has a long and distinguished tradition of commitment to equality of opportunity, irrespective of income, for racial and ethnic minorities, women, gay men and lesbians, people with disabilities and others who have historically been the victims of discrimination. As an integral component of that commitment, the Association has historically stood in strong opposition to discrimination on the basis of sexual orientation.

The Center for Lesbian and Gay Civil Rights is a not-for-profit legal services organization providing legal assistance, representation and education for lesbians and gay men in Pennsylvania. The Center represents individuals in cases of public accommodation discrimination throughout Pennsylvania. It is common for Courts of the Commonwealth of Pennsylvania to look to the jurisprudence of New Jersey because of the proximity of the two states. Thus, the result in this case will be used as influential authority in similar cases litigated in Pennsylvania on behalf of clients of the Center for Lesbian and Gay Civil Rights. In addition, the Center for

Lesbian and Gay Civil Rights is currently the largest lesbian and gay Civil rights organization in the Commonwealth of Pennsylvania. The Center responds to approximately 750 calls for legal assistance each year. The result in this case will inform the discussion of public and judicial policy in the Commonwealth in a variety of different areas of the law. The Center will be the primary vehicle for the development of this discussion. Accordingly, the Center seeks to join in this brief as amicus.

The Colorado Lesbian and Gay Bar Association is a voluntary professional association of attorneys and legal professionals which, among other activities, seeks to educate its members and the bar at large in the state of Colorado about legal issues confronting the gay, lesbian, bisexual and transgendered community. Chief among the legal issues confronting this community is the civil right of access to housing, employment and public accommodations by gay, lesbian, bisexual and transgendered persons. The determination in the case at bar that the appellant Boy Scouts of America is a place of public accommodation is of significant interest to our members, many of whom are themselves are gay, lesbian, bisexual or transgendered, and all of whom represent clients who are members of that community. Any interpretation of the status of "public accommodation" will impact our members, since virtually all of the state and local civil rights laws and ordinances in Colorado include provisions prohibiting discrimination in public accommodations. While only a few of those laws and ordinances include sexual orientation as a class attribute upon which such discrimination is banned, the impact of decisions concerning the reach of civil rights laws upon places of public accommodation will determine the extent to which our members and their clients can participate fully in American civil society.

Gay and Lesbian Lawyers of Philadelphia (GALLOP) is a bar association of over three hundred sixty (360) legal professionals and serves Eastern Pennsylvania, Delaware and Southern New Jersey. GALLOP is commited to the civil and human rights of gay men and lesbians, and is especially concerned with the enforcement of New Jersey's Law Against Discrimination (LAD). GALLOP has lawyer-members in New Jersey, and each year receives many requests from New Jersey citizens for legal referrals to assist with claims under the LAD.

GAYLAW, founded in 1990, is an independent, non-partisan bar association serving lesbian, gay, bisexual, and transgendered lawyers, law students and legal professionals in the national capital area. GAYLAW, with a membership of over 300, works to advance the rights of lesbian and gay men, to be their voice within the legal community, and to improve their professional lives. A member of the National Lesbian and Gay Law Association, GAYLAW acts in coalition with other local and national groups dedicated to lesbian and gay concerns. GAYLAW appears as amicus curiae in cases where it can join other amici in providing perspective and argument from the viewpoint of its membership.

The Lesbian and Gay Law Association of Greater New York, Inc. (LeGaL) is a 20 year-old professional association of the lesbian and gay legal community in the New York metropolitan area with almost 500 members. A essential part of LeGaL's mission is to promote the civil rights of all people including lesbians, gays, bisexuals, and persons of transgender experience (LGBT). LeGaL is interested in the outcome of this case because the issues decided here will have a profound effect on the LGBT communities both in New York City and throughout the United States.

LHR: The Lesbian and Gay Bar Association (LHR) is a not-for-profit association of lesbian, gay, bisexual and transgendered attorneys, judges, legal workers and law students in the Los Angeles, California area. Our mission is to provide a strong leadership presence within the legal profession and in the community at large through legal advocacy, educational activities, social functions and participation in civic activities in which we promote equality and fairness for all people. As a part of such efforts, we maintain an affiliate status with both the Los Angeles County Bar Association and the National Lesbian and Gay Law Association, as well as maintain cooperative relationships with other local and national associations or organizations around the country, to promote and protect the interests of lesbian, gay, bisexual and transgendered persons throughout the nation. LHR also takes particular interest in this case because of its potential impact upon similar cases which have either previously come before the California Supreme Court or are likely to in the future. Indeed, the very issue addressed by the New Jersey Supreme Court in this case was also taken up by our high court in *Curran v. Mount Diablo Counsel of the Boy Scouts of America*, 17 Cal.4th 670 (1998). Cases such as these raise important constitutional questions of equal protection and religious freedom as well as the authority of government to put an end to discrimination that is public or private.

The Massachusetts Lesbian and Gay Bar Association (MLGBA) is a voluntary statewide professional association of lawyers maintaining a visible lesbian and gay presence within the Massachussetts legal community. MLGBA is affiliated with the Massachusetts Bar Association (MBA) and the National Lesbian and Gay Law Association (NLGLA). MLGBA promotes the administration of justice throughout Massachusetts for all person without regard to their sexual

orientation, advocates for the enactment and enforcement of laws promoting equal rights and treatment for lesbians and gay men, and is thus interested in the outcome of this case, especially as it may affect the administration of Massachusetts' anti-discrimination statute, which prohibits discrimination on the basis of sexual orientation.

The Minnesota Lavender Bar Association (MLBA) is a recently-established organization whose membership includes gay, lesbian, bisexual, and transgendered (GLBT) attorneys, academics, students, and others involved in the legal profession. Based largely in the Twin Cities area, MLBA seeks to educate the legal profession regarding GLBT legal issues, assure that the legal system responds appropriately to GLBT individuals and concerns, and encourage awareness by GLBT individuals of their legal rights. Like New Jersey, Minnesota protects its citizens from discrimination based on sexual orientation. Consequently, MLBA's members and constituents are especially concerned when public organizations invoke private associational rights in an attempt to avoid the reach of State anti-discrimination laws.

The National Lesbian and Gay Law Association (NLGLA) was founded in 1988 as a voice for the nation's lesbian and gay attorneys. In 1992, the NLGLA was officially affiliated with the American Bar Association and has since that time participated actively in the ABA's House of Delegates on behalf of the lesbian, gay, bisexual, and transgendered legal community. The NLGLA also sponsors an annual conference at which hundreds of attorneys, judges, legislators, students and others gather from across the nation and around the world to address issues of current interest to the organization's members and to the clients we serve. The NLGLA and its members (many of whom live and practice in

states and municipalities which have anti-discrimination statutes and ordinances) have a vital interest in the issues raised in this case.

Washington LEGALS is a professional organization of lawyers, legal workers, judges, paralegals, legal secretaries, investigators, law students, law professors, and other legal professionals dedicated to advancing the rights of the lesbian and gay community. LEGALS is an affiliate of the National Lesbian and Gay Law Association (NLGLA). LEGALS is recognized by the King County Bar Association, Washington State Trial Lawyers Association and the Washington State Bar Association as a minority bar association.

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No. 99-699

IN THE
SUPREME COURT OF THE UNITED STATES

BOY SCOUTS OF AMERICA,

Petitioner,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

MICHAEL P. FARRIS*
SCOTT W. SOMERVILLE
Center for the Original Intent of the Constitution, at
Patrick Henry College
P.O. Box 1776
Purcellville, VA 20134
(540) 338-1776
* *Counsel of Record*

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17 pp

QUESTION PRESENTED

Does State law requiring Boy Scout troop to appoint avowed homosexual and gay rights activist as assistant scoutmaster responsible for communicating Boy Scouting's moral values to youth members abridge First Amendment rights of freedom of speech and freedom of association?

TABLE OF CONTENTS

Question Presented ii

Table of Contents iii

Table of Authorities iv

Interest of the *Amicus* 1

Summary of Argument 4

Argument 5

New Jersey Law, As Applied, Violates the Fourteenth Amendment by Infringing Upon the Protected Privileges of American Parents 5

A. The Court Ignored the Parent's Federal Constitutional Right to *Direct* the Upbringing of the Parent's Child 5

B. Parental Rights at Common Law 6

C. Parental Rights in Constitutional Law 9

D. The Ruling Below Conflicts with this Court's Freedom of Association Cases 10

Conclusion 11

TABLE OF AUTHORITIES

Cases

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) 9

Dred Scott v. Sandford, 60 U.S. 393 (1856) 2

Force v. Haines, 7 N.J.L. 385 (1840) 8

Meyer v. Nebraska, 262 U.S. 390 (1923) 6, 10

Parham v. J.R., 442 U.S. 584 (1979) 7

Pierce v. Society of Sisters, 268 U.S. 510 (1925) ..... passim

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 10, 11

The Slaughterhouse Cases, 83 U.S. 36 (1872) 2

Thorpe v. Rankin, 19 N.J.L. 36 (1842) 8

Vernonia School Dist. v. Acton, 515 U.S. 646 (1995) 8, 9

Wisconsin v. Yoder, 406 U.S. 205 (1972) 6

Statutes

Civil Rights Act of 1866 2

Law Against Discrimination, N.J.S.A. 10:5-1 to –49 ..... 4, 5

Other Authorities

1 W. Blackstone, *Commentaries on the Laws of England* (1769). 7

Constitutional Provisions

U.S. Const. Amend. XIV, § 1, cl. 2 ..... 2, 6

U.S. Const. Preamble 2

INTEREST OF THE *AMICUS*[1]

The Center for the Original Intent of the Constitution was formed by the Home School Legal Defense Association in 1998, and now operates under the auspices of Patrick Henry College. The Center holds that the interpretation of the Constitution according to the original intent of the Founders is the only safe basis for the preservation of limited government and all rights including those important to our association. The Center exists to systematically research and advocate constitutional interpretation according to the principle of original intent.

The Center has filed a number of briefs explaining how *federalism* enhances freedom. Our Founders understood that power should be exercised as close to home as possible, and our federal Constitution makes real their vision of decentralized and limited government. That vision is in danger of being lost, today.

Federalism was an important part of our Founders' original intent, but it was not their only concern. Federalism was one means to their overarching vision of liberty through law. That vision of liberty included those common law privileges

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[1] Pursuant to Rule 37.6, this brief was authored, prepared, and paid for in its entirety by the Center for the Original Intent of the Constitution at Patrick Henry College and the Home School Legal Defense Association. No counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

The amicus curiae requested and received the written consents of the parties to the filing of this brief. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court. See Sup. Ct. Rule No. 37.3(a).

and immunities that they had fought to retain during their war with Great Britain.

Our Founders were so concerned that the new federal government could threaten the traditional "rights of Englishmen" that they wrote a Bill of Rights to make sure the new federal government did not become a new form of tyranny. Most of the first ten Amendments enshrine their commitment to protect recognized common law privileges from federal usurpation.

After the Civil War, our ancestors extended the federal guarantee of limited government to the States. They enacted the Fourteenth Amendment, which expressly protects the "privileges and immunities of citizens of the United States" from State infringement U.S. Const. Amend. XIV, § 1, cl. 2. This *amicus* respectfully argues that this Court made a crucial mistake when it interpreted that clause in *The Slaughterhouse Cases*, 83 U.S. 36 (1872). The Fourteenth Amendment was originally intended to keep States from infringing those "civil rights" which had been denied to African-Americans in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), and which had been statutorily conferred by the Civil Rights Act of 1866.

This *amicus* believes the whole point of the Fourteenth Amendment was to protect the well-recognized privileges and immunities of the common law from State infringement, not to unleash a regime of purely subjective government by judiciary. This *amicus* hopes to see Fourteenth Amendment jurisprudence eventually placed upon a solid common-law foundation.

Our interest is to preserve the blessings of liberty for ourselves and our posterity. U.S. Const. Preamble. We seek to

do this by holding the federal government to the terms of our original social contract: the Constitution. Faithful adherence to the original intent of the Founders is essential; not because they are ancient and deserve veneration, but because they were the elected representatives of the people.

Self-government demands that the intention of the elected Framers should always prevail over the views of unelected judges guided by floating notions of a "living Constitution." Our Founders made promises to the people that ratified the Constitution. Those promises are what are ultimately at stake in this case.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court devoted a mere two paragraphs to a discussion of whether its interpretation of the Law Against Discrimination, N.J.S.A. §§ 10:5-1 to 49, ("LAD"), infringed a parent's express statutory right to direct the education and upbringing of a child under his control. The court noted that parental rights could extend to persons, "like a step-parent," whose "intent it is to assume the parental relationship." But the court limited its analysis of parental rights, in effect, to a question of whether Scoutmasters *are* parents. New Jersey forced parental rights onto the bed of Procrustes, and then amputated the parental rights claim to make it fit. A quick review of this Court's cases proves that the problem here is New Jersey's cramped understanding of parental rights.

When this Court first articulated the right "to direct the education and upbringing of a child" in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), it was a right that was actually exercised in association with others. The only plaintiffs in *Pierce* were a Catholic school and a military academy. The parental right to "direct" the education of a child includes the right to have someone else do the actual teaching. According to *Pierce*, the parent's right to direct the destiny of a child goes to the very heart of our system of ordered liberty:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the

> right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce, 268 U.S. at 535.

The New Jersey court assumes parental rights vanish in association. The original intent of the Constitution, as reflected by the time-honored decisions of the Court, together with our common law tradition, does not agree with this truncated view of associational parental rights. Two fundamental rights—parental rights and the freedom of association—protect the parental liberty to bring up their young sons in an organization without homosexual activists for leaders.

Parents have both the right and the "high duty" to shape the values of their children, and that right is strengthened, not weakened, when citizens come together to inculcate shared values in a Boy Scout troop. The decision below undermines those constitutionally protected freedoms. The decision below should be reversed.

ARGUMENT

NEW JERSEY LAW, AS APPLIED, VIOLATES THE FOURTEENTH AMENDMENT BY INFRINGING UPON THE PROTECTED PRIVILEGES OF AMERICAN PARENTS

A. THE COURT IGNORED THE PARENT'S FEDERAL CONSTITUTIONAL RIGHT TO *DIRECT* THE UPBRINGING OF THE PARENT'S CHILD

The Law Against Discrimination, expressly affirms "the right of a natural parent or one *in loco parentis* to direct the

education and upbringing of a child under his control." N.J.S.A. 10:5-51. The New Jersey Court limited its inquiry to whether *Scoutmasters*, in and of their own right, have a right to direct the education and upbringing of a child. The court failed to consider whether its ruling might infringe the parent's *own* right to direct the upbringing of his or her child.

The lower court failed to consider whether the federal parental rights doctrine extends to associational exercise like the Boy Scouts. This is not a question of first impression: this Court's ground-breaking parental rights cases *only* involved parental rights in an assocation. This Court has consistently held that the Fourteenth Amendment prohibits States from depriving parents of such liberties, whether acting individually, *see*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), or together, *see, Pierce, supra; Meyer v. Nebraska*, 262 U.S. 390 (1923).

B. PARENTAL RIGHTS AT COMMON LAW

This Court has long relied on history and tradition as the text for parental rights analysis. As Chief Justice Burger noted:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).* See also

> *Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 400 (1923)*.... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries 447; 2 J. Kent, Commentaries on American Law 190.

Parham v. J.R., , 442 U.S. 584, 602 (1979)

Under the common law, parents had a right to direct the education and upbringing of a child, and there was never any doubt as to whether this right could be exercised in association with others. Groups of parents routinely hired schoolmasters to teach their children, just as individual parents hired tutors. These tutors and schoolmasters exercised the delegated authority of the parent himself. A parent could:

> delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

1 W. Blackstone, *Commentaries on the Laws of England* 441 (1769).

The schoolteacher was the very paradigm of the persons standing *in loco parentis*. Parents also sought apprenticeships for their children, and masters likewise stood *in loco parentis*. This was certainly what the New Jersey Supreme Court believed in 1842, when it said:

> The master, to a certain extent, stands in loco parentis, and it is of great importance, as well to society as to the parents and the apprentice, that he should be well instructed in the art or trade to which he has been bound; and that his moral conduct and character should be watched over and cultivated.

Thorpe v. Rankin, 19 N.J.L. 36, 40-41 (1842); *see also Force v. Haines*, 17 N.J.L. 385, 399 (1840) ("apprentices, towards whom the master is *in loco parentis*").

The common law notion of parental rights has not become irrelevant with the passage of time. Quite the contrary: this Court has recently relied upon concepts of *in loco parentis* to decide other constitutional questions. In *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995), for example, this Court allowed schools to conduct drug tests that would have been unconstitutional for law enforcement agents. Justice Scalia wrote:

> When parents place minor children in private schools for their education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status.

Vernonia, 515 U.S. at 654-55.

Similarly, in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986), this Court noted the right of school authorities, acting *in loco parentis*, to govern school libraries in a way that would be otherwise impermissible under the First Amendment.

If parental rights can be limited to just those things the parents do themselves, then *Vernonia* and *Bethel* were wrongly decided. It was school officials, not parents, who conducted the drug tests and selected library books. These cases only make sense because parents can delegate their authority to others, who then stand in the place of the parents. But if parents can delegate their common law privileges and immunities to school officials, surely they can delegate them to Scoutmasters.

C. PARENTAL RIGHTS IN CONSTITUTIONAL LAW

The New Jersey court would only uphold parental rights when the parents, themselves, are shaping values, not when they seek help from others. As we have seen, this is not how parental rights operated at common law. It also flies in the face of the federal cases on the subject. This Court's watershed cases on parental rights makes it obvious how far the lower court missed the mark.

If the New Jersey court was right, then this Court was wrong in *Pierce, supra*. The New Jersey court limited parental rights to parents and step-parents, but the nuns who ran that Oregon school did not intend to *adopt* the children whose Catholic parents sent them there. Under the rule established below, Oregon would have been free to abolish secular private schools, although religious schools might be independently protected on free exercise grounds. But the other plaintiff in *Pierce* was Hill Military Academy, a secu-

lar private school. *Pierce* was decided on the basis of parental rights, not free exercise.

If New Jersey was right, then this Court was wrong in *Meyer, supra*. The teachers who taught German in the schools did not intend to *adopt* their students. Under the rule of the court below, Nebraska could have outlawed the teaching of German by anybody but a parent. But this Court struck down that Nebraska law.

D. THE RULING BELOW CONFLICTS WITH THIS COURT'S FREEDOM OF ASSOCIATION CASES

Both the common law and the constitutional cases confirm that parents have not only the right but a "high duty" to shape the values of their own children. Many parents recognize their need for help with such a task. That is why so many parents seek help in inculcating those values from other adults who share those values. This case will determine whether parents are still free to fulfill their parental responsibilities by associating with others.

The Boy Scouts of America is an association of like-minded people with a set of shared values. It is an *expressive* organization. Justice O'Connor hinted at the status of the Boy Scouts in her concurrence in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), when she wrote:

> It is easy enough to identify expressive words or conduct that are strident, contentious, or divisive, but protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service. Cf *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). The purposes of

> an association, and the purposes of its members in adhering to it, are doubtless relevant in determining whether the association is primarily engaged in protected expression. Lawyering to advance social goals may be speech, *NAACP v. Button*, 371 U.S. 415, 429-430 (1963), but ordinary commercial law practice is not, see *Hishon v. King & Spalding*, 467 U.S. 69 (1984). A group boycott or refusal to deal for political purposes may be speech, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 912-915 (1982), though a similar boycott for purposes of maintaining a cartel is not. *Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.*

Roberts, 468 U.S. at 635-36 (O'Connor, J., concurring in part and in the judgment) [*emphasis supplied*].

Parental rights should grow stronger, not weaker, when citizens peacefully assemble. The freedom to associate should grow stronger, not weaker, when people gather to inculcate shared values, even values that may have become "politically incorrect" with the passage of time. But the New Jersey court has turned the First Amendment on its head. This Court must reverse that ruling to set it right again.

CONCLUSION

The New Jersey Supreme Court erred when it limited its parental rights inquiry to whether Scoutmasters, in and of themselves, could exercise parental rights. The unquestioned

rights of parents are *strengthened*, not *weakened*, when citizens join together to inculcate a set of shared values. The decision of the New Jersey Supreme Court violates the constitutional right to freedom of association, and it should therefore be reversed.

Respectfully Submitted,

MICHAEL P. FARRIS*
SCOTT W. SOMERVILLE
Center for the Original Intent of
the Constitution, at
Patrick Henry College
P.O. Box 1776
Purcellville, VA 20134
(540) 338-1776

* *Counsel of Record*

(44)

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IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of *Certiorari* to the Supreme Court of New Jersey

BRIEF OF *AMICI CURIAE*, ROLAND POOL AND MICHAEL GELLER, IN SUPPORT OF RESPONDENT

DAVID M. GISCHE *
MERRIL HIRSH
BRIAN L. OWSLEY
ROSS, DIXON & BELL, L.L.P.
601 Pennsylvania Avenue, N.W.
North Building
Washington, D.C. 20004-2688
(202) 662-2000
Attorneys for *Amici Curiae*
Roland Pool and
Michael Geller

* Counsel of Record

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE EXCLUSION OF HOMOSEXUALS FROM SCOUTING IS A PURELY IDENTITY-BASED DISCRIMINATION THAT CONTRADICTS, RATHER THAN REFLECTS, THE WELL-EXPRESSED PURPOSES THAT BRING MEMBERS OF THE BOY SCOUTS TOGETHER.	4
A. The Policy At Issue In This Case Is An Identity-Based Exclusion That Has Nothing To Do With Expression.	4
B. It Is No Part Of The Scouting Program To Say Anything About The Morality Of Sexual Orientation.	7
1. The Boy Scouts Are Chartered To Be Inclusive, Not Exclusive.	7
2. Because Of These Tenets, It Is Not And Never Has Been Any Part Of The Scouting Program To Discuss Homosexuality Or Its Morality	9
3. The BSA Policy Is Not Mentioned In The Vast Collection Of Materials By Which It Describes Its Values, Its Program Or Its Operations.	10
4. The Boy Scouts Do Not Express A Message For Or Against Homosexuality, Even In *Private* Conversations.	15

TABLE OF CONTENTS—Continued

Page

5. Because Of These Rules, The Boy Scouts Expect That Scouts And Their Parents Would *Never* Find Out That The Organization Had Any Policy Concerning Sexual Orientation. 17

6. It Is So Foreign To The Boy Scouts' Message To Say Anything About Homosexuality That Scouters With Decades Of Experience Had No Idea That The BSA Leadership Took Any Position Concerning The Morality Of Homosexuality, Or Its Appropriateness For Scouting, Until They Read About It In Newspapers. 17

C. The BSA's Policy Of Excluding Homosexuals Is So Incoherent, It Is Impossible To Reconcile The Prongs Of The Boy Scouts' Litigation Position Much Less Identify It As A Principle That Brings Its Members Together. 19

1. The BSA's Exclusion Policy And Its Purported Justifications Are Recent And Found Only In Public Relations Materials And Briefs. 19

2. No One Has Been Able To Articulate A Coherent Explanation Of The Policy The BSA Is Asking The Court To Find Constitutionally Essential To Its Operation... 21

3. The Version Of The Policy That The BSA Uses For Purposes Of Litigation Is Not Even Internally Consistent. 24

II. THIS CASE INVOLVES A NATIONAL POLICY IMPOSED BY "THE LARGEST YOUTH MOVEMENT THE WORLD HAS EVER SEEN," NOT THE DETERMINATIONS OF INDIVIDUAL TROOPS. 25

TABLE OF CONTENTS—Continued

Page

III. THESE FACTS DO NOT PRESENT ANY REASON TO RECONSIDER THE *ROBERTS* TRILOGY. 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES — Page

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 3, 28
Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 218 (Cal. 1998) 20
Dale v. Boy Scouts of Am., 734 A.2d 1196 (N.J. 1999), *cert. granted*, 68 U.S.L.W. 3458 (U.S. 2000) 2
Gilmore v. City of Montgomery, Alabama, 417 U.S. 556 (1974) 2
New York State Club Ass'n v. New York, 487 U.S. 1 (1988) 3
Northern Securities Co. v. United States, 193 U.S. 197 (1904) 30
Roberts v. United States Jaycees, 468 U.S. 609 (1984) 3, 24, 28, 30

STATUTES AND REGULATIONS

10 U.S.C. § 2544 28
10 U.S.C. § 4682 28
10 U.S.C. § 7541 28
10 U.S.C. § 9682 28
13 U.S.C. § 641 28
36 U.S.C. § 23 (1916) 7
D.C. Code § 1-2501 *et seq.* 1
N.J. Rev. Stat. § 10:5-1 *et seq.* 1
N.J. Rev. Stat. § 23:2-3 28
OPNAV Instruction 5760.5b 28

BOY SCOUT PUBLICATIONS

Boy Scouts of America, 1990 Annual Report 27
Boy Scouts of America, 1996 Annual Report 27, 28
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Boy Scouts of America, A Representative Membership (1986 prtg.) 7
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TABLE OF AUTHORITIES—Continued

Page

Boy Scouts of America, Bear Cub Scout Book (1969 prtg.) 11
Boy Scouts of America, Boy Scout Handbook ("The Official Handbook for Boys") (1st ed. 1911) 10, 16
Boy Scouts of America, Boy Scout Handbook ("The Official Handbook for Boys") (2d ed. 1915 prtg.) 7, 12, 16
Boy Scouts of America, Boy Scout Handbook ("Handbook for Boys") (4th ed. 1937 prtg.) 10, 12, 26
Boy Scouts of America, Boy Scout Handbook ("Handbook for Boys") (5th ed. 1948) 10, 12, 26
Boy Scouts of America, Boy Scout Handbook (6th ed. 1959 prtg.) 10, 12, 26
Boy Scouts of America, Boy Scout Handbook (7th ed. 1971 prtg.) 10, 12
Boy Scouts of America, Boy Scout Handbook ("Scout Handbook") (8th ed. 1977 prtg.) 11, 12
Boy Scouts of America, Boy Scout Handbook ("The Official Boy Scout Handbook") (9th ed. 1979) 11
Boy Scouts of America, Boy Scout Handbook (10th ed. 1990) ..... *passim*
Boy Scouts of America, Boy Scout Parent/Leader Orientation (1986 prtg.) 26
Boy Scouts of America, BSA at a Glance (1988 prtg.) 15
Boy Scouts of America, Bylaws 7
Boy Scouts of America, Commissioner Administration of Unit Service (1996) 10
Boy Scouts of America, Cub Scout Leader Basic Training Home-Study Workbook (1988 prtg.) 6
Boy Scouts of America, Cub Scout Leader How-To Book 15
Boy Scouts of America, Employment Policy (1989) 19
Boy Scouts of America, Ethics in Action 15
Boy Scouts of America, Facts About Scouting (1996 prtg.) 26, 27

TABLE OF AUTHORITIES—Continued

	Page
Boy Scouts of America, Handbook for Scout Masters (1st ed. 1914 prtg.)	8
Boy Scouts of America, Handbook for Scoutmasters (3d ed. 1936 prtg.)	8
Boy Scouts of America, Handbook for Scoutmasters ("The Official Scoutmaster Handbook") (7th ed. 1987 prtg.)	*passim*
Boy Scouts of America, Handbook for Scoutmasters ("Scoutmaster Handbook") (8th ed. 1990)	16
Boy Scouts of America, Issues and Crisis Communications Guide (1992)	*passim*
Boy Scouts of America, Learning For Life: Sixth Grade (1991)	15
Boy Scouts of America, Marketing to Today's Families: Guide for District Scouters	6
Boy Scouts of America, National Capital Area Council 1992-1993 Annual Report	15
Boy Scouts of America, National Capital Area Council, *Character Counts*	27
Boy Scouts of America, Organizations That Use Scouting: Keys to Relationships (1989 prtg.)	27, 28
Boy Scouts of America, Scoutmastership Fundamentals (1987)	10, 15
Boy Scouts of America, Speech by Chief Scout Executive Jere Ratcliffe, Uplink Broadcast (Mar. 29, 1993)	21
Boy Scouts of America, Wolf Cub Scout Book (1969 prtg.)	11
Boy Scouts of America, Youth Protection Guidelines (1987)	6
Boy Scouts of America, Youth's Frontier: Making Ethical Decisions (rev. 1994)	15, 24
OTHER AUTHORITIES	
Edelman Public Relations Worldwide, Media Training Guide for Boy Scouts of America (1992)	20
Robert L. Stern et al, Supreme Court Practice (7th ed. 1993)	2

INTEREST OF *AMICI CURIAE* [1]

Roland Pool and Michael Geller ("*amici*") have a unique perspective and knowledge about this dispute. Mr. Pool and Mr. Geller are Eagle Scouts with vast Scouting experience.[2] The Boy Scouts of America (the "BSA") and its National Capital Area Council ("NCAC") excluded each of them from Scouting the moment the BSA learned that he is homosexual. *Amici* brought a proceeding before the District of Columbia Commission on Human Rights for violations of the District of Columbia Human Rights Act. D.C. Code § 1-2501, *et seq.* (the "DCHRA"), *compare with* N.J. Rev. Stat. § 10:5-1, *et seq.* (the "LAD"). And in that proceeding, the parties presented 12 days of testimony and scores of exhibits, including all the evidence that the BSA could muster to show a factual basis for the Constitutional defenses it asserts here.

Amici believe that Petitioners' (collectively the Boy Scouts') brief seriously misportrays this dispute, the policy

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[1] Letters from Petitioners and Respondent consenting to the filing of this brief are on file with the Clerk's Office. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored the brief in whole or in part.

[2] Roland Pool was a vulcanologist at the Smithsonian until 1997, when he left for divinity school, where he is currently studying to become a Quaker minister. In addition to being an Eagle Scout, he is a Vigil Honor member of the Order of the Arrow, a former assistant Scoutmaster, a leader of several troops to Boy Scout national jamborees, and for five summers a paid employee of the Boy Scouts at its Philmont Scout Ranch, the world's largest privately-owned wilderness. At Philmont, he rose from ranger to Assistant Director of Conservation, and was the author of a chapter of the Philmont Field Guide. Michael Geller, who is currently an employee of the World Bank, became a Boy Scout on his eleventh birthday, the first day he could join. Not only is he an Eagle Scout, and a member of the Order of the Arrow, two of Mr. Geller's uncles were Eagle Scouts. His father is a Life Scout who in 1997 celebrated 55 years in Scouting. Michael Geller's brother, David, is also an Eagle Scout, as are his three cousins.

at issue in this case, who created the policy, and how it is imposed. As explained below, when the facts are reviewed, it is apparent that there is no grave Constitutional question.

STATEMENT OF THE CASE

Amici adopt Respondent's statement of the facts of the case. *See also Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1200-05 (N.J. 1999), *cert. granted*, 68 U.S.L.W. 3458 (US. 2000).[3]

SUMMARY OF ARGUMENT

Amici file this brief to make three points:

1. This case is *not* about anything that has ever been basic to Scouting or the reasons why the Boy Scouts' members came together. This case is not about *expression*. The BSA will *exclude* a homosexual who never intends to say anything about homosexuality—even a priest who preaches that homosexual conduct is *wrong*. But the Boy Scouts have welcomed self-avowed "advocates" for any number of causes—including those who urge that homosexuality *is* moral—so long as they *are* heterosexual.

Moreover, this case is not about the *Boy Scouts' expression*. Even the BSA's executives concede that making any statement concerning homosexuality forms no part of

[3] *Amici* have also lodged with the Clerk documents from the Commission's proceedings in order "to call the Court's attention to official documents not in the record that shed light on the arguments in [this] case." Robert L. Stern et al., Supreme Court Practice 556 (7th ed. 1993). These include excerpts from Boy Scout publications and the sworn testimony of Scouters—including two 30(b)(6) witnesses chosen by the Boy Scouts (Scott Teare and Marcus Mack), the BSA's former President, Richard Leet, and its Scout Executive for the NCAC, Ron Carroll, as well as other experienced Scouters called by the BSA and *amici*. *See Amici's Lodging* ("AL") Table of Contents (identifying the witnesses and documents). *Amici* request that this Court take judicial notice of these documents. *See, e.g., Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556, 567 n.8 (1974).

what Scouting seeks to do, nor of the Boy Scouts' charter, bylaws, program, literature, recruitment, fundraising or even private conversations. Indeed, (1) Scouters (meaning the over one million adult members and former members) with even 50 years of experience had never heard there was such a policy until the BSA had a public relations agency draft statements attempting to defend it; (2) the policy is articulated only in public relations statements and legal briefs; and (3) the policy is so incoherent and inconsistent with the program and purposes that are found in the Boy Scouts' literature that it could not possibly be a basis upon which the Boy Scouts' membership has come together.

2. This case is not about what a Boy Scout *Troop* can do. No troop decided to exclude James Dale or *amici* from Scouting; none has been ordered to do *anything* in this case. As Richard Leet, a former BSA President testified in *amici*'s proceeding, for purposes of this policy, "a troop is not a policymaking unit." This is a national policy, imposed over many troops' express objection, by an organization that bills itself as "the largest youth movement the world has ever seen."

3. Because of these circumstances, this case does not present any reason for the Court to reassess the framework it erected in the *Robert* trilogy—*Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); and *New York State Club Ass'n v. New York*, 487 U.S. 1 (1988). These cases impose no difficult burden on organizations like the Boy Scouts. If this case actually involved a matter for which its members had come together, the BSA would not have any problem showing this to be true. When, however, an organization that has had every chance to support the premise that its members have come together to express a particular message is reduced to relying on its own say-so to support that assertion, courts are not bound to accept it.

ARGUMENT

I. THE EXCLUSION OF HOMOSEXUALS FROM SCOUTING IS A PURELY IDENTITY-BASED DISCRIMINATION THAT CONTRADICTS, RATHER THAN REFLECTS, THE WELL-EXPRESSED PURPOSES THAT BRING MEMBERS OF THE BOY SCOUTS TOGETHER.

When the BSA frames the question in this case "Does state law requiring Boy Scout troops to appoint an avowed homosexual activist as assistant scoutmaster . . . abridge First Amendment rights of freedom of speech and freedom of association," it misstates the issue. As discussed in this section, New Jersey has not overturned a Boy Scout policy aimed at "avowed homosexual activist[s]"; the policy has nothing to do with avowal or activism. As discussed in Part II below, this case does not frame the issue of whether a "Boy Scout *troop*" is required to appoint anyone; this case involves a *national* policy imposed by a huge organization on troops, many of whom actively disagree with it, and none of whom ever chose to exclude James Dale.

A. The Policy At Issue In This Case Is An Identity-Based Exclusion That Has Nothing To Do With Expression.

Although the BSA strains to suggest that it carries out an exclusion based upon activism or expression, in fact, its exclusion has nothing to do with either. Far from singling out those with pro-gay views or a pattern of activism, the BSA excludes *anyone* who it learns is homosexual. "[T]he Boy Scouts of America does not accept homosexuals as members or leaders." AL 515 (Issues and Crisis Communications Guide) ("ICC Guide"); *see also* J.A. 453-59. In the words the BSA wrote when it told James Dale to sever all ties he had with Scouting, BSA policies "forbid membership to homosexuals." J.A. 137. The Boy Scouts similarly told *amicus* Roland Pool

that "[t]he policy" is "that the Boy Scouts of America does not accept homosexuals as youth leaders." AL 580.

The BSA does not ask or care whether someone who is homosexual intends to make sexual orientation an issue of any sort. AL 278 (BSA District-level professional Azzie Mae Hill). As Scout Executive Ron Carroll explained, the BSA will exclude someone who was compelled by legal process to reveal his or her sexual orientation, even if s/he swears never even to think of mentioning such personal information in any other context. AL 107, 251. The BSA would exclude a homosexual Catholic Priest who, on a daily basis, advocates the position that homosexual conduct is *contrary* to his religion. AL 140-43 (testimony of BSA witness Father Hummel).

As James Kay, who decided to exclude James Dale, testified, once an individual is identified as a homosexual, there is no information that person could give the BSA that would allow the application to be accepted. AL 305. The BSA told James Dale and *amici* that any attempt to provide information would be futile. *See, e.g.*, AL 580. Scott Teare, one of the BSA's chosen 30(b)(6) representatives in *amici*'s proceeding, said the rule is simple: "There should be no ifs, ands, or buts." AL 395.

On the other hand, if someone is heterosexual, expression by itself is *not* a reason for exclusion. The BSA does not exclude heterosexuals who believe that homosexuality is moral, even if they publicly avow this belief by marching in a gay and lesbian rights parade. AL 126-29 (BSA witness John Thomas); AL 383-84 (Teare); AL 358-62 (Marcus Mack; also BSA (30(b)(6) witness); AL 309-10 (Kay); or pass (AL 576) and publicize (AL 577) a resolution denying that homosexuality is immoral.[4]

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[4] The blanket exclusion of homosexuals also does not reflect any general code of conduct. The BSA will exclude homosexuals even if they are celibate. AL 109-10 (Carroll); AL 375 (Teare); AL

Nor (so long as the activist is heterosexual) do the Boy Scouts have any rule against associating with activists, who in their daily lives *do* promote views that would be inappropriate in Scouting. Although the Boy Scouts have no official position on abortion, they will admit those known to perform abortions and those who call it "murder." Although the Boy Scouts embrace no political party, AL 312 (Kay), they will welcome active Democrats, Republicans and Independents. The Boy Scouts ascribe to no particular religion, but will accept the evangelical who in other contexts, seeks converts, as well as those who would find such conversion to be contrary to their religions. AL 135-39 (BSA witness Rev. Turner). The BSA does not generally fear being associated with activists'

345-46 (Mack); AL 277-78, 291-92 (Hill). "If a homosexual rabbi wants to join the Boy Scouts, he would not qualify as a member based on that he does not live a morally straight life." AL 345 (Mack). But the BSA neither has a general policy of excluding heterosexuals who engage in adultery or premarital sex, nor does it generally police their sexual conduct. AL 380-82 (Teare); AL 281-83 (Hill); AL 243-48 (Carroll). Indeed, the BSA actively markets Scouting to *non*-traditional families—such as inner city, single-parent families, including those with unwed parents. *See, e.g.*, AL 518-537 (Marketing to Today's Families: Guide for District Scouters); AL 567 (Cub Scout Leader Basic Training Home-Study Workbook (1988 prtg.)); AL 415 (Official Scoutmaster Handbook 7th ed.); AL 151-54 (former BSA Executive Board member and National Explorer President Charles Wolfe), 204-05 (Leet). Thus, Mr. Kay testified that he was unaware of any BSA "policy concerning any other sexual practices, other than homosexuality" or "of anyone having their membership revoked under the standard of 'morally straight' who wasn't a homosexual." AL 307.

Also, contrary to suggestions of one of the *amici* filing on its behalf, the BSA does not maintain that the policy of excluding homosexuals exists to serve or does serve any end of avoiding child sexual abuse. The Boy Scouts recognize that the two issues are "not related," AL 511, 513 (ICC Guide); AL 390-91 (Teare), and train Scouters to avoid the mistake of acting on the "myth" that "children are at greater risk of sexual victimization from 'gay' (homosexual) adults than from 'straight' (heterosexual) adults." AL 558 (BSA, Youth Protection Guidelines (1987)).

different messages, or presume that all activists will use Scouting as a bully pulpit. But the BSA excludes all homosexuals regardless of whether they are "activists."

B. It Is No Part Of The Scouting Program To Say Anything About The Morality Of Sexual Orientation.

1. *The Boy Scouts Are Chartered To Be Inclusive, Not Exclusive.*

It is not surprising that the Boy Scouts openly embrace members with such disparate views. In 1916, six years after it was founded, the BSA received a Congressional charter "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which were in common use by Boy Scouts on June 15, 1916." 36 U.S.C. § 23 (1916). As the BSA recognizes, "[o]ur federal charter sets forth our obligation to serve boys." AL 552 (BSA, A Representative Membership (1986 prtg.)). Thus, the BSA is inclusive:

> *Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy.* The National Council and Executive Board have always taken the position that Scouting should be made available for *all* boys who meet entrance age requirements. [*Id.* (emphasis added).]

Similarly, the most salient point about the Boy Scouts' view of religions is its inclusiveness. The Boy Scouts are required by their bylaws to be "absolutely nonsectarian," J.A. 362; they inform adults of this on every application. AL 597. The Boy Scouts do not define what constitutes a belief in God and have always left religious training up to parents and religious leaders. *See, e.g.*, AL 583 (BSA, Advancement Guidelines (1992)); AL 437 (BS Hbk.

2d [5]); ("If he be a Catholic boy scout, the Catholic Church of which he is a member is the best channel for his training. If he be a Hebrew boy, then the Synagogue will train him in the faith of his fathers . . . ."); AL 347-48 (Mack); AL 392-93 (Teare).

Thus, "[t]he Boy Scout program conflicts with no religious doctrine." AL 406 (SM Hbk. 3d); *see also* AL 400-01 (SM Hbk. 1st). The Boy Scouts welcome not only Christians, Jews and Moslems, but Buddhists, Hindus, and those who are not members of *any* organized religion. AL 583 (Advancement Guidelines). As former Chief Scout Executive Ben Love put it, "I don't care if he worships the Great Turtle, you have to believe in something." AL 183-84, 185-86.

The Boy Scouts did not come together (or receive extensive governmental support, *imprimatur* and participation) for the purposes of expressing ideas that are not part of their charter or program, and, in fact, divide their vast membership. To the contrary, the BSA's bylaws, literature and principles do not permit it to pick and choose among the moral views of different religions or among the faithful within particular religions. AL 280 (Hill); AL 15-16, 17-19 (former District Commissioner Thornell Jones), 71-74 (former Assistant District Commissioner Dan Press). A Scout is told repeatedly to follow his parents and his religious leaders in being faithful to his own religion and that the failure to respect the religious beliefs of others is as contrary to the principles of Scouting as faithlessness in one's own religious beliefs, *see, e.g.*, J.A. 189, 216, 226. And the Boy Scouts repeat this pluralism again and again, *except* when the BSA tries to defend the policy at issue in this case.

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[5] "BS Hbk. nth" and SM Hbk. nth respectfully refer to the series of Boy Scout Handbooks and Scoutmaster Handbooks. The "nth" refers to the edition.

2. *Because Of These Tenets, It is Not And Never Has Been Any Part Of The Scouting Program To Discuss Homosexuality Or Its Morality.*

When the BSA concedes that "Boy Scouting does not convey an explicit 'anti-gay' message to the boys," Pet'r Br. at 21, it understates the facts. In fact:

It is no part of the Boy Scouts' program to teach any view concerning sexual orientation or its morality. AL 308 (Kay); AL 384 (Teare); AL 11-12, 28 (Jones).

The Boy Scouts do not discuss their policy of excluding homosexuals when they recruit either youth or adults to become members or organizations to become sponsors. J.A. 691, 753-54. As a Boy Scout professional put it when asked whether parents of prospective Scouts are told about the exclusion of homosexuals when they attend "Join Scouting Night" recruitment activities, "we don't ever bring that out." AL 284 (Hill); *see also* J.A. 104-05.

The policy of excluding homosexuals is not articulated at various Boy Scout events where Scouting values are discussed. AL 233-41 (Carroll). For example, the Boy Scouts do not discuss homosexuality or its morality at Scout meetings, at adult meetings, or at training sessions. *Id.* The Boy Scouts have Boards of Review for possible advancement in the ranks of Scouting, where Scout leaders meet with Scouts to discuss very thoroughly the Scout Oath, the Scout Law, and the Scout's efforts to live up to these ideals; but these never discuss the morality of homosexuality. J.A. 151-52.

The Boy Scouts do not mention the policy of excluding homosexuals when they train adult volunteers or youth. AL 11, 45-49 (Jones); AL 266-67 (Regional official Doug Fullman). If it does come up, it is in the context of telling Scout leaders not to mention homosexuality unless someone else brings it up. AL 279, 284-86, 287-90 (Hill).

The Boy Scouts' policy of excluding homosexuals is never mentioned as part of fundraising efforts. AL 31-32 (Jones), AL 103-04, 233-40 (Carroll), AL 147 (Wolfe).

3. *The BSA Policy Is Not Mentioned In The Vast Collection Of Materials By Which It Describes Its Values, Its Program Or Its Operations.*

Contrary to the impression the BSA seeks to leave in its brief, the Boy Scouts are not shy or subtle about expressing the values they exist to serve. "Few organizations have such an abundant reservoir of manuals, guidebooks, pamphlets and training tools available for their leaders as does the Boy Scouts of America." AL 602 (BSA, Commissioner Administration of Unit Service (1996)). The Boy Scouts routinely provide volunteer Scout leaders with policies on matters such as "two-deep leadership," aquatic safety, use of alcohol and tobacco, first aid, accommodating religious practices, national and council initiatives, recruitment, fundraising, program activities, camping, merit badge requirements, awards, uniforms, ceremonies and scores of others, and have detailed the aims, principles and methods of Scouting in tens of thousands of pages of material. AL 55-92 (Press).

Nor does the BSA usually hide its membership policies. When the Boy Scouts excluded women from leadership positions, they told Scoutmasters and troop committees about it in the training materials. *See* AL 562-63 (BSA, Scoutmastership Fundamentals (1987)). When the Boy Scouts speak of the requirement that individuals swear to uphold a duty to God, they speak of it "proudly" and cite bylaws and editions of the *Boy Scout Handbook*, old and new, to reflect that policy. *See, e.g.*, AL 595.

Statements about homosexuality, the Boy Scouts' views concerning it or even reference to its exclusionary policy, however, are not merely absent from the "[o]fficial Scouting materials addressed to the boys." Pet'r Br. at 5; *see also, eg.*, AL 428-29, 448-49, 451-57, 464-75, 477-83,

489-95, 498-503 (BS Hbks. 1st and 4th through 9th, respectively). They are absent from all *adult* materials too. *See, e.g.*, J.A. 691 ("policy [is not] contained in explicit language in any document that is disseminated to Scouts . . . [or] to parents of Scouts"); J.A. 188-89.

Moreover, even if one were to assume that, for purposes of excluding homosexuals, the Boy Scouts suddenly decided to be subtle about what values they sought to articulate, the Scouting literature does not even fairly imply such a policy. To the contrary, the Boy Scouts' program materials articulate, over and over again, principles of tolerance and deference to the diverse judgments of parents and religious leaders on issues of morality.

In the Scout Oath, for example, a Scout promises to do his best "[t]o do my duty to God." This duty, however, specifically means following one's own conscience on religion, and it is as important to respect the religious beliefs of others as to be true to one's own religion. As the *Scout Handbook* explains:

> Your family and religious leaders teach you to know and love God and the ways in which God can be served. As a Scout, you do your duty to God by following the wisdom *of those teaching in your daily life, and by respecting the rights of others to have their own religious beliefs.*

J.A. 216 (emphasis added); *see also, e.g.*, AL 420 (Bear Cub Scout Book); AL 423-24 (Wolf Cub Scout Book); AL 488, 495 (BS Hbk. 8th).

When the Scout Oath refers to doing a duty to "my country," Scouts are advised to "[h]elp keep the United States strong by obeying its laws." J.A. 216. As far back as 1915, the Boy Scouts told youth that obeying laws meant standing for "equal opportunity and justice":

> Good citizenship means to the boy scout not merely the doing of things which he ought to do when he

> becomes a man, such as voting, keeping the law, and paying his taxes . . . . It means that he will stand for the equal opportunity and justice which the Declaration of Independence and the Constitution guarantees. [AL 433 (BS Hbk. 2d)].

The Boy Scouts have repeated that message countless times since. *See, e.g.*, J.A. 56, 110; AL 445-46, 447 (BS Hbk. 4th); AL 459 (BS Hbk. 5th); AL 462 (BS Hbk. 6th); AL 411 (SM Hbk. 7th).

The Scout Oath says that a Scout is supposed "to help other people at all times." The *Scout Handbook* explains these words as follows:

> There are many people who need you. Your young shoulders can help them carry their burdens. A cheerful smile and a helping hand will make life easier for many who need assistance. By helping whenever aid is needed and by doing a Good Turn daily, you prove yourself a Scout. You are doing your part to make this a better world. [J.A. 217.]

The importance of the term "mentally awake" in the Scout Oath is that "[w]ith an open attitude and the willingness to ask questions, you will get the most out of your life." J.A. 218.

The *Scout Handbook* defines the words "morally straight" in the Scout Oath as follows:

> To be a person of strong character, guide your life with honesty, purity and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant. [*Id.*]

See also AL 20-21 (Jones); AL 488 (BS Hbk. 8th); AL 484 (BS Hbk. 7th) ("your conscience speaks to you about your relationships to other people—respecting their rights, treating them justly, giving them a fair chance.").

The first point of the Scout Law, "A Scout is Trustworthy," makes honesty part of a Scout's "code of conduct," and requires him *to be true to himself*. J.A. 219; AL 13 (Jones).

The third point of the Scout Law, "A Scout is Helpful," includes being concerned about other people and doing a good turn. J.A. 220-21; AL 13-14 (Jones).

The Boy Scouts describe the fourth point, "A Scout is Friendly," as follows:

> A Scout is Friendly—A Scout is a friend to all. He is a brother to other Scouts and to all the people of the world. *He seeks to understand others. He respects those with ideas and customs that are different from his own.*
>
> * * * *
>
> The moment you become a Scout, you join a brotherhood of friends that circles the world. Those in it are of different countries and colors and creeds, but they are all brother Scouts. *They live up to Scout Oaths and Laws just as you do.*
>
> Making a friend is fairly easy if you are friendly yourself. Keeping a friend is more difficult. Every person is an individual with his or her own ideas and ways of doing things. *To be a real friend you must accept other people as they are, show interest in them, and respect their differences.*
>
> Accept who *you* are too. You don't have to be just like everyone else. Real friends will respect the beliefs, interests, and skills that make you unique.

J.A. 221 (emphasis to first three paragraphs added).

In describing the sixth, seventh and tenth points of the Scout Law—"A Scout is Kind," "A Scout is Obedient," and "A Scout is Brave"—the Boy Scouts tell Scouts to "[t]ake time to listen to the thoughts of other people," to "[i]magine what it would be like if you were in someone else's place," J.A. 222; to be "kind to people you don't

know or don't understand, and to people with whom you disagree," because "compassion for all people is a good antidote to the poisons of hatred and violence," *id.*; to obey[] the laws of [your] community." J.A. 223; to "also trust your own beliefs and obey your conscience when you know you are right," *id.*; and to "do what is right in spite of what others might say." J.A. 225.

The Boy Scouts explain the eleventh point, "A Scout is Clean" as follows:

> Swear words, profanity and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults. [J.A. 226.]

The final point of the Scout Law, "A Scout is Reverent," reiterates the basic philosophy of being true to one's own religion and respectful of others. Again, in the Boy Scouts' words:

> The United States Constitution gives each of us complete freedom to believe and worship as we wish without fear of punishment. All your life you will encounter people who hold different religious beliefs or even none at all. It is your duty to respect and defend the rights of others whose beliefs may differ from yours. [*Id.*]

Accepting people who are different is not idle advice. "Scouting's aim is to . . . eradicate the prevailing narrow self-interest, personal, political, sectarian, and national, and to substitute for it a broader spirit of self-sacrifice and service in the cause of humanity; and thus to develop mutual goodwill and cooperation. . . ." AL 416 (SM Hbk. 7th) *See also, e.g.*, J.A. 56 ("The BSA endeavors to develop American citizens who . . . have a keen respect for the basic rights of all people . . . .") Through programs entitled "Ethics in Action" and "Youth Frontier," the Boy Scouts "directly respond" to their mission statement by "teaching today's young people how to apply the[] abstract ideas [of the Scout Oath and Scout Law] in everyday situations." AL 538-39. These programs use intensive exercises to teach Scouts that it is wrong to discriminate, that people must be treated as individuals and that differences among them should be celebrated. AL 541-48; AL 172-82; AL 590-91. Similarly, in "Learning for Life," the Boy Scouts go into public schools to teach students "Scouting values," AL 585 (NCAC 1992-93 Annual Report); AL 569 (BSA, BSA at a Glance), such as "the importance of respecting the rights of *all people*. . . ." AL 575 (BSA, Learning For Life: Sixth Grade 1991)) (emphasis in original).

Thus, while the Boy Scouts write briefs suggesting that it is contrary to Scouting values to associate with one group or another, they write manuals teaching that it is contary to Scouting values to associate with intolerance. In their programs, the Boy Scouts urge that if students "are surrounded by people who are prejudiced against others or intolerant of persons with differences, students will tend to reflect those prejudices." AL 575A; *see also* AL 203 (Leet).

4. *The Boy Scouts Do Not Express A Message For Or Against Homosexuality, Even In Private Conversations.*

"Scouting believes that boys should learn of sex and family life from their parents, consistent with their spiritual beliefs." AL 560-61 (Scoutmastership Fundamentals). Scoutmasters "do not undertake to instruct Scouts, in any formalized matter in the subject of sex and family life. The reasons are that it is not construed to be Scouting's responsibility, and [they] may not be qualified to do this." AL 414 (SM Hbk. 7th). In counseling Scouts, a Scoutmaster "absolutely refrains from giving advice,

even if it is asked for," or letting the Scout "know 'where [the Scoutmaster] stands.'" *Id.* at 414 (emphasis added). The Boy Scouts have told Scoutmasters that "[w]hat you consider moral or immoral depends on your upbringing and background." *Id.* at 412. Accordingly instead of dictating a particular morality, Scoutmasters look to see if a Scout displays "Courage about what he believes," "Respect for other people's viewpoints when they differ from his," "Compassion for others' feelings and needs," "Acting as if the rights of others matter to him," and "Accepting others as equal in worth and dignity." *Id.* at 412-13. At all times, Scoutmasters are to "respect the right of parents to teach their sons about life," and to "refer boys with sexual problems to persons qualified to handle them." *Id.* at 414.[6]

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[6] *See also, e.g.*, J.A. 211; J.A. 249; AL 427, 430 (BS Hbk. 1st); AL 433-38 (BS Hbk. 2d). Thus, contrary to the BSA's implication, Br. at 3, when handbooks tell Scouts "[t]alk with your . . . Scoutmaster," or, actually "[t]alk with *your parents, religious leaders, teachers*, or Scoutmaster," J.A. 211 (emphasis added), about problems and tell Scoutmasters to "[b]e very open and clear when talking to them," J.A. 249, they do *not* direct Scoutmasters to give Scouts *guidance* on sexual matters. The paragraph in the *Boy Scout Handbook* that precedes the one the BSA cites instructs Scouts that such guidance comes from other sources: "[y]our religious leaders can give you moral guidance. Your parents or guardian or a sex education teacher should give you the facts about sex that you must know." J.A. 211. William Kirkner, who helped *author* the passage the BSA references, explained that it was never intended to address homosexuality. AL 164-71.

Similarly, the full passage from the *Scoutmaster Handbook* instructs Scoutmasters *not to* be the source of guidance on sexual issues: Rather they are to "[a]ccept all youth as they are . . . Your acceptance will reassure them that they are 'normal,'" and to "[b]e accepting of their concerns about sex." J.A. 248, 249. Nothing tells Scoutmasters that the words, "[a]ccept all youth as they are," are supposed to mean "expel any youth who is homosexual."

5. ***Because Of These Rules, The Boy Scouts Expect That Scouts And Their Parents Would Never Find Out That The Organization Had Any Policy Concerning Sexual Orientation.***

The BSA does not expect that Scouts or parents will ever learn that homosexuality violates a principle of Scouting. James Kay testified:

> Q: How would a prospective Boy Scout learn of the policy . . . concerning homosexuals, as set forth in the "POSITION STATEMENT"[?]
>
> * * * *
>
> A: If he became in violation—If he became in violation—If he were an avowed homosexual he would be informed of the policy. [AL 306.]

Indeed, Ron Carroll, the Scout Executive involved in *amici*'s exclusion from Scouting, added that even when the Scout is told that "you are excluded," the Scout is *still* not supposed to be told that the Boy Scouts believe homosexual conduct is immoral. AL 121-22.

6. ***It Is So Foreign To The Boy Scouts' Message To Say Anything About Homosexuality That Scouters With Decades Of Experience Had No Idea That The BSA Leadership Took Any Position Concerning The Morality Of Homosexuality, Or Its Appropriateness For Scouting, Until They Read About It In Newspapers.***

At *amici*'s hearing, the Boy Scouts could not locate *any* witness to testify that it is a goal of Scouting to condemn homosexuality, or that he was taught as part of his Scouting experience that homosexuality was wrong. In contrast, numerous witnesses attested that the issue of sexual orientation was never mentioned throughout their Scouting experience. *See, e.g.*, J.A. 153, 669. Indeed, several Scouters with 20, 30, 40 or even 50 years of membership were unaware of the policy until the 1990s, when they learned about it directly or indirectly through newspaper articles. *See, e.g.*, J.A. 623-29; J.A. 647-67.

None of them said that their experience informed them that Scouting conveyed some "subtle" pro-heterosexuality message.[7]

In short, if a Scout were to ask his parent or religious leader whether homosexual conduct is immoral, and the parent or religious leader said "no," there is nothing in the vast body of Scouting literature or practice that suggests that the Boy Scouts disagree with this answer, much less that the boy should disobey the dictates of his parents or religious leader. *See, e.g.*, AL 130-34 (Thomas); AL 506-07 (BS Hbk. 10th); AL 220-21 (Bond). And there is everything to contradict the notion that the Boy Scouts agree with Baptists, but not Episcopalians, or prefer the view of Orthodox over Reform Jews, or those of some Methodists over others. The Boy Scouts do not articulate any message on the morality of homosexuality. They urge Scouts to follow their *own* religious convictions.

[7] Thus, it is misleading for the BSA to declare that "[f]or most of Scouting's history, no one could have had any doubt about the organization's view on homosexuality." Pet'r Br. at 5. Some states had laws (many long unenforced and repealed) against sodomy. But that does not show that *Boy Scouts existed for the purpose of promoting those laws* any more than the facts that, for many years, states also barred interracial marriage and women from voting or holding public office show that the Boy Scouts (or every other organization in existence at the time) existed to promote those causes. In any event, the words "[f]or most of Scouting's history," leaves the rest of Scouting history. The DCHRA has barred discrimination on the basis of sexual orientation since 1978. If the organization truly were formed for the purpose of expressing some view on homosexuality, it would have made this clear somewhere in recruitment, fundraising, training or program materials in the 22 years since.

C. The BSA's Policy Of Excluding Homosexuals Is So Incoherent, It Is Impossible to Reconcile The Prongs Of The Boy Scouts' Litigation Position Much Less Identify It As A Principle That Brings Its Members Together.

The BSA's policy of excluding homosexuals has several salient features: (1) the policy is stated not in program materials, but in public relations materials and briefs; (2) no one is able to articulate a consistent policy that reflects its ostensible purposes; and (3) the formulation ("known or avowed homosexuals") the BSA now uses to support its argument is so internally contradictory that it could not possibly be an expressive message that brought its members together.

1. *The BSA's Exclusion Policy And Its Purported Justifications Are Recent And Found Only In Public Relations Materials And Briefs.*

The BSA first stated a policy of excluding homosexuals in two 1978 internal memoranda. J.A. 451, 453-56. However, it was not until 1991 that it issued a public statement mentioning the policy. Even internally, for years, the BSA did not link the exclusion to the Scout Oath or the Scout Law or even suggest that it would attempt to apply the policy in places where laws barred discrimination on the basis of sexual orientation. J.A. 455 (1978 memorandum stating that policy would be applied "in the absence of law to the contrary," because "[i]n the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it"). As late as 1989, the Boy Scouts' official policy with respect to paid employees was to "offer equal employment opportunity . . . on the basis of qualifications and ability without regard to race, color, national origin, sex, age, religion, handicap . . . *or any other criterion prohibited by applicable law.*" AL 619 (BSA Employment Policy (1989)) (emphasis added).

In the early 1990s, however, *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218 (Cal. 1998), went to trial, and the exclusion policy became a "significant focus of attention." AL 510 (ICC Guide); AL 370-72 (Teare). In response, the BSA developed a public relations strategy of arming its professionals with position statements, Q&As and media training materials so that they would know what to say *when asked* about the BSA's policy on homosexuals in Scouting. J.A. 453-61; AL 386-87 (Teare).

The goal of these position statements was public relations. They were not drafted by the BSA divisions that draft the manuals and guides for the Boy Scouts' programs. AL 367 (Teare). A public relations firm, Edelman Worldwide, drafted these statements with help from the BSA's public relations staff. AL 319, 321-22, 324, 327-28 (Lewis); AL 385, 388-89 (Teare); AL 208-09 (Leet). These statements were designed to deal with the problem that the BSA's position was not well understood in the media. AL 325-26 (Lewis). And they were coordinated through an Edelman employee, whom the BSA designated as its "national spokesperson." AL 368-69 (Teare); AL 316-18 (Lewis); AL 579 (Edelman Public Relations Worldwide Media Training Guide for BSA (1992)); AL 93 (BSA media training tape).

The public relations was defensive. The Boy Scouts did not want to discuss this policy unless the media pressed the issue. *See, e.g., id.* at 94-97; AL 512 (ICC Guide); AL 372 (Teare); AL 320 (Lewis). The BSA did not send these position statements to scoutmasters or other volunteers. The BSA sent them to its *professional Scout Executives*, AL 386 (Teare), and left the rank and file to learn of the policy (if at all) from articles that quoted the BSA's attempt to justify a policy volunteers could find in no manual. J.A. 662, 688; *see also, e.g.*, AL 22-45 (Jones), 148-50 (Wolfe).

2. No One Has Been Able To Articulate A Coherent Explanation Of The Policy The BSA Is Asking The Court To Find Constitutionally Essential To Its Operation.

Whatever merits these "position statements" may have for the BSA's public relations, they did not establish a coherent policy. When its witnesses were questioned, none could explain exactly what the BSA's policy is and why.

Do the Boy Scouts exclude every homosexual, or only "known and avowed" ones? In practice, the Boy Scouts exclude every homosexual no matter what they avow. This is how the BSA's "national spokesperson," Blake Lewis, understood the policy, AL 323 (Lewis), as did its top professional, Chief Scout Executive, Jere Ratcliffe. AL 587 (Ratcliffe Speech). And it is what the BSA said in the letters it used to expel Mr. Dale and *amici* from Scouting, *e.g.*, AL 580, and when it trained professional spokespersons. AL 515.

In fact (contrary to Pet'r Br. at 7), both the BSA's statements, *see, e.g.*, J.A. 455 (Q2), and several of its witnesses even confirm that the BSA will *investigate* the sexual orientation of adult and youth. *See, e.g.*, AL 349-55, 363 (Mack); *id.* 363 (policy of investigations applies to youth); AL 377-78 (Teare) (same). One professional noted that it "would have raised some questions in [his] eyes" to see that an applicant had volunteered at Washington, D.C.'s Whitman-Walker Clinic, because it "is a clinic that treats patients with AIDS. And I know that many of those patients are members of the gay community from what I have been given to understand." AL 222 (Bond). During *amici*'s hearing, the BSA's counsel sought to identify homosexual Scouters and conceded that the BSA would use that information to investigate them. AL 155-60.

But the BSA's supposedly authoritative position statements give conflicting answers about to whom the policy applies. Many say that the BSA excludes *homosexuals* without limitation. J.A. 457-59; *see also* J.A. 137. And

others refer to "avowed" homosexuals, J.A. 460-61; *see also, e.g.*, J.A. 138, 451, 552—not "*known or* avowed."

BSA's witnesses further confuse the situation. After being deposed, *every one* of the BSA's representatives filed *errata* materially changing his description of the policy to add "known or avowed" qualifications. AL 375-76, 380, 394, 396 (Teare); AL 345-46, 363 (Mack); AL 228-32, 252-57 (Carroll). And, at *amici*'s hearing, Scout Executive Carroll testified that although numerous statements (including his own letter) said that the BSA excluded all homosexuals, the BSA really meant "known or avowed" homosexuals. AL 108 (Carroll).

If "known or avowed" is the policy that has, for 90 years brought Boy Scout members together, what does it mean? For some BSA executives, it means nothing. They say that all the words "known or avowed" mean is that the BSA intends to exclude anyone who is a homosexual, but can only exclude the ones it knows about. *See, e.g.*, AL 333-37 (Mack); AL 218-19 (Bond); AL 249-50 (Carroll).[8]

For others, "known or avowed" means there is no problem with *being* homosexual, just with *saying* you are homosexual. For example, when asked if the BSA has "a problem with someone who is a closeted homosexal participating in Scouting," the BSA's witness said:

> So long as in front of the kids, the youth, the young members, that they are upholding the values and principles found in the Scout oath and law and they have come up to that level, we want them to come up to be a volunteer. But from the moment they say they are a homosexual, so now they are known or avowed, they can no longer present those values

[8] Of course, such a policy would be no defense. The Constitution does not afford special protection to defendants who declare that they are not really excluding Italians or Jews, but merely those they know or hear tell are Italians or Jews.

> to the children because of who they are, who they said they are.

AL 379-80 (Teare); *see also* AL 118-20 (Carroll); AL 275-76 (Hill) (it would not concern the BSA to think that an applicant was homosexual; only "if there was a confession of homosexuality"). Former BSA President Richard Leet testified that someone who engages in homosexual sex behind closed doors *can* "sincerely take the Scout Oath and Scout Law and be part of the Boy Scouts so far as the Boy Scouts is concerned," AL 206-07, as long as the person does not talk about it. Scout Executive Kay testified both ways. *Compare* AL 305 (he is not aware of "any circumstances under which it would be consistent with Boy Scouts' policy for a homosexual to be a member of Scouting") *with id.* at 310-11 (suggesting "known or avowed" means that someone who hides his homosexuality can be a member).

If, however, the BSA does not want homosexuals to be "known or avowed," it has an odd way of implementing it. Not only will the BSA *investigate* allegations of homosexuality, some of the same executives who testified that the BSA does not care about homosexuals so long as the person does not admit it also interpret the BSA's adult volunteer application to *ask* about sexual orientation. Question 6(e) on the application asks the applicant to identify and to "explain" whether there is anything that "call[s] into question [the applicant] being entrusted with the supervision, guidance and care of young people." These BSA professionals say that this question asks a homosexual person to *identify him/herself as a homosexual.* AL 373-75 (Teare); AL 111-17, 242 (Carroll); AL 337-44 (Mack); AL 216-17 (Bond).

Taken together, the BSA is asking the Court to conclude that its members, over a period of 90 years, came together for the shared purpose of implementing a policy as follows: *It is OK to be homosexual, just don't say that*

you are. But we do ask, even though we don't want to know. And you are supposed to tell us. But if you do tell us that makes you an advocate and we won't want to associate with you (although we will associate with heterosexuals who are admitted advocates). Small wonder the New Jersey Supreme Court had problems finding that the members in fact come together for such a purpose.

3. *The Version Of The Policy That The BSA Uses For Purposes Of Litigation Is Not Even Internally Consistent.*

Even the BSA's preferred version for purposes of litigation is incoherent. The BSA cannot simultaneously tell the Court that Scouting regards homosexual conduct as immoral, but that a homosexual who keeps his/her sex life private can "sincerely take the Scout Oath and Scout Law and be part of the Boy Scouts so far as the Boy Scouts is concerned." AL 206-07 (Leet). The reason a closeted homosexual can sincerely take the Scout Oath and Law is because the Scout Oath and Law do not make homosexuality immoral.

One of the principal messages the Boy Scouts give adult leaders is to "practice what you preach," because "[t]he most destructive influence on boys is adult inconsistency and hypocrisy." Pet'r Br. at 4 (quoting J.A. 257). The belief that homosexuality is only immoral if you are honest about it is not what "brought [the Boy Scouts' members] together." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984). Dishonesty is what, in any other context, Boy Scouts oppose. *Cf.* Point One of the Scout Law; AL 590 (Youth's Frontier: Making Ethical Decisions) ("[i]f you punish a child for being honest the child learns quickly not to do that again").

II. THIS CASE INVOLVES A NATIONAL POLICY IMPOSED BY "THE LARGEST YOUTH MOVEMENT THE WORLD HAS EVER SEEN," NOT THE DETERMINATIONS OF INDIVIDUAL TROOPS.

This case does not fairly frame the issue of whether a Boy Scout *troop* is required to admit anyone. No troop is a defendant; there is no order requiring any troop to accept Mr. Dale; no troop decided to exclude Mr. Dale or *amici*; and none is here claiming *its* rights were infringed. "Dale was informed *by higher Scouting authorities* that he was ineligible to serve as a Scout leader . . . ." Pet'r Br. at 9 (emphasis added). Not only would Mr. Geller's troop welcome him as an adult leader, the Board of the (Baden-Powell) council covering a multi-county region in which his troop was located *unanimously* passed a resolution *opposing* the BSA's national policy of excluding homosexuals. J.A. 644-46. Mr. Pool was trained as a unit commissioner, where he would not be with any troop, but report to an assistant district commissioner and district commissioner, *both of whom* testified on *his* behalf about why they wanted him.

More importantly, troops have no control over this decision. The BSA's exclusion of homosexuals from Scouting is a national policy, imposed on the nation. AL 101-02 (BSA training tape); AL 356-57 (Mack). "The BSA's position is unyielding." AL 515 (ICC Guide). "[E]xceptions to the national policies of the BSA [on this issue] are not granted," J.A. 460, even when troops actively oppose the policies. *See, e.g.*, J.A. 626-28, 638-46; AL 576-77 (troop resolution and publicity about it). As its former President Leet put it, "[y]*ou know, a Troop is not an organization that is part of a policymaking chain.*" AL 210 (emphasis added).

The BSA cannot bootstrap rights from the troops that it leaves out of its "policymaking chain." The Court should not declare a Constitutional principle on the *guess* that scores of troops, many sponsored by public organiza-

tions that are barred by the LAD from discriminating based upon sexual orientation or by religious groups that fervently oppose such discrimination, will *all* now decide to exclude Mr. Dale on that basis.[9]

Nor, of course, are the Boy Scouts as a whole an "intimate association." For purposes of its argument, the BSA portrays itself as if it were some sort of insular, distinctly private club, formed by a group of churches to promote religious programs that oppose homosexuality. In any other context (such as fundraising or seeking government support), however, the Boy Scouts would describe themselves as "the largest youth movement the world has ever seen." AL 463 (BS Hbk. 6th).[10]

The Boy Scouts believe that "Boy Scouting is for any boy who meets the age requirements and is willing to subscribe to the religious principles." AL 555 (Boy Scout Parent/Leader Orientation (1986)). It is a BSA priority to expand membership of both youths and adults. AL 193-94, 197-98 (Leet). When the BSA runs its major recruitment effort "Join Scouting Night" in public schools its goal is "Band every boy, tag every boy, stick

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[9] Moreover, even if all these troops would do so, the BSA plays with semantics when it states that it would be impossible for Mr. Dale to "remain a member without holding a leadership position," because there are "no roles for adult 'members' beyond serving as volunteer leaders for youth." Br. at 14 n.5. In Scouting, every adult is referred to as a Scouter or "Scout Leader," but there are many adults who maintain an affiliation with the Boy Scouts through renewing an annual membership (as Roland Pool would have), but do not have an affiliation with *any* Troop. J.A. at 373.

[10] *See also, e.g.*, AL 458 (BS Hbk. 5th) (uniform "shows that you belong to the biggest boys' organization in the world"). The BSA is the largest youth organization in America. AL 517 (ICC Guide). The Boy Scout Handbook is "the country's best seller, with the exception of the Bible," AL 444 (BS Hbk. 4th), with more than 33 million copies printed since 1911. AL 508 (BS Hbk. 10th). Since 1911, *Boy's Life* has placed "more than 16 billion magazines in circulation," AL 604 (Facts About Scouting); more than 2 million boys receive it. *See* AL 508 (BS Hbk. 10th).

every boy." AL 609 (1997 Join Scouting Night Council Guidebook). Similarly, the Boy Scouts inform adults that "[i]f you have an interest, we have a volunteer job for you." AL 549 (BSA NCAC, *Character Counts*). Because the Boy Scouts actively seek to encourage membership, they engage in no routine screening of youth applicants, AL 10 (Jones); AL 302-04 (Kay), and almost no routine screening of adult applicants. AL 9 (Jones); AL 206-301 (Kay); AL 261 (former Regional Scout Executive Rudy Flythe). Despite having over 93,000,000 members in its history, AL 603 (Facts About Scouting (1996)), there are only 7,000 people whom the BSA has ever rejected or expelled from Scouting *for any reason*. AL 617 ¶ 10, 611 ¶¶ 3, 5 (affidavits by BSA counsel).

The BSA's 1996 Annual Report proudly proclaims that "more than ever, Scouting is an integral part of the fabric of America." AL 605. Its charter requires it to report to Congress each year on the status of the organization. J.A. 318. In fact, the BSA personally delivers its annual "Report to the Nation" to the President as well. AL 105-06 (Carroll). Each President has "taken an active part in the work of the movement" and has "served as Honorary [BSA] President during his term in office." J.A. 46; AL 190-92 (Leet).

The Boy Scouts are required by their charter to operate through other agencies or organizations. J.A. 315. Some of these agencies or organizations are public, some are private; some are secular; some are religious. AL 622-23 (Organizations That Use Scouting (1989 prtg.)) BSA's 1990 Annual Report noted that some three times as many registered youth were in units sponsored by public schools than in units sponsored by any other organization. AL 571. Other sponsors include fire departments and law enforcement groups as well as the military and governmental agencies. *Id.*; AL 622-23 (Organizations That Use Scouting); AL 195-96 (Leet).

Due to their charter and mission, and by choice, the Boy Scouts operate as one of the most public of organizations imaginable. Since 1981, every Boy Scout national jamboree has taken place (on privileged terms) at a military base—Fort A.P. Hill. AL 54 (Press). Congress has authorized the military to provide free transportation to Boy Scout jamborees and to loan equipment for free for the Boy Scouts' use. 10 U.S.C. §§ 2544, 7541. The Navy also has regulations on how it can assist the Boy Scouts' program. OPNAV Instruction 5760.5b; *see also, e.g.*, 13 U.S.C. § 641; 10 U.S.C. §§ 4682, 9682 (statutes authorizing the military to sell obsolete or excess material to the BSA); N.J. Rev. Stat. § 23:2-3 (authorizing government agencies to stock bodies of water with fish for use by Boy Scouts). The Boy Scouts have long had ceremonial roles in events like the National Tree Lighting Ceremony, the National Easter Egg Hunt at the White House, and presidential inaugural activities. The Boy Scouts actively recruit on privileged terms in public schools. *See, e.g.*, AL 609.

The Boy Scouts do not decline this public exposure, access and largesse, on the basis that they are a "distinctly private organization." AL 199-202 (Leet). For those purposes, the Boy Scouts are "an integral part of the fabric of America." AL 605 (1996 Annual Report).

In any event, the BSA cannot invoke a Constitutional right of intimate association to sustain a *national* policy that *prevents* over six million members from deciding with whom they wish to associate. In *Roberts* and *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), organizations failed to make out an intimate association claim even though their members all registered with a local club *knowing* that the club was supposed to be all male. *See Rotary Club*, 481 U.S. at 546-47; *Roberts*, 468 U.S. at 619-22. But the BSA cannot contend that people join Scouting in order to associate with heterosexuals; it does not notify volunteer applicants that it excludes homosexuals. Rejecting the BSA's argument, would, in fact, protect the right of intimate association for troops, who would then decide with whom they want to associate.

III. THESE FACTS DO NOT PRESENT ANY REASON TO RECONSIDER THE *ROBERTS* TRILOGY.

If the Boy Scouts' members actually had come together to express a view concerning homosexuality, it would have been easy for the BSA to establish that point. The BSA could point to the many editions of the *Boy Scout Handbook*, the *Scoutmaster Handbook*, the training manuals or innumerable other documents to support it. To support the propositions that the Boy Scouts are "absolutely non-sectarian," that Scouts are expected to "[r]espect and defend the rights of all people," or that Scouts are expected to follow the guidance of their parents and religious leaders on matters of morality, the BSA could call literally millions of witnesses. For purposes of justifying conduct that has been held to violate the LAD, however, the BSA is unable to cite anything coherent, except a desire *in this instance only* to be permitted to violate its well-expressed principles by picking and choosing among the views of religious groups.

Even if for some reason the teachings of the *Roberts* trilogy were wrong, this case would not be the appropriate opportunity to redefine those teachings. Under any standard, there has to be at least *bona fides*. Courts are entitled to decide whether an organization's members have joined together for the purpose of making a statement concerning homosexuality, *Roberts*, 468 U.S. at 626-27; whether the law "imposes any serious burdens," *id.* at 627, on such an expressive association; or whether the organization's desire to discriminate overcomes the State's compelling interest in eradicating discrimination. *Id.* at 623. Otherwise, organizations would be above the law; any organization could discriminate so long as its leader-

ship declared in litigation that it really did want to discriminate, irrespective of whether that desire had anything to do with the expressive purposes of its members.

The BSA's case fails not because the Court imposes any difficult burden, but because its defense contorts a national organization designed to be part of the fabric of America into one that rends that fabric. Every citizen of New Jersey or of the District of Columbia has school teachers that are chosen without regard to sexual orientation, as well as day care workers and the staff at the toy store. Many go to churches and temples where they are told that it is wrong to discriminate against people based upon their sexual orientation, perhaps by religious leaders who are themselves homosexual. Schools that cannot discriminate do not sponsor Boy Scout troops so as to promote discrimination. And the faithful of churches or temples that decry such discrimination do not join troops for the purpose of violating their beliefs.

"Great cases" are prone to "make bad law." *Northern Sec. Co. v. United States*, 193 U.S. 197, 400-401 (1904) (Holmes, J., dissenting). Here, the BSA seeks to make the case "great" in order to make bad law. The Supreme Court of New Jersey unanimously and properly recognized that if laws against discrimination mean anything, they mean that parties cannot declare themselves exempt by say-so.

CONCLUSION

For these reasons, the decision of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

DAVID M. GISCHE *
MERRIL HIRSH
BRIAN L. OWSLEY
ROSS, DIXON & BELL, L.L.P.
601 Pennsylvania Avenue, N.W
North Building
Washington, D.C. 20004-2688
(202) 662-2000
Attorneys for *Amici Curiae*
Roland Pool and
Michael Geller

* Counsel of Record

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and
MONMOUTH COUNCIL BOY SCOUTS OF AMERICA,

Petitioners,

—v.—

JAMES DALE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT

MARC D. STERN
Counsel of Record
AMERICAN JEWISH CONGRESS
15 East 84th Street
New York, New York 10028
(212) 360-1545

Attorney for Amici

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TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . -i-

TABLE OF AUTHORITIES . . . . . -iii-

INTEREST OF AMICUS . . . . . -v-

SUMMARY OF ARGUMENT . . . . . -1-

ARGUMENT . . . . . -3-

I. The Public Accommodation Laws Must Be Balanced Against the Right Not To Associate . . . . . -3-

A. The Right to Associate Includes the Right Not to Associate . . . . . -3-

B. The Right Not To Associate Extends Beyond Religious Groups . . . . . -5-

II. Balancing the Interests . . . . . -11-

A. Intimate Association . . . . . -11-

B. Expressive Associational Freedoms . . . . -11-

III. The Absence of a Clear Policy on Sexual Orientation Dooms the Claim that Scouts

Associated for Purposes of Expressing a View on Sexual Orientation ..... -15-

CONCLUSION .....-21-

TABLE OF AUTHORITIES

Cases

Bob Jones University v. United States, 461 U.S. 574 (1983) .....-5-

Chicago v. Morales, 527 U.S. 47 (1999) ..... -16-

City of Dallas v. Stanglin, 490 U.S. 19 (1989) ..... -17-

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) ..... -17-

Cohn-Frankel v. United Synagogue of Conservative Judaism, 246 A.D. 2d 332, 667 N.Y.S. 2d 360 (App. Div.1998) ... -3-

Employment Division v. Smith, 494 U.S. 872 (1990) .....-5-

Evans v. Newton, 382 U.S. 296 (1966) ..... -8-

Gilmore v. City of Montgomery, 417 U.S. 556 (1974) ... -8-

Hurley v. Irish American Gay Group, 515 U.S. 557 (1995) .....-5-

James v City of Long Beach, 18 F. Supp. 2d 1078 (C.D. Cal. 1998) .....-18-

Morse v. Republican Party of Virginia, 517 U.S. 186 (1996) .....-8-

New York State Club Association v. City of New York, 487 U.S. 1 (1988) ..... -7-

Norwood v. Harrison, 413 U.S. 455 (1973) ..... -5-

Roberts v. United States Jaycees, 468 U.S. 609 (1995) ... -3-

Romer v. Evans, 517 U.S. 620 (1996) ..... -6-

Rotary International v. Board of Directors, 481 U.S. 537 (1987) ..... -8-

Runyon v. McCrary, 427 U.S. 160 (1976) ..... -5-

Rust v. Sullivan, 500 U.S. 173 (1991) ..... -20-

Spence v. Washington, 418 U.S. 405 (1974) ..... -17-

Warth v. Selden, 422 U.S. 490 (1975) ..... -13-

Wazeerud-Din v. The Goodwill Home and Missions, Inc., 325 N.J. Super. 3, 737 A.2d 683 (1999) ..... -4-

Welsh v. Boy Scouts of America, 793 F.2d. 1267 (7th Circuit 1996) ..... -19-

White v. Napolean, 897 F.2d 103 (3rd Cir. 1990) ..... -18-

INTEREST OF THE *AMICUS*

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of American Jewish Congress. It has over the years urged an expansive view of both the right of expressive association and the right to be free of invidious discrimination in places of public accommodation. In this brief, we attempt to maximize the scope of each of these rights as they collide.

The brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

1. The freedom of association includes a right (in certain circumstances) to exclude persons from an association, even where the exclusion is based on status, not an absence of shared ideological commitment. The determination of who is a member of the group defines a group, its purpose, ethics, strategies and goals. Membership boundaries, like definitions of citizenship, define the polity, and communicate to others the group's ideology.

2. This right of exclusion should be available not only to religious groups but political, ideological or other groups. Frequently, however, there will be no need to countenance rules that discriminate on the basis of a person's status, as ideological commitment to an agency's purpose will be an adequate substitute. However, there will be cases (and this is one) where a status-based exclusion is freighted with ideological meaning.

3. An unfettered right not to associate would have devastating consequences for the public accommodation laws. Those laws have often been invoked to override claims of expressive association, even when made by not-for-profit groups.

4. Not-for-profit groups have accumulated important social capital, which to ensure equality, must be generally available to all groups in the society.

5. In assessing a claim of associational freedom, it is not relevant that a reviewing court believes the exclusion archaic or stereotypical. Nor is it determinative that a group's membership does not unanimously support an exclusionary policy. The Court below erred in invoking these grounds, which reflect an official orthodoxy inconsistent with fundamental First Amendment values.

6. A court may not – as the Court below seems to have done – reject a freedom of association claim because it judges the exclusionary rule not central to an organization's purpose, just as a court cannot evaluate whether a religious claim is central to a person's belief system.

7. The decision below nevertheless should be affirmed because the *sina qua non* of an expressive association claim is the intent to come together to communicate an idea. As this Court has repeatedly held, for conduct to be protected by the First Amendment, there must be both an intent to communicate and an action which is reasonably understood as communicating an idea.

8. Because the Boy Scouts have never expressly communicated any view about sexual orientation, it cannot be said that Scouts joined together to express any idea about sexual orientation and scouting. By contrast, they have clearly expressed views about male only scouting and belief in God.

ARGUMENT

I. The Public Accommodation Laws Must Be Balanced Against the Right Not To Associate[1]

A. THE RIGHT TO ASSOCIATE INCLUDES THE RIGHT NOT TO ASSOCIATE

We recognize, at the outset, that the right to associate embodies a right, in certain circumstances, not to associate. *Roberts v. United States Jaycees* 468 U.S. 609, 623 (1995). The right not to associate reflects a strong national commitment to diversity.

The American Jewish Congress and other Jewish organizations, even ones that are not pervasively sectarian, are, and should be, free to decide who is part of their community. They are free to decide that non-Jews should not be admitted to their counsels. They are, and should be, equally be free to decide to open their membership to all.

Jewish institutions are, and should be, free to decide that so-called messianic Jews are not Jews, and that, notwithstanding public accommodation laws banning religious discrimination, such persons are unwelcome. *cf. Cohn-Frankel v. United Synagogue of Conservative Judaism*, 246 A.D. 2d 322, 667 N.Y.S. 2d 360 (App. Div.1998) (messianic Jew expelled from synagogue sponsored tour).

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

Exclusions by private bodies on the basis of religion are undoubtedly discriminatory. Of equal certainty, these exclusions enjoy constitutional protection, as subsequent to the decision on review here, the New Jersey courts have acknowledged. *Wazeerud-Din v. The Goodwill Home and Missions, Inc.,* 325 N.J. Super. 3, 737 A.2d 683 (1999) (drug rehabilitation program operated by a religious group may exclude addicts not sharing its religious beliefs.)

Accordingly, this Court should not shrink from declaring some forms of discrimination by private not-for-profit agencies constitutionally protected. The determination of who shall be a member of the group is an aspect of the associational right protected by the Constitution. That is, eligibility rules for membership in the group define the group, its purposes, ethics, strategies and goals. Such rules do not simply mark off in a technical sense who can be a member. They are akin to the question of who can be a citizen of a country. Whether citizenship is defined by birth, see XIV Amendment, §1, loyalty, or some other criteria, is not a technical question, but goes to the very nature of the polity.

Rules on membership, whether exclusionary or inclusionary, reflect, and communicate an attitude toward others, either welcoming or rejecting, and a stance toward the world, either open or closed. Such membership rules are, for a wide range of groups, ideological decisions, and are, therefore, properly protected by the First Amendment's freedom of association.

To allow government to insist on its own, monochromatic, non-exclusionary vision is to allow

government to control, dictate and limit the terms of all private association, and to end all discussion about any groups defined by the 'status' of its members. *Hurley v. Irish-American Gay Group*, 515 U.S. 557, 579 (1995). That is an Orwellian vision, incompatible with freedom and the existence of real ideological competition with official (and unofficial) orthodoxies.

B. The Right Not To Associate Extends Beyond Religious Groups

This principle that the right to associate includes the right to exclude ought not to be limited to religious groups,[2] notwithstanding the special protection and solicitude religious practice and political associations enjoy under the Constitution. *Norwood v. Harrison,* 413 U.S. 455 (1973). *But see, Employment Division v. Smith,* 494 U.S. 872 (1990).

Amicus believes that the same principle applies to political associations. Neither the NAACP nor the Klan (much as we hesitate to mention the two in the same grammatical clause) could constitutionally be compelled to accept members of a different race, as the Klan has chosen not to do, but the NAACP has.

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[2] We do not mean to suggest religious groups have unlimited and unconstrained authority to exclude. This Court has held they do not, at least with regard to racial discrimination and educational institutions. *Bob Jones University v. United States,* 461 U.S. 574 (1983); *Runyon v. McCrary,* 427 U.S. 160 (1976).

To be sure, as this Court recognized in *Roberts, supra*, 468 U.S. at 628, exclusions cast in terms of identity or status are, at bottom, stereotypes. Still, should the NAACP have made, or choose in the future to make a racially exclusionary decision, even though the decision reflected stereotypical assumptions about racial attitudes, the organization should be permitted to make that decision. This would be so although it could substitute less stereotypical measures of adherence to common ideological purpose.

The same is true of moral decisions. Groups often define themselves around a moral principle - abolition, temperance, equal rights and the like. Although such groups are usually content with constitutionally protected ideological membership criteria, *Hurley, supra*, some groups organized around moral principles will enforce status-based membership criteria.

Status-based criteria rest on immutable characteristics fixed at birth (religion being regarded as immutable, though not so fixed). Under this test, the ban on homosexual scoutmasters may well be status-based. Further evidence of the status-based nature of the ban is the fact that scouts may advocate non-discrimination on the basis of sexual orientation. Sexual orientation is likely status-based for constitutional purposes, when government draws lines based on sexual orientation. *cf. Romer v. Evans*, 517 U.S. 620 (1996). [3] However, given the continuing debate whether sexual orientation is (to over simplify) an immutable characteristic or a volitional one

[3] Amicus takes no position on same sex marriage.

freighted with moral consequences, we believe those actors with associational freedom claims should not be barred at the threshold from making "status" based decisions about sexual orientation.

Moral rules by their very nature draw lines. Moral judgements are inevitably exclusionary and judgmental. Much as many regard moral judgments about others, particularly about the private sexual activity of others, as intrusive and dangerous, the ability to join together to express, teach and *live* out one's moral views is an inescapable privilege, and risk, of freedom. *Hurley, supra*.

If not securely cabined, however, the exclusionary principle — the right of freedom of expressive association guaranteed by the First Amendment — would expand to the point where it would call into question the application of public accommodation laws to the broad spectrum of non-commercial activities.[4]

This Court has frequently *rejected* freedom of expressive association claims as a defense to the charge that an exclusionary rule violated a non-discrimination law, *New York*

[4] Petitioners wisely do not contend that commercial entities can claim the protection of the First Amendment to justify discrimination. By and large, claims by private employers that their religion required them to discriminate fail. *See Brief Amicus Curiae of the Beckett Fund.*

Although it is too broad a statement to assert that commercial employers can never invoke the First Amendment to defend a civil rights claim - corporations should be able to announce opposition to civil rights laws without being guilty of creating a hostile work environment - it certainly will be the unusual case where such a claim would justify a refusal to hire, the closest analogy to the Boy Scout's refusal to "hire" Dale as a scout leader.

State Clubs v. City of New York, 487 U.S. 1 (1988); *Roberts v. United States Jaycees*, *supra*; *Rotary International v. Board of Directors*, 481 U.S. 537 (1987). It has refused to recognize such claims in other contexts as well. *Runyon v. McCray*, 427 U.S. 160 (1976) (religious school: racial discrimination). Even in the case of political parties, this Court has been unwilling to tolerate practices with a disparate impact on minority groups. *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (filing fee for party convention delegates subject to the Voting Rights Act, not withstanding freedom of expressive association claim).

Petitioners would draw a bright line around non-for-profit activity and suggest that all not-for-profits are entitled to exclude whom they will.[5] Though there is a surface appeal to this claim, it does not survive closer scrutiny.

Equal access to most not-for-profits conveys no message contradictory to the organization's beliefs about sexual orientation, gender, faith, race or national origin, such that application of the non-discrimination rule of public accommodation law would impinge upon the organization's freedom of expressive association. A chamber of commerce ordinarily has no expressive association defense, *Roberts v. United States Jaycees, supra, Rotary International v. Board of*

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[5] Petitioners do not contest the power of government to insist on non-discrimination as a condition of government funding, even from ideologically motivated not-for-profit organizations. *Amicus* believes that not only may government insist on such a condition, but that in many cases it is obligated to do so. See Title VI of the 1964 Civil Rights Act, 42 U.S.C 2000d, *et seq.* See *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974); *Evans v. Newton*, 382 U.S. 296 (1966).

Directors, *supra*. Neither would a not-for-profit humane society have its expressive association rights violated by requiring it to accept members regardless of race, creed, gender, national origin, or sexual orientation. Nothing in the day-to-day functioning of art, science and history museums, theaters, and sports leagues would justify a refusal to accept blacks, Catholics or gays on equal terms with whites, Protestants, or heterosexuals.

Because the mediating institutions of the private sector play such an important and defining role in the life of the community, full and equal access to these institutions is crucial to every person's ability fully to exploit the opportunities available to all and to full and equal citizenship. Petitioner's proposed rule leaves too much room for needless discrimination.

Blanket tolerance of private discrimination in the not-for-profit sector would come at a very high price, and involve costs not randomly distributed across society. Those who have over the years built powerful and socially important organizations, such as the Boy Scouts, whose members enjoy valuable contacts and opportunities for 'networking', are likely to be defenders of the status quo, whether it be ideological, political, racial, ethical, social, religious or, as here, moral and sexual.

Those, like Dale, excluded from those organizations are most likely to be members of marginalized groups which are excluded from the main stream of society. The very persons and groups public accommodation laws are designed to protect and integrate into the social mainstream would be denied access

to these crucial social institutions and the opportunities they present. The sense of fraternity, commonality and community which accrues from membership in nominally private organizations like the Boy Scouts, is an integral part of society's social capital. That capital is placed off limits to distinct and disadvantaged groups only at a high cost to the whole community.

But even if the burden was equally distributed, society is harmed by the creation of exclusive, walled-off communities, established along immutable group lines. These parochial communities are destructive of the sense of community essential to society's health. Public accommodation laws are premised on the notion that real equality means more than merely equality in treatment by government. It requires equal access to important social institutions.

These ideas are not unique to the public accommodation laws. They run like a thread through the applications of civil rights law to private activity. Thus, in the debates leading to the enactment of Title VII of the 1964 Civil Rights Act guaranteeing equal employment opportunity in the private sector, sponsors spoke of the futility of insuring equal protection of the laws if blacks had not the economic wherewithal to exercise effectively the rights of citizenship.

II. Balancing the Interests

This Court then, is confronted with a social paradox. It is a measure of society's health that people can voluntarily join together to form groups to advance ideas, even unpopular and disputed ones. These same groups, if powerful, exclusionary, insular and parochial, may undermine the health of that society.

The New Jersey Supreme Court offered several explanations of why in this case, the right to equal treatment ought to trump the right to expressive association. Although several of those reasons do not withstand scrutiny, its conclusion is nevertheless sound.

A. Intimate Association

Amicus agrees with the Court below that the Boy Scouts cannot assert right of intimate association. Its membership is too large, too publicly recruited, without any genuine limiting criteria, to be comparable to the small, intimate units in which such a right has been recognized. *See Roberts, supra.*

B. Expressive Associational Freedoms

In our view, this case turns on the right of associational freedom recognized in cases such as *Hurley*, *Roberts*, *and Runyon*. In deciding that the Boy Scouts had not made out such a claim, the Court below committed several errors.

First, it rejected the Scouts' own interpretation of its oath. The Scouts contended below, and they contend here, that

the reference in the well-known Boy Scout Oath to Scouts to being "morally clean" rejects homosexuality as acceptable sexual practice. The Court below disagreed, noting that this was an "archaic and stereotypical view," and therefore could not be what "morally clean" meant.

That Court reasoned as well that not all groups sponsoring scout troops shared the view about homosexuality asserted by the Scouts and hence that Petitioners were not properly interpreting their own oath. *Amicus* believes that the interpretation of an organizations's moral views is for the organization, not the courts.

Those who disagree with the Boy Scouts' morality are free to challenge it or establish competing organizations. Churches which believe that homosexuals are entitled to equal treatment with heterosexuals are free to challenge the Scouts, refuse to sponsor scout troops or form their own organizations. But it does not follow that their opposition sheds light on the Scouts' beliefs.

It certainly does not follow that states are free to reinterpret private moral codes to meet contemporary standards of political correctness or orthodoxy. Labeling the Scouts' views "stereotypical or archaic", as the New Jersey Supreme Court did, does not advance the argument. The state may not insist that private organizations act only in keeping with the latest 'progressive' morality, or that only non-stereotypical views prevail. *Hurley, supra,* 515 U.S. at 579.

The New Jersey Supreme Court's reference to the archaic nature of the Boy Scouts views belies that Court's insistence that the suppression of the Boy Scouts' rule against

gay scoutmasters is unrelated to the suppression of ideas, or that the statute was being applied without regard to an organization's viewpoint. On the contrary. It appears that suppressing "archaic views" is precisely what that court thought it was about.

It also cannot be that the right of expressive association depends on the affirmative assent of all of an association's members. Only in the most narrowly focused single issue groups is the membership agreed on policy. Real world organizations do not work this way. The right to expressive association ought not to be constricted in ways that make it illusory. The Court has recognized with regard to its claim of associational standing that it is enough if *some* members of the association are adversely affected, a recognition that unanimity is not a fact of organizational life. *Warth v. Selden*, 422 U.S. 490, 509 (1975).

People join organizations notwithstanding disagreement on particular issues. They may regard a disputed issue as relatively unimportant, or outweighed by other policies by the group. People may join the ACLU because of its crucial contributions to freedom of speech and religion, even as they disagree about its positions on abortion, affirmative action or aliens.

The American Jewish Congress limits membership to Jews or members of their households. It has members who believe that it should open its membership roles to all who share its ideological message, regardless of faith. The constitutional protection the American Jewish Congress enjoys

to limit its membership on religious lines does not and should not turn on the absence of internal dissent and disagreement.

This Court said as much in *Hurley*. There, groups seeking to intrude forcibly on a parade asserted that the parade could not assert a right of associational freedom because people of many views marched in the parade. The Court rejected that submission, for "a private speaker does not forfeit constitutional protection, simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message..." 515 U.S. at 569-70.

The opinion of the Court below could also be read to allow a claim of expressive association only where discriminatory criteria are central to the purposes of the association. Thus, the Court below described the Scouts as being concerned with outdoor activities, group activities and the like, not with making a statement on disputed moral questions. This, too, is not a secure basis for denying the right of expressive association.

Whether the Boy Scouts is a group dedicated to introducing boys to the outdoors that also has a peripheral interest in moral issues, or a group designed to demonstrate that one can live a certain vision of the moral life and still enjoy the out-of-doors and group activities, is a question not given to an objective answer.

An appropriate analogy is this Court's repeated insistence that in judging free exercise of religion claims the courts are precluded from judging the 'centrality' of a practice to the faith. This Court noted that it could no more make that determination in the religious context than in the political one:

> It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than *it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field.*

Employment Division v. Smith, 494 U.S. 872, 886-87 (1990) (emphasis added).

III. The Absence of a Clear Policy on Sexual Orientation Dooms the Claim that Scouts Associated for Purposes of Expressing a View on Sexual Orientation

While recognizing the importance of maintaining the right of expressive association, *Amicus* remains convinced that the decision below should be affirmed. The right of expressive association is "the right to combine with others to expound one's views," *New York State Club Association v. City of New York, supra,* 487 U.S. at 13. The right presumes a deliberate melding of individuals into a collective for the purpose of more effectively advancing ideas held in common.

While we believe, as noted above, that the state may not insist that a discriminatory idea be endorsed unanimously by members of a group, we believe that it is unintelligible to insist on a right of collective expression – especially in derogation of a non-discrimination l[illegible] where there is no objective, factual basis for believing that individuals bonded together to advance a specific idea. If no idea is communicated, then the application of the public accommodation law cannot and does not interfere with protected First Amendment activity.

Here, as the New Jersey Supreme Court found, there was no explicit, stated policy about sexual orientation, such that Boy Scouts, their parents and volunteers, could be said to have at least agreed to tolerate, much less advance, by participating in scouting activities. It asks too much, we know all too well, to insist on proof that members are actually aware of even explicit organizational statements. It is sufficient if a statement has been plainly made, and is available for those seeking it. Government may not second guess whether the organization has correctly applied its own principles. But an idea which has not been expressed cannot be the basis of a expressive association claim.

This Court insists that for a claim that conduct constitutes expression to succeed, it must have both an intended communicative purpose and perceived message. Thus, in *Chicago v. Morales*, 527 U.S. 47, _____ (1999), the Court rejected a claim that an anti-loitering ordinance impinged on associational freedoms, because it did "not prohibit any form of conduct that is apparently intended to convey a message."

Morales cited *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). *Clark*, considered a claim that sleeping was protected speech. For purposes of decision, this Court assumed sleeping was speech, because "a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative," 468 U.S. at 294. The sleep-in in *Clark* was intended to communicate an idea about the government's failure to house all citizens and, in the context of a protest in front of the White House, was reasonably likely to be understood as such.

City of Dallas v. Stanglin, 490 U.S. 19 (1989), upheld an ordinance limiting admission to certain dance halls to adolescents aged 14-18. Plaintiffs unsuccessfully asserted the ordinance denied them a right of expressive association:

> The hundreds of teenagers who congregate each night at this...dance hall are not members of any organized association; they are patrons of the same business establishment. Most are strangers to one another, and the dance hall admits all who are willing to pay the admission fee. There is no suggestion that these patrons "take positions on public questions" or perform any of the other similar activities described in *Spence v. Washington*, 418 U.S. 405, 409 (1974).
>
> 490 U.S. at 24-25

In *Spence,* the Court held that a flag flown upside down with a peace symbol affixed was communicative because "an intent to convey a particularized message was present, and in the surrounding circumstances, the likelihood was great that the message would be understood by those who viewed it." 418 U.S. at 410-11; *Accord, White v. Napolean,* 897 F.2d 103, 114 (3rd Cir. 1990) (refusal of prisoner to be treated not protected speech); *James v. City of Long Beach,* 18 F. Supp. 2d 1078 (C.D. Cal. 1998) (attendance at sporting event not expressive association).

The Court below found that the Boy Scouts had never publicly announced a position on sexual orientation. There were several internal memos expressing such views, but they were never widely circulated. The Boy Scout oath is not explicit on this score, and neither are various Scout handbooks. It cannot be said that in joining the Scouts, Scouts and Scout leaders knew that they "intended to communicate" anything at all about sexual orientation.

It certainly cannot be said that any of the Scout's policies would "reasonably be understood by the viewer to be communicative" of any idea about homosexuality. As noted, the Scouts are entitled to interpret their own rules as they wish, and the state may not "correct" that interpretation. But in the face of the compelling interest in social equality a state may demand a plain statement of a discriminatory rule as a prerequisite for making an expressive association claim.

With such a statement, it may fairly be said that persons who join the Scouts do so knowing that their membership will help communicate an exclusionary message. Citizens may

express such views in exclusionary group associations (subject to any countervailing, narrowly tailored compelling interest the state may credibly assert in non-discrimination), but they should have to do so expressly. Without a clear statement, there is no reason to conclude that Scouts associate to express a view on sexual orientation.

This "plain statement" rule easily explains why the Boy Scouts may limit membership to boys and insist on a belief in God. The Scouts unambiguously communicate the view that boys ought to band together in single sex entities in order to further certain purposes. That view to some is archaic and stereotyped. It is a plainly communicated ideological position, and a classic example of protected expressive association.

The same is true of the Scouts' insistence that Scouts affirm a belief in God. *cf. Welsh v. Boy Scouts of America*, 793 F.2d. 1267 (7th Cir. 1996) Boy Scouts know – because they are explicitly reminded by the oath and other ceremonies – that in joining the Scouts they are acceding to the view that a belief in God is essential to this organization's purpose. An individual who joins may believe in his heart of hearts that it would be best not to so limit eligibility for scouting. But by joining a group which has openly expressed its beliefs, a member must be taken as assenting to the group's message.

No one can make such a claim about the Scouts sexual orientation policies, and no one could contend with anything approaching certainty that Scouts in New Jersey gathered together to say something about sexual orientation. Perhaps, if asked, they would agree to a position about gay scoutmasters. Perhaps not. The absence of a clear statement of the reasons for

coming together in an association is fatal to a claim of expressive association.

A clear statement rule would also facilitate the state's discharge of its responsibility not to subsidize discrimination. *City of Montgomery v. Gilmore, supra*; *Evan v. Newton, supra*. Without attempting to catalog what the government may or may not do in the way of withholding subsidies, *see, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991), a state should not be required to yield to a discriminatory policy in the name of freedom of expressive association and inadvertently subsidize that same discrimination because the views said to be expressed have been kept secret.

CONCLUSION

For the reasons stated, the judgment should be affirmed.

Respectfully submitted,

Norman Redlich
Marc D. Stern
COUNSEL OF RECORD
American Jewish Congress
15 East 84th Street
New York, NY 10028

March 23, 2000

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

BOY SCOUTS OF AMERICA, *et al.*,

Petitioners,

—v.—

JAMES DALE,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF NEW JERSEY

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION; THE AMERICAN FEDERATION OF TEACHERS; THE ANTI-DEFAMATION LEAGUE; THE CALIFORNIA WOMEN'S LAW CENTER; THE CENTER FOR WOMEN POLICY STUDIES; EQUAL RIGHTS ADVOCATES; THE HUMAN RIGHTS CAMPAIGN; THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; THE NATIONAL ASIAN PACIFIC LEGAL CONSORTIUM; THE NATIONAL COUNCIL OF JEWISH WOMEN; THE NATIONAL GAY AND LESBIAN TASK FORCE; THE NOW LEGAL DEFENSE AND EDUCATION FUND; THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; THE NATIONAL WOMEN'S LAW CENTER; THE NORTHWEST WOMEN'S LAW CENTER; PEOPLE FOR THE AMERICAN WAY FOUNDATION; WOMEN EMPLOYED; AND THE WOMEN'S LAW PROJECT; IN SUPPORT OF RESPONDENT

Matthew A. Coles
(*Counsel of Record*)
Steven R. Shapiro
Sara L. Mandelbaum
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Lenora M. Lapidus
ACLU of New Jersey Foundation
35 Halsey Street, Suite 4B
Newark, New Jersey 07102
(973) 642-2084

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. A CLAIMED RIGHT TO FREEDOM OF ASSOCIATION DOES NOT ENTITLE THE BOY SCOUTS TO DISCRIMINATE AGAINST A PROTECTED CLASS IN A PLACE OF PUBLIC ACCOMMODATION 5

A. The Boy Scouts Are Not An Intimate Association 6

B. Any Rights of Expressive Association That May Exist In This Case Are Not Unduly Infringed By The Challenged Nondiscrimination Order 9

Page

II. ANY INCIDENTAL BURDEN ON THE BOY SCOUTS' EXPRESSION IS OUTWEIGHED IN THIS CASE BY NEW JERSEY'S OVERRIDING INTEREST IN ENSURING EQUAL OPPORTUNITY ON THE BASIS OF SEXUAL ORIENTATION 16

A. New Jersey Has A Critically Important Interest In Ensuring Equality On The Basis Of Sexual Orientation 16

B. New Jersey's Interest In Equality Is Unrelated To The Suppression Of Free Expression, And Its Law Against Discrimination Limits Expression No More Than Necessary To Achieve Its Stated Goal 20

CONCLUSION 22

APPENDIX 1a

TABLE OF AUTHORITIES

Page

Cases

420 E.80th v. Chin,
115 Misc. 2d 195 (1982), *aff'd*, 97 A.D.
2d 390 (N.Y.A.D. 1st Dep't 1983) 19

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 12

Board of Directors of Rotary International v. Rotary Club of Duarte,
481 U.S. 537 (1987) 5, 7, 16

Bob Jones University v. United States,
461 U.S. 574 (1983) 5

Bradwell v. Illinois,
83 U.S. 130 (1872) 9

Branti v. Finkel,
445 U.S. 507 (1980) 12

Burton v. Cascade School District Union High School,
512 F.2d 850 (9th Cir.), *cert. denied*, 423
U.S. 839 (1975) 19

Childers v. Dallas Police Dep't,
513 F. Supp. 134 (N.D. Tex. 1981), *aff'd*,
669 F.2d 732 (5th Cir. 1982) 19

City of Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985) 18, 19

Coon v. Joseph,
192 Cal. App. 3d 1269 (1987) 20

Frontiero v. Richardson,
411 U.S. 677 (1973) 17

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419 U.S. 477 (1975) 11

Daniel v. Paul,
395 U.S. 298 (1969) 11, 18

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608 F.2d 327 (9th Cir. 1979) 19

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427 U.S. 347 (1976) 12

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20 F.Supp.2d 1160 (S.D.Ohio 1998) 19

Grant v. Brown,
39 Ohio St. 2d 112 (1974), *cert. denied sub nom. Duggan v. Brown*, 420 U.S. 916 (1975) 20

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133 Cal. App. 3d Supp. 1 (1982) 19

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515 U.S. 557 (1995) 4, 10

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392 U.S. 409 (1968) 17

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496 U.S. 1 (1990) 12

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405 U.S. 1046 (1972) 19, 20

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262 U.S. 390 (1923) 6

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418 U.S. 241 (1974) 10

Moore v. City of East Cleveland,
431 U.S. 494 (1977) 7

Morell v. Department of Alcoholic Beverage Control,
204 Cal. App. 2d 504 (1962) 19

Naboszny v. Podlesney,
92 F.3d 446 (7th Cir. 1996) 20

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487 U.S. 1 (1988) 6, 12, 16

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417 F.2d 1161 (D.C. Cir. 1969) 19

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413 U.S. 455 (1973) 6, 8

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235 A.2d 12 (N.J. 1967) 19

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31 N.Y.2d 965 (1973) 20

Pickering v. Board of Education,
391 U.S. 563 (1968) 15

Police Department v. Mosley,
408 U.S. 92 (1972) 9

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447 U.S. 74 (1980) 10, 15

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468 U.S. 609 (1984) ..... *passim*

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517 U.S. 620 (1996) 18, 20

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497 U.S. 62 (1990) 12

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735 S.W.2d 164 (Mo.App. 1987) 19

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480 U.S. 273 (1987) 17

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30 Cal. Rptr. 2d 395 (Cal.App. 1994),
reversed on other grounds, 12 Cal. 4th 1143
(1996), *cert. denied*, 521 U.S. 1129 (1997) 18

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730 So. 2d 581 (Miss. 1999) 19

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496 U.S. 226 (1990) 15

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434 U.S. 374 (1978) 7

Statutes

42 U.S.C. § 2000e 17

Legislative History

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Education" (1998) 8

INTEREST OF *AMICI*[1]

This brief is filed by the following *amici*:

The American Civil Liberties Union, the American Federation of Teachers, the Anti-Defamation League, the California Women's Law Center, the Center for Women Policy Studies, Equal Rights Advocates, the Human Rights Campaign, the Mexican American Legal Defense and Educational Fund, the NAACP Legal Defense and Educational Fund, Inc., the National Asian Pacific Legal Consortium, the National Council of Jewish Women, the National Gay and Lesbian Task Force, the NOW Legal Defense and Education Fund, the National Partnership for Women and Families, the National Women's Law Center, the Northwest Women's Law Center, People for the American Way Foundation, Women Employed, and the Women's Law Project.

The statements of organizational interest are attached to this brief as an appendix.

STATEMENT OF THE CASE

The Boy Scouts of America is a federally chartered corporation with five million members, including one million youth members and 420,000 adult members in its Boy Scouts program. The organization is run by a National Council, which acts as its policymaking body. *Dale v. Boy Scouts of America* 160 N.J. 562, 571 (1999). The smallest unit in the organization is the troop, and the average troop consists of 15 to 30 boys. Pet.Br. at 40. The purpose of the Boy Scouts is to promote the ability of boys to do things for themselves and others, and to

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

teach patriotism, courage, self-reliance and kindred virtues. Its mission is to instill values in young people and prepare them to make ethical choices. 160 N.J. at 573-74.

The organization aggressively solicits new members through national advertising campaigns on television, in magazines, and through local recruiting drives at schools and elsewhere. "Any boy" is welcome to join the Boy Scouts. *Id.* at 590-91, 609.

James Dale became a cub scout at the age of 8 and remained in scouting until he reached the maximum age of 18 in 1988. He was an exemplary scout. He was accepted in the adult program as an Assistant Scoutmaster in 1989, and served for 16 months. *Id.* at 577-78.

While attending Rutgers University, Dale became a member and eventually co-president of the Rutgers Lesbian/Gay Alliance. During a conference on the psychological and health needs of gay teens, he was interviewed by the Newark Star-Ledger. An article later published in the paper quoted Dale describing his second year at Rutgers. According to the Star-Ledger, he said: "I was looking for a role model, someone who was gay and accepting of me." Dale was identified only as co-president of the Rutgers Alliance. The Boy Scouts were not mentioned in the article. *Id.* at 578; Joint Lodging Materials 10.

Within a month, Dale was told to sever his relations with the Boy Scouts. When he asked for an explanation, he was told that the Boy Scouts forbids membership to homosexuals. Five months later, a lawyer for the Boy Scouts told Dale the organization does not admit "avowed homosexuals." 160 N.J. at 579-80.

Dale sued, charging his expulsion from the Boy Scouts violated New Jersey's Law Against Discrimination, which forbids discrimination based on sexual orientation in public

accommodations. The trial court granted summary judgment to the Boy Scouts, holding that: (1) the organization was not a public accommodation under New Jersey law; (2) if it were, it would meet the law's exception for organizations which are distinctly private; and (3) in any case, subjecting the Boy Scouts to New Jersey's antidiscrimination law would violate the organization's freedom of expressive association. *Id.* at 580.

The Appellate Division reversed on all three points, holding that the Boy Scouts is a public accommodation under the L.A.D. and is not distinctly private. It also rejected the Scouts' freedom of intimate and expressive association claims. 308 N.J.Super. 516 (1998). That decision was in all respects affirmed by the New Jersey Supreme Court. 160 N.J. 562.

SUMMARY OF ARGUMENT

The Boy Scouts of America has more than a million young members and 420,000 adult members in its scouting program. It aggressively solicits new members and tells the public that "any boy" is welcome to join. It holds that moral fitness is a matter of what an individual's own head and heart tell him is right, and it discourages its scoutmasters from discussing sexuality at all. Under these circumstances, the Boy Scouts has no more right to discriminate in violation of state law than the Rotary Club or the Jaycees. Like those other organizations, whose earlier efforts to evade the civil rights laws were soundly rejected by this Court, the exclusionary anti-gay membership policy that the Boy Scouts now so vigorously defends falls outside the scope of any associational or expressive freedom protected by the First Amendment.

1. A Boy Scout troop is not an intimate association. Lack of selectivity alone disqualifies it. More fundamentally, its members do not choose each other; they make no decision about who shall or shall not be members of the troop.

2. New Jersey's Law Against Discrimination does not affect any expressive activity undertaken by the Boy Scouts, or any message the Boy Scouts may wish to convey about gay people. For that reason, *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston* 515 U.S. 557 (1995), does not control this case. State regulation of who takes part in an act of expression, like a parade or a demonstration, interferes directly with a speaker's message. By contrast, insisting that an association not discriminate in its membership ordinarily does not interfere with the organization's message because there is little risk that an association open to the public will be thought to be making a statement through the composition of its membership. The fact that James Dale is seeking to remain a scoutmaster does not alter that understanding since whatever leadership responsibilities Dale's position entails have nothing at all to do with the basis on which Dale was excluded from the Boy Scouts.

3. Any incidental burden on the Boy Scouts' freedom of expressive association is outweighed by the state's compelling interest in ensuring equality. In banning sexual orientation discrimination, New Jersey sought to include in ordinary life a group of Americans unfairly excluded from much of it. That is an important interest, unrelated to the suppression of expression; the Law Against Discrimination is narrowly tailored to effectuate it.

To hold otherwise would be to allow every effort to halt discrimination to be checkmated by an assertion of associational autonomy. The analysis this Court has used to keep equality and expression in balance has worked well for both. The Court should reaffirm it in this case.

ARGUMENT

I. A CLAIMED RIGHT TO FREEDOM OF ASSOCIATION DOES NOT ENTITLE THE BOY SCOUTS TO DISCRIMINATE AGAINST A PROTECTED CLASS IN A PLACE OF PUBLIC ACCOMMODATION

This case does not involve a right to associate as much as an asserted right to disassociate. While those two rights are often opposite sides of the same coin, they are not identical. And when, as here, the desire to exclude is directed against a group that the state has chosen to protect from unequal treatment, the conflict with the state's overriding interest in enforcing its civil rights laws becomes most acute. Over the past two decades, therefore, this Court has crafted a set of rules designed to preserve freedom of association without allowing it to become a subterfuge for discrimination based on animus or ignorance. In applying those rules, moreover, this Court has generally reacted with great skepticism to claims that important institutions in the social and economic life of the nation have a constitutional right to perpetuate discrimination.

Indeed, this Court has never struck down any civil rights law as a violation of the freedom to associate. Instead, the Court has consistently rejected such claims in a wide variety of contexts. *E.g., Runyon v. McCrary,* 427 U.S. 160 (1976)(upholding civil rights claim against private school that discriminated on the basis of race); *Bob Jones University v. United States,* 461 U.S. 574 (1983)(upholding denial of tax-exempt status based on racial discrimination); *Hishon v. King & Spalding,* 467 U.S. 69 (1984) (upholding sex discrimination judgment against law firm partnership); *Roberts v. United States Jaycees,* 468 U.S. 609 (1984)(upholding state law requiring Jaycees to admit women as members); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537

(1987)(upholding state law requiring Rotary Club to admit women as members); *New York State Club Ass'n v. New York,* 487 U.S. 1 (1988)(upholding application of local civil rights law that prohibits discrimination by private clubs that solicit business from nonmembers).

Despite this extensive body of case law, the Boy Scouts claims that it is entitled to a constitutional exemption from New Jersey's antidiscrimination law because, it contends, it violates the organization's rights to both intimate association and expressive association. In fact, it violates neither. The Boy Scouts relies on a conception of those rights that is so potentially limitless it would enable virtually any group to evade the civil rights laws by proclaiming its discriminatory membership policies as evidence of selectivity and an ideological point of view. This Court, however, has consistently and correctly rejected that false syllogism. As the Court observed in *Norwood v. Harrison,* 413 U.S. 455, 470 (1973), "the Constitution places no value on discrimination." Thus, while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protection." *Id.* at 470. *See also Runyon v. McCrary,* 427 U.S. at 176. The New Jersey Supreme Court correctly applied those principles below, and its decision should be affirmed.

A. The Boy Scouts Is Not An Intimate Association

The Boy Scouts invokes two distinctly different aspects of the constitutionally protected right of intimate association: the right to form "highly personal relationships" in which people share an intense commitment to each other, *Roberts,* 468 U.S. at 618, and the right of parents to direct the upbringing of their children, *see, e.g., Meyer v. Nebraska,* 262 U.S. 390 (1923). Both rights enjoy very substantial protection against government interference in proper circumstances. This case, however, does

not present those circumstances.

The right of intimate association protects an individual's decisions regarding those with whom she or he will form deep personal attachments, and with whom she or he will make intense personal commitments. *Roberts* 468 U.S. at 617, 619-20; *see also, Zablocki v. Redhail,* 434 U.S. 374 (1978); *Moore v. City of East Cleveland,* 431 U.S. 494 (1977).

Under this Court's jurisprudence, one of the distinguishing characteristics of an intimate association is "a high degree of selectivity in decisions to begin and maintain the affiliation." *Roberts,* 468 U.S. at 620. By contrast, the record below demonstrates that the goal of the Boy Scouts is to recruit as many members between the ages of eleven and seventeen as possible, with the hope of attracting a broadly diverse membership. *Dale,* 160 N.J. at 609. Based on this record evidence, the New Jersey Supreme Court found that the Boy Scouts were "unselective" in their membership. *Id.* That finding, which is not questioned in this Court, *see* Pet.Br. at 39-41, is alone fatal to any claim of intimate association. *See Roberts, 468 U.S.* at 621.[2]

There is an additional problem with any claim of intimate association on the facts of this case, however. The Boy Scouts does not actually grant its members the associational right that the organization now asserts as the basis for defying New Jersey's antidiscrimination law. Unlike the Jaycees in *Roberts,* 468 U.S. at 540-41, and the Rotarians in *Duarte,* 481 U.S. at 613-14, individual members of boy scout troops do not select their fellow scouts. *Dale,* 160 N.J. at 576-77. Rather, the

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[2] "The less intimate and more attenuated the association -- and the more the association affects the public realm and access to the privileges and opportunities available in that realm -- the greater the state's power to regulate an organization's exclusionary practices." TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988), §16-15 at 1480 n.37.

creation of a scout troop is much more akin to student class assignments, which are usually determined without any significant input by the students themselves. *See* Tribe, §16-15 at 1479 (school may not rely on associational rights of children when their choices are "obviously dominated" by adults). The average primary school class is about the same size as the average boy scout troop, it is similarly led by an adult, and it requires a substantial commitment of time and energy by the children involved.[3] Whatever attenuated right of intimate association primary school students may have in the composition of their class, the power of the state to prohibit school officials from engaging in unlawful discrimination when they decide whom to admit is no longer open to serious question. *See Runyon v. McCrary*, 427 U.S. at 177-79. The same principle applies with equal force here and provides ample support for the decision below.

The Boy Scouts fares no better by alleging that New Jersey's Law Against Discrimination somehow infringes the constitutional right of parents to direct the upbringing of their children. The right of parental autonomy simply does not embrace the right to insist that a public accommodation indulge a parent's discriminatory views by barring disfavored groups from goods and services that are otherwise available to the general public. Thus, while some parents may wish to send their children to an all-white school, that fact does not excuse the school from the need to comply with the state's antidiscrimination laws. *Runyon*, 427 U.S. at 177, and *Norwood*, 413 U.S. at 461-63. Indeed, a working definition of unlawful discrimination is that it is the transformation of private

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[3] U.S. Dep't of Education, National Center for Education Statistics, *The Condition of Education, 1998*, at 1 (average primary school class size is 24 in public school, 22 in private school) and at "Indicator 38" (avg. hours spent in the classroom by a primary school teacher in a year is 958). *Compare* Pet. Br. at 40 (a typical boy scout troop consists of 15 to 30 boys).

prejudices into market decisions.

Accordingly, there is no legal significance to the Boy Scouts' claim that their decision to exclude James Dale from the Scouts solely because he is gay reflects what the organization perceives to be the moral disapproval of at least some of its scouting parents. Even if that perception is accurate, it cannot be controlling. Most forms of discrimination that are now prohibited by our civil rights laws are or were justified on the basis of deeply held moral views. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 3 (1967)(trial judge's finding that segregation was ordained by God); "Resolution on Racial Reconciliation on the 150th Anniversary of the Southern Baptist Convention," The Southern Baptist Convention Annual (1995) at 80-81 (acknowledging denomination's support of slavery and segregation and apologizing to African-Americans); *Bradwell v. Illinois*, 83 U.S. 130, 141 (Bradley, J., concurring) (1872) (natural unsuitability of women to work).

The right to direct the education of one's children is not a right to decide who else may attend school or who may teach. Similarly, the right to provide one's child with a scouting experience is not a right to decide that only members of favored groups may be permitted to join the troop or to lead it.

B. Any Rights of Expressive Association That May Exist In This Case Are Not Unduly Infringed By The Challenged Nondiscrimination Order

In *Roberts*, 468 U.S. at 618, this Court recognized that freedom of association serves an important "instrumental" value in promoting freedom of expression. Accordingly, the government has no more right to dictate the content of the message delivered by a group, *see, e.g., Police Dep't v. Mosley*, 408 U.S. 92 (1972), than it has to dictate the content of the message delivered by an individual, *see, e.g., Texas v. Johnson*,

491 U.S. 397 (1989). That principle does not assist the Boy Scouts in this case, however, because the nondiscrimination law that New Jersey is seeking to enforce is plainly content-neutral, and leaves the Boy Scouts free to advocate whatever position the organization chooses about gay people.

This case is thus fundamentally different from *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, on which the Boy Scouts so heavily relies. That case arose out of a longstanding dispute about whether the private organizers of Boston's St. Patrick's Day Parade had to permit a gay and lesbian group to march under its own banner. In holding that they did not, this Court rejected the view that the parade could appropriately be characterized as a place of public accommodation in the ordinary sense of the term. Rather, the Court concluded, the parade represented a traditional form of expressive activity and the sponsors of the parade, no less than the publishers of a newspaper, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), were entitled to determine the message they wished to convey. Under the contrary rule proposed by the state, the Court explained, "any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own." *Hurley*, 515 U.S. at 573.

Had Massachusetts been allowed to insist that the lesbian and gay delegation be admitted to the parade in *Hurley*, observers along the way might well have assumed that the organizers included the lesbian and gay delegation in the parade, and made their message a part of its message. *Id.* at 575. By contrast, there is little risk that an association will be understood to be making a statement through the identity of its members, particularly if the association has millions of members and is open to the public. *See Pruneyard Shopping Center v. Robins*,

447 U.S. 74, 87 (1980); *accord Dale*, 160 N.J. at 571. Our society is far too diverse for that.

The Boy Scouts would like to read *Hurley* for the proposition that the state can never enforce its civil rights laws over the opposition of any organization that purports to represent a set of values that conflicts with the state's antidiscrimination goals. But the holding of *Hurley* clearly does not go so far. Certainly, nothing in the Court's opinion purports to overrule *Roberts* or even to question it.

To be sure, the ACLU and other members of the civil rights community are acutely aware that government attempts to regulate the membership of an expressive association pose their own First Amendment dangers. *Cf. Cousins v. Wigoda*, 419 U.S. 477 (1975). But this case does not involve a targeted or viewpoint-based effort to regulate an association's membership; it involves instead the indirect effect of a neutrally applied public accommodations law designed to promote civil rights. On these facts, any impact of that law on First Amendment rights is incidental, at best, and must be balanced against the risk to civil rights enforcement if an organization's selective membership policies become their own justification for a claimed right to discriminate. Nor is that concern a fanciful one. In the 1950s and 1960s, many businesses in the deep South converted overnight into "private clubs" where every white patron was entitled to automatic membership and every potential black customer was barred at the door. *See Daniel v. Paul*, 395 U.S. 298 (1969). With this history in mind, the Court has been appropriately wary of any claim that the message of an association is inextricably tied to its membership policies, so that the latter cannot be regulated without abridging the former.[4]

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[4] Recognition of the fact that there is a "close nexus between the freedoms of speech and assembly" does not mean "that in every setting in which individuals exercise some discrimination in choosing associates, their

There may be rare situations where that is true. In *New York State Club Ass'n. v. New York*, 487 U.S. at 13, this Court recognized the possibility that an association might show that it was organized for a specific expressive purpose that it could not effectively advocate unless it could limit its membership to be consistent with its message. For example, an organization founded to promote anti-Semitism and anti-Catholicism[5] might well be right that simply having members who admit to being Jews or Catholics is so inconsistent with its core mission that the First Amendment allows it to exclude them. Given the competing interests at stake, however, *amici* do not believe it is possible to avoid the task of "carefully assess[ing]" the extent to which application of the state's antidiscrimination laws will actually interfere with the organization's core purposes. *Roberts*, 468 U.S. at 620.[6]

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selective process of inclusion and exclusion is protected by the Constitution." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. at 13 (citations and internal quotations omitted).

[5] Higham, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, *1860-1925* (Rutgers University Press, 1992 ed.), at 286-299 ("The Klan Rides").

[6] This approach is also consistent with the methodology that the Court has employed in other association contexts. In the political patronage cases, the Court has asked whether party affiliation has any relevance to job performance, which is simply another way of asking whether the ability of the prevailing political party to deliver its message will be impeded if it is forced to associate with members of the opposing party by hiring (or retaining) them to fill certain critical positions. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). In the compelled dues cases, the Court has focused on whether the organizational dues are being spent for a purpose that is "germane" to the reason that the dues were collected in the first place, which is simply another way of asking whether the challenged expenditure is in furtherance of the organization's central purpose. *See, e.g., Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Keller v. State Bar of*

That is precisely the inquiry that this Court undertook in *Roberts*, when it determined that any impact on the expressive message of the Jaycees was incidental at best. *Id.* at 627.[7] It is also precisely the inquiry undertaken by the New Jersey courts in this case, which is what led them to conclude that:

> The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourage its leaders from disseminating any views on sexual issues; and Boy Scouts include sponsors and members who subscribe to different views in respect of homosexuality.

160 N.J. 2d at 612.

These conclusions could be challenged only if the Boy Scouts were now to demonstrate that the organization is in fact defined by its view that homosexuality is immoral, that this view is integral to who the Boy Scouts are, and that its members decided to join the organization because of its intolerant views

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California, 496 U.S. 1 (1990).

[7] Justice O'Connor's concurring opinion in *Roberts* suggests that the constitutionally relevant line is between expressive associations and commercial associations. 468 U.S. at 632-35. That line, however, would not account for the result in *Runyon v. McCrary*. A school is the quintessential expressive association, *Roberts*, 468 U.S. at 636 (O'Connor, J.). Yet the *Runyon* Court unequivocally held that while the private school defendants in that case could advocate segregation, they could not express that view by segregating their student body. That was not, we believe, because the schools charged tuition, but rather because the core purpose of the schools was to educate, and because the Constitution places so little (if any) value on discrimination as a means of expression. *Runyon*, 427 U.S. at 176. The same analysis applies here.

about homosexuality. Even in its submissions to this Court, however, the Boy Scouts has stopped well short of that claim. Instead, the Boy Scouts has tried to shift the focus of its argument from a question of membership to a question of leadership. The theory, apparently, is that an organization's leadership choices are entitled to deference by the state -- even when they conflict with the state's antidiscrimination laws -- because those choices represent an organizational statement of some sort.

That argument is flawed on the facts of this case for several critical reasons. First, any act of intentional discrimination can be said to represent an organizational statement but that cannot be a sufficient justification for ignoring the civil rights laws or those laws would quickly become a dead letter. *See Runyon v. McCrary,* 427 U.S. 160. Second, as this Court made clear in the patronage cases, leadership is not a matter of title but a matter of job responsibility. *See* n.6, *supra.* Here, James Dale is seeking to remain an assistant scoutmaster, which is not a policymaking position within the Boy Scouts. *Dale*, 160 N.J. at 572-73, 577. Third, the fact that Dale is gay does not conflict with his non-policymaking responsibilities. While it may be fair to characterize scoutmasters as teachers in some sense, they are specifically instructed by the Boy Scouts to avoid any teaching on issues of sexuality and religion. If the subject comes up, the prescribed answer is that such matters are better discussed at home. *Id.* at 160 N.J. at 575, 614-15.

This would be a different case if Dale were actively seeking to undermine a message about homosexuality that the Boy Scouts were actively seeking to promote, but the record does not support either proposition. As the New Jersey Supreme Court noted: "[T]here is no indication that Dale intends to 'teach' anything whatsoever about homosexuality as a scout leader, or that he will do other than the Boy Scouts instructs him to do -- refer boys to their parents on matters of religion and

sex." *Id.* at 623.

In the final analysis, the position of the Boy Scouts appears to be that it is prepared to accept gay members and even gay scoutmasters as long as they remain safely closeted, but it will not accept the presence of anyone who is openly gay. That attitude would not be tolerated for a moment if the Boy Scouts were claiming that it would accept Jewish or Catholic scouts as long as they kept their faith hidden. The price of equal opportunity in this country should not be a requirement to disguise one's identity. To the contrary, the entire goal of the antidiscrimination laws is that people should be judged on what they can do and not on who they are.

It is true that since Dale is openly gay, the better he is at his job as a scoutmaster, the more some may think that being gay is "acceptable." That is a "danger" with anyone who is open about his or her ethnicity or religion. But the Boy Scouts' fear that this will be seen as its message is simply without much basis in reality. What a teacher says outside of school is usually not fairly attributable to the school, *see Pickering v. Board of Education,* 391 U.S. 563, 572 (1968); *Westside Community Schools v. Mergens,* 496 U.S. 226, 250 (1990), particularly if the school makes its wish not to take a position clear. *See Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 87 (1980). Any danger of attribution here is virtually nonexistent because, as the New Jersey Supreme Court found, the Boy Scouts tells the public that all boys are welcome to join. 160 N.J. at 609. All that an organization can really be understood to have "said" by retaining someone protected against discrimination by the civil rights laws is that the organization obeys the law. If anything, that is a message that the Boy Scouts presumably endorses.

II. ANY INCIDENTAL BURDEN ON THE BOY SCOUTS' EXPRESSION IS OUTWEIGHED IN THIS CASE BY NEW JERSEY'S OVERRIDING INTEREST IN ENSURING EQUAL OPPORTUNITY ON THE BASIS OF SEXUAL ORIENTATION

In *Roberts v. United States Jaycees,* 468 U.S. 609, *Board of Directors of Rotary, Int'l v. Duarte,* 481 U.S. 537, and *New York State Club Ass'n v. City of New York,* 487 U.S. 1, this Court essentially applied the analysis it first developed in *United States v. O'Brien,* 391 U.S. 367 (1968), for evaluating government actions which, while not aimed at a speaker's message, limit the means one can use to express it. That test requires that the government show: (1) that it is acting in pursuit of an "important" interest;[8] (2) that the interest is unrelated to the suppression of free expression; and (3) that the approach it has adopted is "narrowly tailored" to achieve the government's goal. Each of those requirements was easily satisfied in the 1980s trilogy; each of those requirements is also easily satisfied here.

A. New Jersey Has A Critically Important Interest in Ensuring Equality On The Basis of Sexual Orientation

One of the central visions on which this nation was founded was that ours would be a society in which talent, skill and hard work would be what mattered. It is an idea that runs through American thought, from James Madison's *Federalist*

[8] *Roberts* described the necessary government interest as "compelling" but, as the *O'Brien* Court pointed out, there is no magic in the terminology used to describe what must be a very significant government interest. *See Roberts,* 468 U.S. at 623; *O'Brien,* 391 U.S. at 376-77.

No. 10, [9] through the debates on the adoption of the civil war amendments,[10] to the opinions of this Court.[11]

That vision has never been realized. Despite our aspirations, we have a long, sad history of judging people not by what they are capable of doing, but by such extraneous things as race, religion, national origin, sex, disability and sexual orientation.

Civil rights laws are enacted to bring our nation closer to a society that does not function on the basis of group stereotype. The Civil Rights Act of 1866 was designed to end "private injustices"against African-Americans who, in the wake of the Civil War, were still unable to find work or housing in large parts of the country. *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 422-36 (1968). The Rehabilitation Act of 1973 was aimed at overcoming "prejudice," "insensitivity," and "ignorance" so that people with disabilities would not be denied "jobs or other benefits." *School Board of Nassau County v. Arline,* 480 U.S. 273, 279 , 284 (1987). The caption of Title VII of the 1964 Civil Rights Act plainly expresses its goal of "equal opportunity." 42 U.S.C. § 2000e.

Thinking in economic terms, as law often does, it is easy to see that the chance to have and hold a job or an apartment on equal terms has to be an essential element of any society that treats people fairly. But the somewhat more intangible value of

[9] THE FEDERALIST PAPERS (Penguin Classics Ed. 1987), at 124.

[10] Cong. Globe, 39th Cong., 1st Sess., 95, 1160, 1833 (1866); *see also* Report of C. Schurz, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1866).

[11] *Frontiero v. Richardson,* 411 U.S. 677, 686-87 (1973)(relegating an entire class of citizens to an inferior status "without regard to actual capabilities" violates a "basic concept of our system"); *see also* Hofstadter, THE AMERICAN POLITICAL TRADITION (Vintage 1974), at 3-21.

not being shut out of lunch counters, theaters, businesses and associations that say they are open to the public is every bit as essential. Indeed, when President Kennedy proposed what became the Civil Rights Act of 1964, he noted that no action could be "more contrary to the spirit of our democracy," and none "more rightfully resented," than being barred from public accommodations. *See Daniel v. Paul,* 395 U.S. at 306. Thus, the overriding purpose of civil rights legislation, as this Court explained just a few years ago, is to make it possible for those protected by the law to participate in the "almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Romer v. Evans,* 517 U.S. 620, 631 (1996). Stated more broadly, the purpose of the civil rights law is to protect basic human dignity. *See Heart of Atlanta Motel v. United States,* 379 U.S. 241, 250 (1964).

This Court has said that laws designed to ensure equal opportunity and equal access to goods and services serve "compelling state interests of the highest order." *Roberts,* 468 U.S. at 624.[12] Given the central place of fair treatment and

[12] It has occasionally been suggested that the government has an overriding interest in forbidding only those forms of discrimination that it would need a compelling justification to practice; or, to put it another way, that the government only has an overriding interest in ending discrimination against those defined by "suspect classifications." *See Smith v. Fair Employment and Housing Commission,* 30 Cal. Rptr.2d 395, 404 (Cal.App. 1994), *reversed on other grounds,* 12 Cal.4th 1143 (1996), *cert. denied,* 521 U.S. 1129 (1997). But apart from using similar terminology, there is no necessary connection between the two ideas, no reason why the Court's analysis of when ensuring equality is overriding should depend on when a reason to treat people unequally is deemed compelling. Indeed, in *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985), this Court held that discrimination against the mentally disabled was not suspect at least in part because of significant government efforts to end discrimination. The Court speculated that those efforts might withstand heightened scrutiny even as it ruled that discrimination against the mentally disabled does not require it. *Id.* at 443-45.

personal initiative in the American vision of society, it may be that virtually any law truly designed to ensure equal opportunity serves government interests of the highest order. The Court need not decide that in this case, however. At a minimum, there can be no doubt that lesbians and gay men have historically been denied equal opportunity to participate in American life. Gay people have been denied employment as everything from telephone operators to librarians to budget analysts to teachers to police officers to mail room clerks.[13] Gay people have lost their homes (as have heterosexuals who lived with gay people), and been told not to dance with each other, not to eat together in booths, and not to "hang out" together in bars and clubs.[14] Gay people have had their families torn apart and their children left in peril.[15] Lesbians and gay men have been subjected to

[13] *See, e.g., DeSantis v. Pacific Telephone,* 608 F.2d 327 (9th Cir. 1979); *McConnell v. Anderson,* 451 F.2d 193 (8th Cir. 1977); *Norton v. Macy,* 417 F.2d 1161 (D.C. Cir. 1969); *Glover v. Williamsburg Local School Dist.,* 20 F.Supp.2d 1160 (S.D.Ohio 1998); *Weaver v. Nebo School Dist.,* 29 F.Supp.2d 1279 (D.Utah 1998); *Burton v. Cascade School District Union High School,* 512 F.2d 850 (9th Cir.), cert. denied, 423 U.S. 839 (1975); *Childers v. Dallas Police Dep't,* 513 F.Supp. 134 (N.D. Tex. 1981) *aff'd,* 669 F.2d 732 (5th Cir. 1982); *Smith v. Liberty Mutual Insurance,* 569 F.2d 325 (5th Cir. 1978).

[14] *See, e.g., 420 E.80th v. Chin,* 115 Misc.2d 195 (1982), *aff'd,* 97 A.D. 2d 390 (N.Y.A.D. 1st Dep't 1983); *Hubert v. Williams,* 133 Cal.App.3d Supp. 1(1982); *Morell v. Dept. of Alcoholic Beverage Control,* 204 Cal.App.2d 504 (1962); *Rolon v. Kulwitzky,* 153 Cal.App.3d 289 (1984); *One Eleven Wines and Liquors Inc. v. Div. of Alcoholic Beverage Control,* 235 A.2d 12 (N.J. 1967).

[15] *See, e.g., Weigand v. Houghton,* 730 So.2d 581, 588 (Miss. 1999)(McRae, J., dissenting)(child placed in home with convicted felon and wife abuser because father was gay); *S.A.G. v. R.A.G.,* 735 S.W.2d 164 (Mo.App. 1987)(mother denied custody in favor of alcoholic father because mother was a lesbian).

unspeakable violence for being gay.[16]

The history of gay people in America is in large measure a history of being forced underground,[17] away from the easy participation in "ordinary civic life" that most Americans take for granted. *See Romer*, 517 U.S. at 631. New Jersey committed itself to creating equal opportunity for a group of Americans who truly have been excluded from equal participation in ordinary life when it added sexual orientation to its Law Against Discrimination. That is a government interest of the highest order. *See Roberts*, 468 U.S. at 624.

B. New Jersey's Interest in Equality Is Unrelated To The Suppression Of Free Expression, And Its Law Against Discrimination Limits Expression No More Than Necessary To Achieve Its Stated Goal

New Jersey's interest in ensuring that the gay people who live there have an equal opportunity to participate in society is unrelated to the suppression of free expression. *See, e.g., Roberts*, 468 U.S. at 623. Like the Minnesota public

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[16] *See, e.g., Naboszny v. Podlesney*, 92 F.3d 446 (7th Cir. 1996); *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir.1997), *cert. denied*, 523 U.S. 1118 (1998); *Coon v. Joseph*, 192 Cal.App.3d 1269 (1987).

[17] *See* Katz, *Gay American History; see also State ex.rel. Grant v. Brown*, 39 Ohio St. 2d 112 (1974), *cert. denied sub nom. Duggan v. Brown;* 420 U.S. 916 (1975)(Greater Cincinnati Gay Society not permitted to incorporate); *Owles v. Lomenzo*, 31 N.Y.2d 965(1973)(overruling a similar decision by the New York Secretary of State); *Rowland v. Mad River Local School Dist.*, 730 F.2d 444, 446 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985)(guidance counselor fired in part because she told coworkers she was bisexual); *Van Ooteghem v. Gray*, 654 F.2d 304 (5th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982)(overturning discharge of gay man who spoke in favor of civil rights at county commission); *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972)(same).

accommodations law in *Roberts*, New Jersey's Law Against Discrimination does not distinguish on the basis of viewpoint or content. *Id.* While the Boy Scouts claim that the application of New Jersey's law to it is motivated by a desire to hamper its ability to express its views, the criteria applied by the New Jersey Supreme Court to determine that the organization is a public accommodation covered by the Law Against Discrimination are undeniably neutral, and have been applied to similar organizations with different views. *Dale*, 160 N.J. at 589-602. Finally, the central purpose of ensuring equality in organizations that open themselves to the general public can be achieved only by forbidding identity-based discrimination. *See Roberts*, 468 U.S. at 626, 628. The Constitution does not disable the government from prohibiting discrimination in places of public accommodation. *See Runyon*, 427 U.S. at 176.

CONCLUSION

For the foregoing reasons, the judgment of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

Matthew A. Coles
(Counsel of Record)
Steven R. Shapiro
Sara L. Mandelbaum
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Lenora M. Lapidus
ACLU of New Jersey Foundation
35 Halsey Street, Suite 4B
Newark, New Jersey 07102
(973) 642-2084

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APPENDIX

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of New Jersey is one of its statewide affiliates. Since its founding in 1920, the ACLU has frequently advocated in support of the right to freedom of association, both on its own behalf and on behalf of other groups. See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995). The ACLU has also frequently argued in favor of the state's constitutional authority to eliminate discrimination in places of public accommodation, see, e.g., Roberts v. United States Jaycees, 468 U.S. 609 (1984), in part through the work of both its Lesbian and Gay Rights Project, and its Women's Rights Project. Because this case once again requires the Court to consider when protected association crosses the line into forbidden discrimination, its proper resolution is a matter of significant concern to the ACLU and its members.

The **American Federation of Teachers (AFT)** is a national labor union that represents over one million members, who work in public schools, community colleges, universities, state government, and health care. The vast majority of AFT members are employed as teachers and teaching assistants in public primary and secondary schools. AFT has a long-standing interest in First Amendment and civil rights issues that have an impact on AFT's membership, and this interest has resulted in AFT participating in a number of *amicus* briefs before the Supreme Court.

The **Anti-Defamation League (ADL)**, one of the nation's oldest civil rights organizations, was founded in 1913 to promote good will among all races, ethnic groups, and religions. As set out in its charter, ADL's "ultimate purpose is to secure justice and fair treatment to all citizens alike and to put

an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." To this end, ADL is committed to eradicating discrimination in public accommodations. ADL filed *amicus* briefs with this court in *Robert v. United States Jaycees*, 468 U.S. 609 (1984), *New York State Club Assn. v. New York*, 487 U.S. 1 (1988) and *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), among other relevant cases.

The **California Women's Law Center (CWLC)** is a private, nonprofit public interest law center specializing in the civil rights of women and girls. Established in 1989, the CWLC places a strong emphasis on advancing the rights of women and girls in employment and education. CWLC has authored numerous *amicus* briefs, articles, and legal education materials on discrimination, and litigates discrimination cases. This case raises questions with an enormous impact on the issues which concern the California Women's Law Center.

The **Center for Women Policy Studies** is an independent, national, multiethnic and multicultural feminist policy research and advocacy institution, founded in 1972. We currently are working with a network of state legislators to ensure that lesbians and gay men have full and equal legal protection from violence and discrimination. The Court's decision in this case will have a significant impact on legislators' ability to enact comprehensive laws to eliminate discrimination against sexual orientation, and to include sexual orientation in state hate crimes statutes.

Equal Rights Advocates (ERA) is a San Francisco-based, public interest law firm focused on ending discrimination against women and girls. ERA works to achieve women's equality and economic security through litigation, education, legislative advocacy and practical advice and counseling. Since, its inception ERA has worked tirelessly to end gender

discrimination and establish gender equality. ERA believes in the value of coalitions and alliances, and works closely with groups in the women's, civil rights, and immigrant rights communities to achieve social justice and equal opportunity.

The **Human Rights Campaign (HRC)** is the nation's largest gay and lesbian civil rights organization, with over 360,000 members nationwide. HRC is devoted to fighting and ending discrimination on the basis of sexual orientation, and to protecting the basic civil and human rights of gay, lesbian, and bisexual Americans. To this end, HRC has provided federal and state legislative, regulatory and judicial advocacy, media and grassroots support on a range of initiatives affecting gay, lesbian and bisexual individuals who suffer discrimination on the basis of their sexual orientation, including the Employment Non-Discrimination Act.

The **Mexican American Legal Defense and Educational Fund (MALDEF)** is a national not-for-profit organization that protects and promotes the civil rights of more than 29 million Latinos living in the United States. MALDEF is particularly dedicated to securing such rights in the areas of employment, education, immigration, political access, and public resource equity. The question presented by this case is of great interest to MALDEF because it implicates the availability of civil rights protections for Latinos in this country.

The **National Asian Pacific American Legal Consortium (the Consortium)** is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, the Consortium and its Affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal services,

community education and advocacy on discrimination issues.

The **NAACP Legal Defense and Educational Fund, Inc. (LDF)** is a public interest law firm founded in 1940, dedicated to combating bias and securing equal opportunity for all Americans through public education, antidiscrimination legislation and full and effective enforcement of the civil rights laws. LDF has participated as counsel of record or *amicus curiae* in important cases before this Court involving discrimination on a variety of levels, including race, *Borwn v. Board of Education*, 347 U.S. 483 (1954), ethnicity, *St. Francis v. Al-Khazraji*, 481 U.S. 604 (1987), gender, *Phillips v. Martin Amrietta Co.*, 400 U.S. 542 (1971), age, *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 353, 115 S. Ct. 4a897 (1995), and sexual orientation, *Romer v. Evans*, 517 U.S. 620 (1996), consistently urging the Court to recognize the real and destructive effects of prejudice.

The **National Council of Jewish Women, Inc. (NCJW)** is a volunteer organization, inspired by Jewish values, that works through research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the Council has 90,000 members in over 500 communities nationwide. NCJW's *National Principles* state that "Public laws, benefits and programs must be developed, enacted, and administered and provided without discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status or sexual orientation."

Founded in 1973, the **National Gay and Lesbian Task Force** has worked to eliminate prejudice, violence and injustice against gay, lesbian, bisexual and transgendered people at the local, state and national level. As part of a broader social justice

movement for freedom, justice and equality, NGLTF works to create a world that respects and celebrates the diversity of human expression and identity where all people may fully participate in society.

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF has frequently appeared as counsel before this Court. *See, e.g., Brzonkala v. Virginia Polytechnic Institute*, 169 F.3d 820 (4th Cir. 1999) (en banc), *cert. granted*, 1999 U.S. LEXIS 4745 (U.S. Sept. 28, 1999) (No. 99-29) (argued Jan. 11, 2000); *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Schenck v. Pro-Choice Network*, 117 S. Ct. 855 (1997); *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). NOW LDEF has a long-standing commitment to elimination discrimination in places of public accommodation and has litigated extensively in this area. *See, e.g., New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

The **National Partnership for Women & Families** is a nonprofit, nonpartisan organization that promotes fairness, quality health care, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971 as the Women's Legal Defense Fund, the National Partnership has participated as *amicus curiae* in many major cases before this Court involving sex discrimination or principles of discrimination law that affect sex discrimination, including *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) and *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987). Because discrimination on the basis of sexual orientation is intricately connected to gender-

based discrimination, the National Partnership has often participated as *amicus curiae* in cases asserting equal opportunity for lesbians and gay men.

The **National Women's Law Center (NWLC)** is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in education, the workplace, and other settings, including through litigation of cases brought under national, state, and local antidiscrimination laws. The Center has a deep and abiding interest in ensuring that these laws are fully implemented and enforced.

The **Northwest Women's Law Center (NWLC)** is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, the NWLC has been dedicated to protecting and securing equal rights for lesbian and their families, and has long focused on threats to equality based on sexual orientation. Toward that end, the NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest, and the country and is currently involved in numerous legislative and litigation efforts. The NWLC continues to serve as a regional expert and leading advocate in lesbian and gay issues.

People for the American Way Foundation (People For) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has more than 300,000 members nationwide. People for has frequently represented parties and

filed *amicus curiae* briefs in litigation seeking to defend First Amendment freedoms, and has also been actively involved in efforts nationwide, including litigation, to combat discrimination and promote equal rights. People For believes society's compelling interest in eradicating invidious discrimination with an organization's First Amendment rights of free speech and association, and has joined in filing this *amicus* brief in order to urge the Court not to disturb those precedents.

Women Employed is a national membership association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination, monitored the performance of equal opportunity enforcement agencies, analyzed equal opportunity policies, and developed specific, detailed proposals for improving enforcement efforts.

The **Women's Law Project (WLP)** is a non-profit public interest legal advocacy organization located in Philadelphia, Pennsylvania. Founded in 1974, WLP works to abolish discrimination and injustice in our laws and institutions and to advance the legal and economic status of women and their families through litigation, public policy development, public education, and individual counseling. The Law Project has worked on both a local and national basis to eliminate discrimination on the basis of gender and sexual orientation in a wide variety of contexts, including employment, education, insurance, family matters and places of public accommodations, the area at issue in this case. WLP has a strong interest in defending our civil rights laws from threats which seek to limit the rights of all citizens to be free of prohibited discrimination.

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

PETITIONERS,

v.

JAMES DALE,

RESPONDENT.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF OF *AMICUS CURIAE* STATE OF NEW JERSEY IN SUPPORT OF RESPONDENT

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
Post Office Box 080
Trenton, New Jersey 08625
(609) 292-4925

JEFFREY BURSTEIN
Senior Deputy Attorney General
Of Counsel

CHARLES S. COHEN
Deputy Attorney General
Counsel of Record and On the Brief

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QUESTION PRESENTED

Whether application of the New Jersey Law Against Discrimination to Boy Scouts of America, a place of public accommodation as defined in New Jersey law, violates Petitioners' right of intimate or expressive association under the First Amendment to the United States Constitution.

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF *AMICUS CURIAE* . 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 9

ARGUMENT

APPLICATION OF THE NEW JERSEY LAW AGAINST DISCRIMINATION TO BOY SCOUTS OF AMERICA ("BSA") DOES NOT VIOLATE PETITIONERS' RIGHT OF INTIMATE OR EXPRESSIVE ASSOCIATION UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION. 11

A. The State of New Jersey has a Compelling Interest in Eradicating Discrimination in Places of Public Accommodation, Like BSA 11

B. Because BSA is Large, Nonselective and Inclusive, and its Members Do Not Gather for the Purpose of Sharing Personal Views on Sexual Orientation, Application of the New Jersey Law Against Discrimination Does Not Violate Petitioners' First Amendment Right of Intimate Association. 15

C. Application of the New Jersey Law Against Discrimination to BSA, a Place of Public Accommodation, Does Not Abridge Petitioners' First Amendment Right of Expressive Association. 19

CONCLUSION 23

APPENDIX 24

TABLE OF AUTHORITIES

CASES CITED

Page

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 11, 16

Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25, 219 A.2d 161 (1966) 5

Crawford v. Board of Educ. of Los Angeles, 458 U.S. 527 (1982) 12

Dale v. Boy Scouts of America, 160 N.J. 562, 734 A.2d 1196 (1999) . . . . . passim

Dale v. Boy Scouts of America, 308 N.J. Super. 516, 706 A.2d 270 (App. Div. 1998) 4

Frank v. Ivy Club, 120 N.J. 73, 576 A.2d 241 (1990) . 4

Fraser v. Robin Dee Day Camp, 44 N.J. 480, 210 A.2d 208 (1965) 5

Fuchilla v. Layman, 109 N.J. 319, 537 A.2d 652 (1988) 5

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) 19

Jackson v. Concord Co., 54 N.J. 113, 253 A.2d 793 (1969) 5

National Organization For Women v. Little League Baseball, 67 N.J. 320, 338 A.2d 198 (1974) 5

New York State Club Ass'n v. New York City, 487 U.S. 1 (1988) 11, 17

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 11

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 9, 11, 14-16, 18

Romer v. Evans, 517 U.S. 620 (1996) 11

Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 11, 16-18

Ruynon v. McRary, 427 U.S. 160 (1976) 14

Sellers v. Philip's Barber Shop, 46 N.J. 340, 217 A.2d 121 (1966) 5

Tiger Inn v. Frank, 498 U.S. 1073 (1991) 4

CONSTITUTIONS AND STATUTES CITED

U.S. Const., Amendment I . . . . . passim

10 U.S.C. § 2544(a) 7

N.J. Stat. Ann. § 10:5-1 et seq., (West 1993 & Supp. 1998) 1

N.J. Stat. Ann. § 10:5-12f (West 1993 & Supp. 1998) 13

N.J. Stat. Ann. § 10:5-2 (West 1993) 12

N.J. Stat. Ann. § 10:5-3 (West 1993 & Supp. 1998) 12

N.J. Stat. Ann. § 10:5-4 (West 1993 & Supp. 1998). 13

N.J. Stat. Ann. § 10:5-5(l) (West 1993) 7, 13

N.J. Stat. Ann. § 10:5-5hh (West 1993) 13

N.J. Stat. Ann. § 23:2-3 (West 1993) 7

N.J. Stat. Ann. § 39:3-17 (West 1993) 7

L. 1991, c. 519, § 3 13

OTHER AUTHORITIES

Goodman, *A Scout is Morally Straight, Brave, Clean, Trustworthy . . . and Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA LAW REVIEW 825 (1999) . . . 21

The Boy Scouts of America, THE BOY SCOUT ENCYCLOPEDIA (B. Grant ed. 1952). 20-22

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The State of New Jersey submits this brief in support of respondent James Dale. As the entity statutorily responsible for implementing and enforcing New Jersey's Law Against Discrimination, the State of New Jersey believes it imperative that this Court affirm the judgment of the New Jersey Supreme Court that Boy Scouts of America[1] may not exclude James Dale on the basis of his sexual orientation.

As amply demonstrated by the record below, BSA seeks and attracts broadly based membership and solicits sponsorship from the widest range of social organizations, including government entities. Indeed, hundreds of scout troops in New Jersey are sponsored by government entities. A ruling allowing an organization of this scope and with this level of engagement with government to discriminate will severely compromise the ability of the State to enforce its civil rights laws in contexts involving the protection of not just sexual orientation, but every class of our most vulnerable citizens.

New Jersey has always been at the forefront of civil rights enforcement. Its Law Against Discrimination, N.J. Stat. Ann. § 10:5-1 *et seq.*, ("LAD"), enacted in 1945, anticipated federal legislation by twenty years and was the first civil rights law of its kind in the nation. The LAD prohibits discrimination in housing, employment, and places of public accommodation. Its ambit has expanded over the years to reflect the halting progress of tolerance in New Jersey's most diverse of societies. Accordingly, the law now forbids discrimination because of race, creed, color, national origin, ancestry, age, sex, marital status, sexual orientation, familial status and nationality. The LAD has prohibited discrimination on the basis of sexual orientation since 1992.

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[1] In this brief, "Boy Scouts of America" and "BSA" denote both petitioners Boy Scouts of America and Monmouth Council, Boy Scouts of America.

The State of New Jersey is a strong defender of the rights of private groups to expressive and intimate association under the First Amendment. Indeed, the anti-discrimination protections afforded by the LAD are balanced explicitly against private First Amendment interests. The act provides exceptions to its protections for distinctly private clubs and institutions, religious educational facilities, and those acting *in loco parentis*.

BSA's claim to the right to exclude James Dale based solely on his sexual orientation must be evaluated, ultimately, in light of the public participation sought and obtained by the organization. In addition to its large size and nonselective membership policies, BSA seeks government assistance, enjoys statutorily conferred benefits, and solicits government sponsorship. In its public advertising and membership solicitations, BSA does not hesitate to publicize its close historical ties with government. New Jersey schools, law enforcement agencies, fire companies, city governments and National Guard units sponsor 750 scouting troops. BSA reinforces this close relationship to government among scouts, conferring merit badges for "citizenship" based on familiarity with the Declaration of Independence, the Constitution and the Bill of Rights; scouts also pledge to respect and obey the law and to deal fairly and kindly with fellow citizens of whatever race or creed, in the spirit of America's tradition of equality of opportunity.

Statutory privileges, free use of public parks, schools, camp grounds and other facilities, and government sponsorship have conferred on BSA a benefit far more fundamental than just financial and logistical assistance. As a consequence of government participation and sponsorship, the actions and policies of BSA bear a stamp of legitimacy, an imprimatur based on government's tacit endorsement. Those excluded based on the BSA's discriminatory practices may well feel the shame and sting of an entire society's rebuke.

The State of New Jersey has an undeniable and compelling interest in applying its anti-discrimination laws to a large, diverse, and nonselective organization that exploits its close ties to government while espousing, largely in response to litigation, a policy that every branch of New Jersey government has condemned as invidious. The State submits this brief in support of James Dale because, in its view, New Jersey's compelling interest outweighs any interest of the BSA in expelling James Dale.

STATEMENT OF THE CASE

Throughout his long and decorated association with Boy Scouts of America, James Dale embodied Boy Scout ideals. Beginning at age 8, he progressed through the ranks of scouting, from Tenderfoot through Eagle Scout, an achievement attained by roughly the top 3 percent of all scouts; he later served as an Assistant Scoutmaster.

At some point during these years, James Dale acknowledged to himself that he is homosexual. The revelation of his sexual identity in a newspaper article having to do with problems facing students at Rutgers University, and which made no mention of his involvement in scouting, led to his expulsion from BSA in 1990. Notably, Dale was not expelled from BSA for any behavior deemed inappropriate for scouts. Rather, Dale's expulsion was grounded in BSA's undistributed, litigation-inspired policy targeting "known or avowed" homosexuals. *See Dale v. Boy Scouts of America*, 160 N.J. 562, 579, 734 A.2d 1196, n.4 (1999).

BSA is a not-for-profit corporation that charters hundreds of other not-for-profit corporations nationwide, including in New Jersey, to support scouting programs. BSA charters and approves only those sponsors that are compatible with the aims and purposes of the organization. Since 1992, when the LAD was amended to prohibit discrimination based on sexual orientation, BSA has in no way severed its ties with the

government. Furthermore, throughout its history, BSA has repeatedly renewed the charters of religious and government organizations adhering to divergent views regarding homosexuality and related moral issues.

After his requests for reinstatement were denied, James Dale filed a complaint in the Superior Court of New Jersey, Chancery Division, in 1992 seeking various forms of relief against BSA. In his lawsuit, Dale alleged that BSA violated the LAD and New Jersey common law by revoking his scout membership based solely on his sexual orientation. The trial court denied Dale's motion for partial summary judgment and granted BSA's motion, dismissing Dale's complaint in its entirety. On appeal, a majority of the Superior Court of New Jersey, Appellate Division reversed the trial court's dismissal of the complaint, holding that BSA constitutes a "place of public accommodation" under the LAD, that BSA did not qualify for any statutory exemption from LAD coverage, and that BSA violated the LAD by concededly denying Dale the privilege of serving in the organization based solely on his sexual orientation. *Dale v. Boy Scouts of America*, 308 N.J. Super. 516, 706 A.2d 270 (App. Div. 1998).

On review, the Supreme Court of New Jersey unanimously affirmed the Appellate Division's majority ruling. *Dale*, *supra*, 734 A.2d 1196. In so affirming, the New Jersey Supreme Court cited ample precedent and evidence in the record to support its conclusion that BSA is a "place of public accommodation" despite the absence of a permanent site at which scouts regularly meet. *Id.* at 1208-10.

The New Jersey Supreme Court's decision that BSA falls within the purview of the LAD follows a long line of decisions defining the term "public accommodation." *See*, *e.g.*, *Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990), *cert. denied sub nom. Tiger Inn v. Frank*, 498 U.S. 1073 (1991) (holding that Princeton University's eating clubs,

although not owned or operated by the university, itself a place of public accommodation, were so closely related to it as to subject them to the LAD); *Fraser v. Robin Dee Day Camp*, 44 N.J. 480, 210 A.2d 208 (1965) (day camp is a place of public accommodation); *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25, 219 A.2d 161 (1966) (swim club is a public accommodation, and although it can limit access to the facilities to members, it cannot discriminate in the selection of members); *Sellers v. Philip's Barber Shop*, 46 N.J. 340, 348, 217 A.2d 121 (1966) (barber shop is a place of public accommodation and cannot refuse customers on the basis of race). In each of these cases, the State of New Jersey played a prominent role in enforcing the statute. Moreover, the courts acknowledged the unique remedial nature of the State's anti-discrimination law. In light of the LAD's aim toward the eradication of the "cancer of discrimination," the statute has always been interpreted, as intended, liberally. *Fuchilla v. Layman*, 109 N.J. 319, 334, 537 A.2d 652 (1988), *cert. denied sub nom. University of Medicine and Dentistry of N.J. v. Fuchilla*, 488 U.S. 826 (1988); *Jackson v. Concord Co.*, 54 N.J. 113, 124, 253 A.2d 793 (1969). *See also National Organization for Women v. Little League Baseball*, 67 N.J. 320 (1974) (exclusion of girls from playing Little League Baseball violated the LAD, and absence of permanent, fixed "place" was not dispositive.)

The New Jersey Supreme Court identified various factors to be considered in determining whether BSA is a place of public accommodation:

> We ask, generally, whether the entity before us engages in broad public solicitation, whether it maintains close relationships with the government or other public accommodations, or whether it is similar to enumerated or other previously recognized public accommodations. [*Dale*, 734 A.2d at 1210.]

The court then evaluated the many decidedly public features of BSA in light of these standards. *See*, *e.g.*, *id.* at 1210-18. In this regard, the court found that BSA engages in broad and aggressive public solicitation activities of the sort that have consistently been a principal characteristic of public accommodations in New Jersey. *Id.* at 1211. Such public solicitation includes the extension of general membership invitations through broadcast and print advertising, public service announcements, posters, promotions and recruiting drives, none of which advertise the exclusion of homosexuals. *Id.* As indicated in the record below, "[n]either the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy. The National Council and Executive Board have always taken the position that scouting should be available to all boys who meet the entrance age requirements." *Id.* at 1215 (quoting BSA publication entitled, "A Representative Membership").

Indeed, it is not disputed that BSA spends millions of dollars modernizing scouting's image in order to encourage as many boys as possible to become scouts. An additional form of public recruitment intentionally employed by the BSA to increase awareness and membership involves individual scouts commonly wearing their uniforms to school and other public places. *Id.* at 1211. The court concluded that BSA closely resembles many of the recognized and enumerated places of public accommodation under the LAD. *Id.* at 1213 (likening BSA to such established LAD public accommodations as Little League baseball and day camps).

Throughout its analysis, the court stressed that BSA benefits considerably from the close relationships it maintains with federal and state governmental bodies and with other recognized public accommodations. *Id.* at 1211. Boy Scouts of America is federally chartered and receives an array of federal, state and local government sponsorship that outfits scouts with a wide variety of facilities, equipment, supplies and services. For example, the federal government has

authorized various federal agencies to provide BSA with goods and services, including medical supplies, cots, blankets, commissary equipment, flags, refrigerators and other supplies, without reimbursement. *Id.* at 1212 (quoting 10 U.S.C. § 2544(a)).

On the state level, New Jersey provides a similarly broad range of benefits to BSA, including authorization for its environmental protection agency to stock with fish any body of water used by Boy Scouts, N.J. Stat. Ann. § 23:2-3, and an exemption for payment of motor vehicle registration fees, N.J. Stat. Ann. § 39:3-17. Moreover, New Jersey public schools and school-affiliated groups sponsor close to 500 scouting units, comprising approximately one-fifth of the chartering organizations in the State. Some schools even allow scout meetings to be held during the school day as part of their curriculum. *Dale*, *supra*, 734 A.2d at 1213. Other governmental entities, such as law enforcement agencies, fire departments, city governments, and the military, sponsor approximately 250 scouting units in New Jersey. *Id.* at 1201.

The New Jersey Supreme Court also considered and rejected BSA's claim that, despite its longstanding close engagement with government and other factors demonstrating that it is a public accommodation, the organization is exempt from the LAD. The LAD contains several express exceptions, including exceptions for distinctly private clubs and institutions, religious educational facilities, and those acting *in loco parentis*, to safeguard the First Amendment rights of truly private groups. N.J. Stat. Ann. § 10:5-5(l). Focusing primarily on BSA's large size, close ties to government, inclusive membership policy, and lack of selectivity in membership, among other factors, the New Jersey Supreme Court rejected Petitioners' claim that BSA is "distinctly private." *Dale*, *supra*, 734 A.2d at 1217.

The court further concluded that BSA does not constitute a "religious educational facility" within the meaning of the

LAD's exception for such facilities because BSA's own pronouncements clearly demonstrate that the organization is not a *bona fide* religious or sectarian institution. *Id.* Nor could BSA be eligible for the LAD's *in loco parentis* exception, since scout leaders do not have the requisite responsibility to maintain, rear and educate children such that they stand in the place of the parent. *Id.* at 1218.

After holding that the LAD applies to BSA, the court next turned to BSA's claim that its First Amendment rights are thereby violated. *Id.* at 1219. As part of its detailed intimate association analysis, the New Jersey Supreme Court carefully considered, among other things, BSA's size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. *Id.* at 1221. The court concluded on the record before it that BSA's large size (more than 87 million members since its inception), unlimited membership, nonselectivity (*e.g.*, BSA does not require new members to be sponsored by current members), admittedly inclusive rather than exclusive purpose, and the practice of inviting or allowing nonmembers to attend meetings, established that the organization is not sufficiently personal or private to warrant constitutional protection under the freedom of intimate association. *Id.* at 1222.

With regard to expressive association, the court carefully weighed New Jersey's compelling state interest in eradicating invidious, status-based discrimination against BSA's First Amendment interests. *Id.* at 1223. Recognizing that a group member infringes upon an organization's freedom of expressive association only if he or she significantly affects the other members' ability to preserve or advocate their viewpoints, the court found on the record before it that scouts do not associate in order to preserve or advocate the view that homosexuality is immoral. *Id.* at 1223-24. To the contrary, BSA discourages its leaders from disseminating any views on sexual issues, and BSA includes sponsors and members who subscribe to different views regarding issues such as

homosexuality and tolerance. *Id.* at 1223, 1225. Accordingly, the court concluded that Dale's expulsion from BSA was based solely on his status as a homosexual and was not justified by any demonstrated need to preserve BSA's expressive rights. *Id.* at 1228. The New Jersey Supreme Court specifically noted that the LAD, like other similar statutes in other jurisdictions, serves a compelling state interest and accomplishes that purpose without abridging BSA's free speech or associational rights. *Id.*

SUMMARY OF ARGUMENT

The New Jersey Supreme Court's interpretation of the LAD to include BSA as a place of public accommodation does not violate BSA's rights of free association or free expression under the First Amendment. New Jersey has an undeniable, compelling interest in protecting the civil rights of all those who reside within its borders. BSA, on the other hand, is unable to demonstrate that it seeks, as one of its purposes, to bring scouts together to share or express views on sexual orientation, and that inclusion of James Dale will alter irretrievably the core "views that brought [the Scouts] together." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

The New Jersey Supreme Court's holding, on the record before it, that BSA satisfies the LAD's well-settled definition of a "place of public accommodation," but does not fall within any of statute's exceptions, involved a straightforward application of established law to the facts of record. Under the LAD, public accommodations may not discriminate against individuals based solely on their sexual orientation, just as they may not, for example, discriminate based upon race, creed, color, age, sex or national origin.

The many factors supporting the conclusion that BSA is a place of public accommodation under the LAD are largely the same as the factors to be considered with respect to BSA's

First Amendment claims. As a large, inclusive, nonselective organization having undeniably close relationships with state and federal governmental bodies, BSA clearly meets the definition of a place of public accommodation. Among BSA's most distinctly public characteristics are its longstanding, purposeful engagement with government and its receipt of wide-ranging public benefits.

Recognizing BSA as a place of public accommodation in no way implicates a legitimate interest in intimate association. That right involves the sharing of beliefs within relationships that are based on a special community of thought; such relationships characteristically center on distinctly personal aspects of members' lives. Once again, selectivity is a factor to be considered along with size, purpose and exclusivity. Under the circumstances of this case, BSA can claim the right of intimate association for its members on neither a local nor a national level.

With regard to BSA's claim that its right to free expressive association is compromised under the New Jersey Supreme Court's decision, the critical issue is whether the group gathers in furtherance of a collective purpose that would be frustrated by inclusion of the excluded member. In this case, the record below amply demonstrates that scouts do not gather for the purpose of sharing their views on sexual orientation, nor does the fact of Dale's status as homosexual force BSA to articulate any particular message that differs from the message it has historically espoused. Accordingly, application of the LAD to BSA does not have a significant impact on members' ability to associate in order to pursue shared views.

ARGUMENT

APPLICATION OF THE NEW JERSEY LAW AGAINST DISCRIMINATION TO BSA DOES NOT VIOLATE PETITIONERS' RIGHT OF INTIMATE OR EXPRESSIVE ASSOCIATION UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The State of New Jersey has a Compelling Interest in Eradicating Discrimination in Places of Public Accommodation, Like BSA.

New Jersey unquestionably enjoys "broad authority to create rights of public access on behalf of its citizens." *Roberts*, *supra*, 468 U.S. at 625 (compelling Jaycees to accept women as full voting members) (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81-88 (1980)). In consistently holding that a state has a "compelling interest of the highest order" in "eliminating discrimination and assuring equal access to its citizens," this Court has made clear that a state may define the scope of its compelling interest as long as it does so through neutral laws of general applicability "unrelated to the suppression of ideas," and any incidental infringement on First Amendment freedoms is no greater than is essential to the furtherance of that interest. *See*, *e.g.*, *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988) (applying anti-discrimination law to a consortium of private clubs that regularly provided services to nonmembers did not significantly affect members' ability to form associations to advocate public or private viewpoints); *Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (applying anti-discrimination law to Rotary Club "plainly serves" state's "compelling interests of the highest order" in eliminating discrimination); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (state constitutional amendment prohibiting state and local legislative bodies from providing anti-discrimination

protection based on sexual orientation was too broad to be justified by the stated goal of preserving the associational freedoms of landlords and employers to share religious and philosophical beliefs disfavoring homosexuality); *Crawford v. Board of Educ. of Los Angeles*, 458 U.S. 527, 542 (1982) (states may go beyond requirements of the Federal Constitution in their anti-discrimination laws).

Like many other similar civil rights statutes nationwide, the LAD is a neutral law of general applicability that serves compelling state interests. Enacted in 1945, the New Jersey Law Against Discrimination is the oldest state civil rights law in the nation. Promulgated pursuant to the State's police power, the statute was adopted "for the protection of the public safety, health and morals and to promote the general welfare and in fulfillment of the Constitution of this State guaranteeing civil rights." N.J. Stat. Ann. § 10:5-2. In the statute, the New Jersey Legislature expressly declared that discrimination against individuals "threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State . . . ." N.J. Stat. Ann. § 10:5-3. In furtherance of its goal to eradicate the severe personal and societal damage caused by bias, it directed that the "act shall be liberally construed in combination with other protections available under the laws of this State." *Id.*

Throughout its fifty-five-year history, the LAD has been amended many times to broaden the scope of its protection. The law now forbids discrimination in housing, employment and places of public accommodation based on race, creed, color, national origin, ancestry, age, sex, marital status, sexual orientation, familial status and nationality.[2] N.J. Stat.

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[2] Although BSA claims that affirmance of the New Jersey Supreme Court's decision would necessarily mean that "Boy Scout Troops would be forced to admit girls" and "Girl Scout Troops would be forced to admit boys," Pet. bf. at 37, this ignores an important exemption in the public accommodations provision of the LAD: the law expressly does not "bar any place of public accommodation which is in its nature reasonably restricted exclusively to one sex" from discriminating on the basis of sex in its accommodations. N.J. Stat. Ann. § 10:5-12f. Such exemption includes, but is not limited to, "any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex." *Id.*

Ann. § 10:5-4. Since 1992, that list has included sexual orientation. *Id.*; N.J. Stat. Ann. § 10:5-5hh; L. 1991, c. 519, § 3. The statute defines the term "place of public accommodation" with a series of examples, such as hotels, camps, stores, restaurants, theaters and the like, although it is clearly stated that the list is not intended to be exhaustive. N.J. Stat. Ann. § 10:5-5(1). The public accommodation section of the LAD includes several express exceptions, including exceptions for "distinctly private" organizations, religious educational facilities and those acting *in loco parentis*. *Id.*

A threshold issue below, therefore, was whether BSA is a place of public accommodation within the meaning of the LAD; for if it is not, Dale's expulsion therefrom -- even if motivated solely by discriminatory animus -- would not constitute a violation of the LAD. The fundamental legal and constitutional issues would be identical if BSA was expelling its members on the basis of race or other grounds prohibited by the LAD. In determining that BSA is, in fact, a public accommodation under New Jersey law, the Supreme Court of New Jersey weighed all of the appropriate factors and correctly applied New Jersey's facially neutral civil rights statute in furtherance of the State's compelling state interest.

New Jersey's interest in fighting discrimination is particularly compelling in this case, where the discriminatory conduct in question bears the imprimatur of government

endorsement. Even without the apparent endorsement of government, status-based discrimination in accommodations offered to the public is abhorrent. *See, e.g., Runyon v. McRary*, 427 U.S. 160 (1976) (small schools denying admission to children solely on the basis of race); *Roberts, supra*, 468 U.S. at 628 ("acts of invidious discrimination in the distribution of publicly available goods, services and other advantages cause unique evils that government has a compelling interest to prevent -- wholly apart from the point of view such conduct may transmit"). Such discrimination unquestionably offends individual dignity and stigmatizes affected citizens. *Id.* at 625. Invidious discrimination also harms society as a whole by denying the benefits of wide participation in political, economic and cultural life. *Id.*

The pernicious effects of discrimination, and the costs to society as a whole, are even greater when the discriminating organization enjoys the perception of government endorsement. Discrimination that carries the perceived imprint of government support sends a cruel message to an individual that he or she is an unequal, and indeed inferior, member of society. As noted by the New Jersey Supreme Court, BSA's publications prominently feature information highlighting BSA's longstanding and ongoing "special association" with government. *Dale, supra*, 734 A.2d at 1212. Because BSA enjoys an uniquely high level of government support, along with many other public attributes, New Jersey has a particularly compelling interest in ensuring non-discriminatory access to its accommodations, advantages, facilities and privileges in this case.

In its analysis, the court below correctly applied the LAD to accomplish the State's legitimate purposes without impermissibly abridging BSA's free speech or associational freedom. On its face, the LAD does not aim at the suppression of speech, nor does it distinguish between prohibited and permitted activity on the basis of viewpoint. Instead, the LAD reflects New Jersey's strong historical

commitment to eliminating discrimination and assuring its citizens equal access to public accommodations. That goal, which is unrelated to the suppression of expression, "plainly serves compelling state interests of the highest order." *Roberts, supra*, 468 U.S. at 624. Furthermore, as demonstrated above, because BSA recruits broadly and unselectively in its membership while receiving widespread government benefits and sponsorship, its action and policies bear a stamp of legitimacy, an imprimatur based on government's tacit endorsement. Under the circumstances, New Jersey's compelling interest is undeniable.

B. Because BSA is large, nonselective, and inclusive, and its members do not gather for the purpose of sharing personal views on sexual orientation, application of the New Jersey Law Against Discrimination does not violate Petitioners' right of intimate association.

The New Jersey Supreme Court correctly rejected BSA's claim that its decision to discriminate against Dale based solely on his sexual orientation is protected by the First Amendment freedom of intimate association. At the core of the right to intimate association is the right of individuals to form and preserve certain kinds of highly personal relations and afford them "a substantial measure of sanctuary from unjustified interference by the State." *Roberts, supra*, 468 U.S. at 618. Such personal bonds are characterized by the cultivation and transmission of shared ideals and beliefs. Protecting these intimate unions, the Court has said, fosters diversity and acts as a critical buffer between the individual and the power of the State. *Id.* at 618-19.

Family relations are often used as a model of these intimate associations because they normally involve deep attachments and commitments among small groups of people who share distinctly personal aspects of their lives. *Id.* at 619-20. With regard to the types of relationships protected under the freedom of association, this Court has observed:

> Among other things, . . . they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of the freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities -- such as a large business enterprise -- seems remote from the concerns giving rise to this constitutional protection. [*Id.* at 620.]

Thus, in determining whether a group is an intimate association, "factors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.*

Following *Roberts*, this Court considered another case in which the same right was being asserted for the same purpose -- excluding women from membership. *Rotary Club of Duarte*, *supra*, 481 U.S. at 539. After noting that local Rotary groups vary in size from as few as 20 to as large as 900 or more, the Court observed that the organization's stated purpose "is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful occupations, and enabling the club to be a true cross section of the business and professional life of the community." *Id.* at 546. Considering the significance of the club's community projects, the attendance and participation of strangers at club meetings and the diversity of club members from varied professions, the Court found lacking "the kind of private or personal relationship to which [the Court has] accorded protection under the First Amendment." *Id.* at 547. *See also New York State Club Assoc.*, *supra*, 487 U.S. at 6 (private clubs' right of intimate association not violated by anti-

discrimination ordinance because plaintiff clubs regularly provided commercial services to nonmembers, a factor at least as important as the participation of strangers at meetings in *Roberts* and *Rotary*).

Application of the pertinent factors identified by this Court to the facts at issue leads inevitably to the conclusion reached by the New Jersey Supreme Court, that BSA is not an intimate association protected by the First Amendment. The record below amply supports this conclusion. For instance, the Court found on the record before it that BSA is large in its overall size (4 million boys and over 1 million adults admitted), is nonselective in its membership, has an inclusive rather than an exclusive purpose, and routinely invites nonmembers to participate in scout functions. *Dale*, *supra*, 734 A.2d at 1219-26. As noted above, BSA itself has "quite clearly said that 'any boy' is welcome." *Id.* at 1221.

BSA counters that when an organization has both a national entity and local groups, the focus should be exclusively on the local groups. Pet. bf. at 39. In this regard, BSA claims that some local troops have between 15 and 30 members, and that these local troops "are involved in the transmission and cultivation of shared ideals and beliefs." Pet. bf. at 39-41. Size, however, is not dispositive. In *Rotary Club*, *supra*, 481 U.S. at 546, for example, this Court specifically held that a local club with as few as twenty members did not qualify as "the kind of intimate or private relation" that warrants First Amendment protection. Furthermore, on the question of exclusivity, this Court has "emphasized that the First Amendment protects those relationships . . . that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life.'" *Id.* at 545 (quoting *Roberts*, *supra*, 468 U.S. at 619-20).

Here, the record is devoid of any evidence indicating that scouts gather at either the national or local level for the purpose of sharing personal views on sexual orientation. To the contrary, BSA has a well-defined policy discouraging formal discussion of sexual topics during scouting activities, and believes that such matters are better addressed by scouts' parents, consistent with their varying spiritual beliefs. *Dale*, *supra*, 734 A.2d at 1203 (quoting Boy Scouts Handbook at 528 (10th ed. 1990)). Moreover, it is beyond dispute that BSA actively recruits members from all walks of life to create an atmosphere of diversity. As in *Rotary*, BSA's goal is to create inclusive, not exclusive membership. *Id.* at 1222. Further, as discussed above, it is undisputed that BSA routinely invites nonmembers to participate in scout functions. This Court emphasized in *Rotary*, *supra*, 481 U.S. at 547, that an association's frequent inclusion of nonmembers in its core activities is an important factor weighing against an intimate association claim.

Based on, among other factors, BSA's proclaimed commitment to diversity and its inclusive and open membership practices, the New Jersey Supreme Court correctly concluded that Boy Scouts of America has failed to demonstrate a protectable intimate association right at either the national or local troop level. To allow such a large, diverse and inclusive organization like BSA, with extensive ties to all levels of government, to assert a right of intimate association would severely undermine New Jersey's anti-discrimination efforts on behalf of all of New Jersey's statutorily protected citizens.

C. Application of the New Jersey Law Against Discrimination to BSA, a Place of Public Accommodation, Does Not Abridge Petitioners' First Amendment Right to Expressive Association.

On its face, BSA's most compelling argument is that application to it of the LAD would abridge its right of expressive association under the First Amendment. Likening Dale's situation in this case to that of the gay and lesbian organization which sought to express gay pride by marching in the Saint Patrick's Day parade in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572-73 (1995), BSA argues that inclusion of Dale will significantly "impair the ability of the original members to express only those views that brought them together." *Roberts*, *supra*, 468 U.S. at 628. The "very argument that government may impose its own interpretation on an organization's moral message," BSA argues, "raises First Amendment concerns of the highest order." Pet. br. at 25-26.

The superficial appeal of these arguments is not difficult to understand, for they strike a deep chord in the American sensibility. Why should government be able to dictate to private organizations whom they must include, particularly when inclusion will frustrate the core message of that organization?

The record below and the history of BSA disconnect it fatally, however, from the rhetoric it now invokes. First, unlike the organization that sponsored the parade in *Hurley*, BSA is not engaged in wholly private or wholly expressive activity. This Court in *Hurley* noted explicitly "that no state action is involved in the parade." *Hurley*, *supra*, 515 U.S. at 566. That simply cannot be asserted here, given the level of government sponsorship and assistance to which BSA has availed itself. Indeed, the charters of 750 local boy scout units are held by government entities which are prohibited by

the LAD from engaging in precisely the kind of discrimination the BSA now allegedly espouses. Furthermore, no argument at BSA's disposal converts BSA -- a membership organization -- into a form of pure expression like the parade in *Hurley*.

Second, even assuming that an anti-homosexual "moral message" lies at the core of what brought BSA together, there is simply no evidence that Dale, unlike the gay organization in *Hurley*, sought inclusion in the BSA in order to express a message inimical to the organization's founding principles. The decision to exclude Dale, in other words, implicated no contrary expressive conduct on his part. That his sexual orientation never affected his conduct as a Boy Scout is evident from the fact that no one ever knew of his orientation until it was revealed in an article that never mentioned his status as an elite Boy Scout.

But there is a more fundamental point. BSA itself concedes that a significant percentage of its membership disagrees with the anti-homosexual position it advances with this Court. Pet. br. at 26, n.7; Reply Pet. Cert. at 8 & n.6; *see also Dale*, *supra*, 734 A.2d at 1203. That dissension is not surprising, for BSA's claim, in effect, that it is organized to discriminate against homosexuals simply does not bear scrutiny, no matter how deferential this Court chooses to be.

By its own terms, BSA was and is organized "to teach boys how to do things for themselves and other people . . . and to learn to be good citizens." Boy Scouts of America, The Boy Scout Encyclopedia 22 (B. Grant ed. 1952). BSA awards merit badges for those who exhibit good citizenship; significantly, and not surprisingly given BSA's strong association with government, the question of what makes a good citizen is left to public policy as defined by government. Thus, the good citizen dedicates himself to: "be familiar with the Declaration of Independence, the Constitution . . . and the Bill of Rights . . . respect and obey the law . . . [and] deal

fairly and kindly with my fellow-citizens of whatever race or creed, in opportunity." *Id.* at 39-40.

The "law" which scouts are duty-bound to respect has been defined by New Jersey government to forbid precisely the discrimination based on sexual orientation that BSA so strongly espouses in the context of this litigation. How are scouts to "respect" such a law, when they are instructed that it is inimical to their core mission? How can scouts be said to honor America's "tradition of equality of opportunity" when they seek now to deny equal opportunity themselves to people the law otherwise protects?

The original BSA ideals of inclusiveness, tolerance and of the "good citizen," who acts with respect for and in deference to American law and the ideal of equal opportunity, simply cannot be squared with BSA's recently discovered aversion to its homosexual members. Aside from some selectively distributed position papers, whose contents are nowhere reflected in BSA public literature and most of which were drafted in response to litigation, BSA has never articulated a position on sexual orientation. *See, e.g., Dale, supra,* 734 A.2d at 1205, n. 4, 1224-25; Goodman, *A Scout is Morally Straight, Brave, Clean, Trustworthy . . . and Heterosexual? Gays in the Boy Scouts of America*, 27 HOFSTRA LAW REVIEW 825, 881 (1999). In fact, BSA discourages its leaders from disseminating any views at all on sexual issues. *Dale*, *supra*, 734 A.2d at 1203.

From its inception, BSA has identified its goals with the goals underpinning American government and society generally. The boy scout "studies the democratic principles on which America is based in his Citizenship Merit Badges. Scouting is open to all boys of every race and religious belief, just as America welcomes all on a democratic basis." Boy Scout Encyclopedia, *supra*, at 47. This close identification of scouting goals with the governmental policies that led to civil rights protection of sexual orientation was not something

foisted upon BSA by "big brother" government; it was a policy the BSA itself embraced freely, and it enabled BSA to avail itself of government sponsorship, facilities, and amenities without conflict. In applying its public policy forbidding discrimination based on sexual orientation to BSA now, New Jersey is not, therefore, as BSA claims, imposing "its own interpretation on an organization's moral message." That organization long ago identified its own moral message with the principles of American government that led to protection of the sexual orientation of men like James Dale.

The State of New Jersey over the past fifty years has come to reflect the widening moral arc of tolerance, an ideal at the heart of Boy Scout beliefs. BSA's insistence now that tolerance ends where sexual awakening begins in some of its members is tragic, not only because it places BSA at odds with the government with which it so strongly identifies, and not only because it casts out certain young men at the most vulnerable time of their lives, but also because, in doing so, it forsakes the bedrock commitment of the Boy Scout citizen to embody the progress of America; "I will do all in my power to pass on a better America to the next generation." *Id.* at 40.

BSA has failed to demonstrate that it has a clearly expressed interest as an association in excluding homosexuals, or that inclusion of James Dale would frustrate the expressive purpose underlying scouting. Even assuming that such inclusion would burden BSA's expressive association rights, the State of New Jersey's compelling need to enforce its law against discrimination against broadly based entities which are closely identified with government clearly outweighs BSA's rights of expressive association.

CONCLUSION

For the foregoing reasons, the judgment of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

John J. Farmer, Jr.
Attorney General of New Jersey

Jeffrey Burstein
Senior Deputy Attorney General

Charles S. Cohen
Deputy Attorney General
Counsel of Record and On the Brief

R.J. Hughes Justice Complex
Post Office Box 080
Trenton, New Jersey 08625
(609) 292-4925

Dated: March 29, 2000

APPENDIX

APPENDIX

EXCERPTS FROM THE BOY SCOUT ENCYCLOPEDIA

Text and illustration prepared under the direction of THE BOY SCOUTS OF AMERICA

Text by BRUCE GRANT

Illustrations by FIORE and JACKIE MASTRI

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Page 3. "The material for these articles has been carefully selected from many different sources. Mr. Bruce Grant has done a splendid job in developing the text, and the lively illustrations of Fiore and Jackie Mastri enhance its value. Expert Scouters have carefully reviewed the material so that you may rely on the accuracy of what you find here. THE BOY SCOUT ENCYCLOPEDIA is not intended to be a basic handbook, but to present a panorama of the Scout program as carried on by millions of boys throughout the United States, and indeed, the world."

Page 22. "Boy Scouts of America. A national organization chartered by Congress to teach boys how to do things for themselves and other people, to train them in Scoutcraft and teach them patriotism, courage, and self-reliance, to help them be physically fit and to develop the kind of strong character they admire, and to learn to be good citizens. Boys of every religious faith can join."

Page 39. "Citizenship Dedication. Exploring is the trail to citizenship. In whatever way it leads the young man to serve his community, it makes him more able to have or enjoy citizenship in common with others and makes him better trained for a voting citizenship when he becomes of age. The Explorer citizen dedicates himself to the following: 1. I will

live the Scout Oath and Law. 2. I will be familiar with the Declaration of Independence, the Constitution of the United States, and the Bill of Rights. 3. I will respect and obey the law in order to have security and freedom. 4. I will share the responsibility of my home, school, church, neighborhood, and community; and when legally of age, I will register and vote in all elections. 5. I will deal fairly and kindly with my fellow-citizens of whatever race or creed, in the spirit of the Scout Law and America's tradition of equality of opportunity. 6. I will work to preserve our American heritage of liberty and responsibility. I acknowledge that the privileges we enjoy were won by the hard work and sacrifices, faith and clear thinking, of our forefathers. I will do all in my power to pass on a better America to the next generation."

Page 47. "[The Scout] studies the democratic principles on which America is based in his Citizenship Merit Badges. Scouting is open to all boys of [e]very race and religious belief, just as America welcomes all on a democratic basis."

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No. 99-699

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

Brief Of *Amici Curiae* American Association Of School Administrators, New York City Board Of Education, Los Angeles Unified School District, San Diego Unified School District, San Francisco Unified School District, and Laguna Beach Unified School District In Support Of Respondent

MITCHELL A. KARLAN
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
48th Floor
New York, NY 10166
(212) 351-4000
Counsel for Amici Curiae

Of Counsel:

RANDY M. MASTRO
LAURIE A. MCLAUGHLIN
S. ELIZABETH FOSTER
GRANT S. THOMPSON

158777

Counsel Press LLC
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43 pp

QUESTION PRESENTED

Whether a large, unselective membership organization that has a unique relationship with the government, is sponsored by public schools and public entities of all kinds, and receives significant benefits from federal, state, and local governments, may invoke the First Amendment to defeat the application of a state's anti-discrimination law to which its governmental sponsors are subject, when none of the purposes, messages, or values that bring its members together is substantially altered or burdened by application of that state law.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	v
Interest of *Amici Curiae*	1
Summary of Argument	4
Argument	6
A. BSA's Extensive Entanglement With Government Endows It With A Public Character Not Shared By Other Organizations.	6
1. BSA Has an Extensive Relationship With The Federal Government.	6
2. BSA Has Extensive Relationships With State Governments.	9
3. Public Entities Sponsor and Provide Facilities For Boy Scout Troops.	10
4. Public Entities Support BSA's Learning For Life and Explorer Programs.	12
5. BSA Relies Upon Its Relationships With Government To Promote Its Organization.	13

Contents

	Page
B. Application of the LAD to BSA's Discriminatory Practices Does Not Infringe Upon BSA's Freedom of Expressive Association.	14
1. BSA Does Not Have an Expressive Purpose of Promoting the View That Homosexuality Is Immoral.	15
2. BSA's Argument that the LAD Impermissibly Infringes on Its Freedom of Association, If Accepted, Would Require a Radical Departure From Established First Amendment Jurisprudence and Would Render Civil Rights Laws Virtually Meaningless.	19
(a) *Hurley* Does Not Apply To This Case.	19
(b) If the Court Were to "Give Deference" To BSA's Own Characterization of Its Expressive Purpose, Any Organization Could Become Exempt From Civil Rights Laws By Professing a Purpose To Justify Its Discrimination After the Fact.	20

Contents

	Page
(c) BSA's "Leadership" Decisions Are Subject to the Same Analysis as BSA's "Membership" Decisions. .	21
3. Because BSA is Extensively Entangled With Government, BSA Can Claim Only Minimal Protection of Its Right of Expressive Association.	23
C. Application of the LAD to BSA's Discriminatory Practices Does Not Infringe Upon BSA's Freedom of Intimate Association.	27
D. The Court Should Not Expand First Amendment Rights to Intrude Upon State Sovereignty.	29
Conclusion	30

TABLE OF CITED AUTHORITIES

	Page
Cases:	
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	Page
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	Page
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16 U.S.C. § 539f (Supp. IV 1994)	7
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36 U.S.C. § 30901 (Supp. IV 1994)	6
36 U.S.C. § 30902 (Supp. IV 1994)	19
36 U.S.C. § 30905 (Supp. IV 1994)	7
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Ala. Code § 40-9-12 (West 1999)	9
Cal. Educ. Code § 200 (West 2000)	12, 18
Cal. Gov. Code § 12940 (West 1999)	23
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	Page
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Page

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Page

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	Page
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2001 National Scout Jamboree: Location and Site (visited Mar. 27, 2000)	8

INTEREST OF AMICI CURIAE[1]

***Amicus curiae* American Association of School Administrators (AASA)**, founded in 1865, is one of the nation's oldest professional organizations for educational leaders. Its current membership consists of 15,000 school superintendents and other administrators nationwide and its mission is to support and develop the highest quality of public education and education-related programs for all children. It carries out this mission, in part, by recommending policies and standards for its members and for the educational profession as a whole. ***Amicus curiae* New York City Board of Education (NYCBOE)** is the policy-making body of the nation's largest public school system. New York City public schools have a student population of nearly 1.1 million, served by over 1,500 elementary, junior high, and senior high schools, and a budget in excess of $9 billion. ***Amicus curiae* Los Angeles Unified School District (LAUSD)** is the nation's second largest public school system. Los Angeles public schools serve more than 700,000 students in more than 900 elementary, middle, senior high and special facility schools with a budget of nearly $7.5 billion. ***Amicus curiae* San Diego Unified School District (SDUSD)** is a school district with a student population of 141,000 served by 180 schools and a budget of over $900 million. ***Amicus curiae* San Francisco Unified School District (SFUSD)** is a school district with a student population of 66,000 and a budget of over $500 million. ***Amicus curiae* Laguna Beach Unified School District (LBUSD)** is a school district with a student population of more than 2,600 students and a budget of over $17.5 million. *Amici* believe that our perspective, as educators and organizations that support educators and set educational policy, will provide a unique viewpoint on the issues in this case.

1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that this brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, their members, or their counsel make a monetary contribution to the preparation of this brief.

Discriminatory attitudes such as those exhibited by the Boy Scouts of America ("BSA" or "Boy Scouts") in expelling James Dale promote negative and harmful attitudes toward gay students in our schools. Gay teens, "whose experience has often been one of dark isolation," are beginning to find acceptance in American society.[2] John Leland, *Shades of Gay*, Newsweek, Mar. 20, 2000, at 46, 48. A recent poll indicates that most Americans now support equal rights in employment (83%) and housing (78%), and a majority support health insurance (58%) and Social Security (56%) benefits for same-sex partners. *Id.* at 48-49. Every state but Florida now allows gay adults to adopt children.[3] Ten states, in addition to New Jersey, include sexual orientation among the forms of statutorily-prohibited discrimination.[4]

Amici, as public educators and caretakers of our nation's youth, are deeply concerned, however, about the isolation and discrimination that gay youth continue to experience. One recent survey of students found the following disturbing facts about the harsh environment for gay students, and students perceived to be gay, in schools today:

2. According to recent studies, homosexual adolescents identify themselves as gay, on average, at age sixteen. Caitlin Ryan & Donna Futterman, *Lesbian & Gay Youth: Care and Counseling*, at 10 (1998). *See also* Daniela Altimari, *Refusing to Hide In the Closet*, Hartford Courant, Feb. 20, 2000, at B1 (The "age when gay people 'come out' has dropped dramatically in recent years" and is now, on average, age fifteen.).

3. *See* Margo Harakas, *Increasingly, Same-Sex Households Are Opting For Parenthood, Whether By Adoption or Other Methods*, Sun-Sentinel, May 11, 1998, at 1D (noting that in 1998 all states except New Hampshire and Florida allowed adoption by gay adults); New Hampshire House Bill 90, 1999 NJH HB 90 (enacted May 3, 1999) ("removing the prohibition on adoption and foster parenting by homosexual persons" effective July 2, 1999).

4. *See* Robert P. Lewis, *Courts Struggle With Sexual Harassment Against Homosexuals*, N.Y.L.J., Nov. 29, 1999, at 1 (listing California, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin).

> [O]ne out of every thirteen students had been assaulted or harassed because they were perceived to be gay. Four out of five of those youth . . . were actually straight. Regardless of the student's actual sexual orientation, these youth that were assaulted or harassed because they were perceived to be gay were more likely to skip school, drop out altogether, or attempt suicide. . . . In addition to direct experience with victimization, 90 percent of gay and lesbian youth reported hearing anti-gay epithets at school, 36 percent reported hearing these remarks from faculty or staff and 39 percent reported that no one ever intervened.

Press Release: Kuehl's Historic Student Protection Legislation Signed by Governor (visited Mar. 27, 2000) <http://democrats.assembly.ca.gov/members/a41/press/p4199021.htm>. Adding to the isolation they experience in schools, gay students are also frequently shunned by families, religious institutions, and organizations that provide crucial support to their heterosexual peers.

Amici are also concerned about the effect of discriminatory practices on students with gay parents. Estimates on the number of children currently under the care of same-sex parents range from four to twelve million. Margo Harakas, *Increasingly, Same-Sex Households Are Opting For Parenthood, Whether By Adoption or Other Methods*, Sun-Sentinel, May 11, 1998, at 1D. "[T]hese moms and dads have the same concerns, frustrations and dreams as any parent. Their kids are in Scouts and sports. They themselves get involved in school functions. . . ." *Id.*

As public organizations responsible for the education and welfare of *all* children, *amici* are deeply concerned about the negative ramifications for children in public school districts across the nation if a large, non-selective group such as BSA, which is so closely connected to the government, receives government funding and other government benefits, and avails

itself of so many government services, is allowed to discriminate against gay students.

SUMMARY OF ARGUMENT

The Boy Scouts are closely affiliated with government at all levels and receive special benefits from public entities of all kinds. BSA operates under charter of the federal government and reports annually to Congress. Moreover, federal, state, and local governments have enacted an array of statutes providing the Boy Scouts with privileges, including free use of facilities, free transportation, free services and supplies, income and property tax exemptions and licensing exemptions.

Public schools are one of the leading sponsors of Boy Scout troops in the country today, accounting for sponsorship of nearly 12,000 troops consisting of more than 425,000 boys. Other public sponsors include the Army, Navy, Air Force, Marines, National Guard, Coast Guard, law enforcement agencies, fire departments, and city governments. As sponsors, these public entities provide facilities, funding and leadership to Boy Scout troops. BSA's extensive relationships with federal, state, and local governments are an important factor in assessing BSA's claims that the New Jersey Law Against Discrimination (the "LAD") infringes upon BSA's First Amendment freedom of expressive association and intimate association.

The LAD does not infringe upon BSA's freedom of expressive association because BSA lacks a purpose of promoting the view that homosexuality is immoral. Scouting has never had any purpose that required the exclusion of gay members or leaders. Indeed, consistent with the policies of public schools and other public entities with which BSA is affiliated, BSA has always been committed to having a diverse and representative membership of boys across the country. If the expressive purposes of the Boy Scouts required the exclusion of gay members and leaders, BSA surely would neither seek nor be able to obtain financial assistance, sponsorships, and other privileges from government entities such as public schools that are prohibited by law, as well as their own official policies,

from discriminating on the basis of sexual orientation. The Boy Scouts have solicited and accepted sponsorships from these public institutions, along with a wide array of other government benefits. Having done so, BSA cannot now claim that it has an expressive purpose that is contrary to the purposes and policies of the public entities with which it is affiliated.

Alternatively, BSA is so entangled with federal, state, and local governments that, even if its First Amendment associational rights were implicated here, BSA can claim only minimal protection of such rights. Just as a commercial group avails itself of the benefits of the marketplace and thereby forgoes some of its First Amendment protections, an organization such as BSA, which has availed itself of the many benefits flowing from its government associations, must forego certain membership restrictions otherwise available to truly private organizations. BSA cannot have it both ways — being public for purposes of receiving publicly funded sponsorships and privileges, and private when it wishes to discriminate. BSA has entered the public arena and must play by its rules.

Nor does the LAD infringe upon BSA's freedom of intimate association because membership in BSA is not the kind of intimate or private relationship that the First Amendment is intended to protect. In addition to its large size and lack of selectivity, BSA's complex network of government affiliations demonstrates that BSA is not the intimate or private organization that it claims to be. BSA operates in public schools and other public facilities across the country in close affiliation with public entities of all kinds. BSA itself promotes extensively its government ties in an effort to recruit new Scouts and volunteers. In doing so, BSA has taken on a public character that directly controverts any claim of intimate association.

Finally, the Court should not expand First Amendment rights to intrude upon state sovereignty. If BSA were permitted to hide behind the veil of the First Amendment, the states would be rendered powerless to combat discrimination in many forms.

This Court should reaffirm its commitment to state sovereignty by holding that states such as New Jersey may protect their citizens from invidious discrimination in places or organizations of public accommodation such as the Boy Scouts of America.

ARGUMENT

A. BSA's Extensive Entanglement With Government Endows It With A Public Character Not Shared By Other Organizations.

BSA claims that it is "neither public nor quasi-commercial" and asserts that if it were subjected to the LAD, then "virtually all contested membership and leadership decisions" of all private organizations would be subject to anti-discrimination laws as well. Pet. Br. 37-38. On the contrary, BSA's extensive entanglement with every level of government endows BSA with a uniquely public character that is not shared by other organizations. It is only through BSA's relationship with the government that BSA has achieved its enormous size and has gained such a pervasive influence in this country.

1. BSA Has an Extensive Relationship With The Federal Government.

Since its inception, BSA has been closely affiliated with the federal government. In 1916, Congress granted BSA a federal charter in recognition of its service to the military and government as an "auxiliary force in the maintenance of public order." H.R. Rep. No. 64-130, at 2 (1916). *See* 36 U.S.C. § 30901 (Supp. IV 1994). BSA's charter requires BSA to report directly to the federal government by submitting an annual report to Congress detailing BSA's activities for the prior year. 36 U.S.C. §§ 30907-08 (Supp. IV 1994). The President of the United States is the Honorary President of BSA, and has traditionally addressed a group of Boy Scouts every four years. *See* BSA, *1996 Annual Report*, at 36; *Historical Highlights: More Than 80 Years of Scouting in America* (visited Mar. 27, 2000) <http://www.scouting.org/factsheets/02-511/1980.html>. BSA's Report to the Nation is presented annually to the executive branch and both houses of Congress. *Press Releases: Scouts Present Report to the Nation* (visited Mar. 27, 2000) <http://www.scouting.org/press/990422/index.html>. BSA's charter also provides perpetual protection — above and beyond federal patent, copyright and trademark law — for the Boy Scouts' emblems, badges, and other descriptive marks. 36 U.S.C. § 30905 (Supp. IV 1994).

In addition to the charter, the federal government has enacted an array of statutes to confer various benefits on BSA. For example, the Boy Scouts are authorized by statute to receive free services and medical supplies from the federal government. 10 U.S.C. § 2544 (Supp. IV 1994). The Secretary of Defense and "[o]ther departments of the federal government" are authorized to lend equipment to the Boy Scouts for use at Boy Scout Jamborees. *Id.* The Navy, Marines, and Coast Guard are authorized to give materials to the Boy Scouts. *Id.* at § 7541; 14 U.S.C. at § 641 (Supp. IV 1994). BSA is entitled to purchase excess material from the Army (10 U.S.C. § 4682 (Supp. IV 1994)), Navy (*Id.* § 7541), Air Force (*Id.* § 9682), Marines (*Id.* § 7541), and Coast Guard (14 U.S.C. § 641 (Supp. IV 1994)). BSA is also entitled to assistance from the National Guard, ranging from transportation to emergency medical services to use of facilities. 32 U.S.C. § 508 (Supp. IV 1994).[5]

The federal government provides other forms of assistance to the Boy Scouts as well. For example, since 1981, Fort A.P.

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5. Other federal statutes providing assistance and benefits to the Boy Scouts include 36 U.S.C. § 40731 (Supp. IV 1994) (authorizing BSA to borrow firearms and supplies, with or without charge, from the Corporation for the Promotion of Rifle Practice and Firearms Safety); 16 U.S.C. § 539f (Supp. IV 1994) (authorizing the Secretary of Agriculture to waive all or a portion of the fees due to the federal government for the use of national forest land as Boy Scout camps); and 10 U.S.C. § 2606 (Supp. IV 1994) (authorizing the Secretary of Defense to cooperate with the Boy Scouts to establish scouting facilities and services for military personnel overseas, authorizing the Boy Scouts to receive free transportation, office space, warehousing, utilities, and means of communication, and to receive reimbursement for the pay of Boy Scout personnel performing services overseas).

Hill, a 76,000-acre U.S. Army facility in Virginia, has served as the permanent site for the National Scout Jamboree. *2001 National Scout Jamboree: Location and Site* (visited Mar. 27, 2000) <http://www.scouting.org/jamboree/location.html>. During the 2001 Jamboree, Fort A.P. Hill will support "a city of nearly 38,000 Scouts and leaders" complete with buses, telephones, a hospital, police and fire stations, post offices, food warehouses, a daily newspaper and retail stores. *Id.* The Jamboree, traditionally held every four years, enlists the aid of thousands of U.S. service members from the Army, Air Force, Navy and National Guard, who — at taxpayers' expense — do everything from set up the Jamboree and run adventure areas to help Scouts earn badges and entertain the Scouts with drill teams, color guards and parachute jumpers. Jim Garamone, *Service Members Build, Run Scout City* (visited Mar. 27, 2000) <http://boyscout.home.texas.net/CITY01.html>.

The federal government has also partnered with BSA in various conservation initiatives. For example, BSA's leaders are working directly with National Park Service personnel to coordinate environmental conservation projects in National Parks. *Press Releases: The Boy Scouts of America Delivering the Promise* (visited Mar. 27, 2000) <http://www.scouting.org/press/990815/index.html>. As part of this project, Scouts will earn a commemorative patch from the National Park Service. *Id.* BSA has also partnered with the federal government in the TRAIL Boss program which was jointly developed by BSA and the U.S. Forest Service, Bureau of Land Management, U.S. Army Corps of Engineers, U.S. Soil Conservation Service, U.S. Environmental Protection Agency, National Park Service and U.S. Fish and Wildlife Service to train leaders of volunteer organizations in skills needed to lead conservation and public service projects. BSA, *1992 Annual Report*, at 7.

2. BSA Has Extensive Relationships With State Governments.

In addition to its longstanding ties to the federal government, BSA also maintains close relationships with state governments. Through those relationships, BSA receives a wide range of special privileges and benefits. In New Jersey, for example, the legislature has exempted from state taxation real and personal property used for the purposes of the Boy Scouts. N.J. Stat. Ann. § 54:4-3.24 (West 1999). New Jersey has also exempted BSA from registration fees for motor vehicles owned by local councils of the Boy Scouts, *id.* at 39:3-27, and from paying taxes on fuel used in motor vessels used for Sea Scout training, *id.* at 54:39-66. New Jersey has even authorized its Board of Fish and Game to stock with fish any body of water "that is under the control of and for the use of . . . the Boy Scouts." *Id.* at 23:2-3. Tax advantages like those granted by New Jersey are common features of state tax codes across the country.[6]

3. Public Entities Sponsor and Provide Facilities For Boy Scout Troops.

Federal, state and local governments are major sponsors of Boy Scout troops. The U.S. Air Force, Army, Navy, Marines, National Guard (Army and Air), Coast Guard, and Department of Housing and Urban Development sponsor troops throughout the country. *Chartered Organizations and the Boy Scouts of America*, BSA External Comm. Div., Pub. No. 2-507 (1999); *Chartered Organizations: Top 30 For 1997 Ranked By Total Youth*, BSA Today, No. 50886, Feb./Mar. 1998 ("*Chartered Organizations: Top 30*"). In addition, law enforcement agencies and fire departments sponsor nearly 7,000 troops and 132,847 youth members in the U.S. *Chartered Organizations: Top 30.*

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6. *See, e.g.*, Ala. Code § 40-9-12 (West 1999); Cal. Rev. & Tax Code § 6361 (West 1999); Ind. Code Ann. § 6-1.1-10-25 (West 1999); Md. Code Ann. Tax-Prop. § 7-233 (West 1999); Okla. Stat. Ann. Tit. 63, § 1356 (West 1999); W. Va. Code § 11-15-9 (West 1999); Wis. Stat. Ann. § 70.11 (West 1999).

Even BSA admits that nearly "10 percent of [Boy Scout troops] are chartered to public institutions." *See* Pet. Br. at 3.

Public schools are among the leading sponsors of Boy Scouts in the country. For example, in 1997, public schools ranked first nationally among all sponsoring organizations in total youth membership. *Chartered Organizations: Top 30* (reporting that public schools sponsor 11,863 Boy Scout troops and 427,842 youth members). *See also Facts About Scouting*, Boy Scout Pub. No. 02-179 (1999) (public schools ranked third nationally among all chartered organizations in the country). In New Jersey alone, public schools and school-affiliated groups sponsor nearly 500 troops, approximately one-fifth of the troops in that state. *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1201 (N.J. 1999).

Public entities that sponsor Boy Scout troops are intimately involved in the operation of these troops. According to BSA, each troop is "locally owned and operated by its [sponsoring] organization." BSA, *1991 Annual Report*, at 13. BSA explains that "BSA really doesn't have any packs or troops, just a unique program chartered to local organizations that deliver Scouting to boys of the community." BSA, *1997 School Night to Join Scouting/Join Scouting Night Guidebook* ("*Join Scouting Guidebook*"). Thus, many troops are owned and operated by federal, state and local government agencies, including public schools. These sponsoring organizations are responsible for providing a meeting place and support for troop activities, as well as the adult leadership for the troops. *See What is Boy Scouting* (visited Mar. 27, 2000) <http://www.scouting.org/factsheets/02-503.html>; *Chartered Organizations and the BSA* (visited Mar. 27, 2000) <http://www.scouting.org/factsheets/02-507.html>.

In addition to sponsoring Boy Scout troops, public schools across the nation make their facilities and resources available to BSA for meetings, activities, and recruiting. According to BSA, "[m]ore and more of our schools are becoming available

for other than formal education. . . . In-school Scouting, where the pack, troop, team, or post meets during the school day, is recognized in many areas." *Organizations That Use Scouting*, BSA Pub. No. 3041C (1989), at 7. BSA also boasts that their after-school programs meet the "educational concerns" of parents in that BSA volunteers include "[d]edicated educators [who] are always willing to give unselfishly of themselves when it comes to youngsters" and who even "supervise homework sessions before beginning Scouting activities." BSA, *1996 Annual Report*, at 10-11. Indeed, recruiting in public schools "is standard practice throughout the nation" for BSA. *Across the USA: News From Every State*, USA Today, Oct. 12, 1999, at 12A; *see also Join Scouting Guidebook* (inviting "[a]ll boys and their parents . . . to the elementary school nearest their homes to learn about Scouting"). BSA uses public schools as a fertile ground for recruitment, asserting that "[t]he education field holds our greatest potential." *Organizations That Use Scouting*, at 7.

Many public school districts with which BSA interacts, including *amici*, have official policies prohibiting discrimination on the basis of sexual orientation. For example, NYCBOE has a longstanding policy of providing educational opportunities without regard to sexual orientation, and expressly prohibits organizations using school facilities from "exclud[ing] persons on the basis of race, religion or any other impermissibly discriminatory reason," including sexual orientation. *See* NYCBOE, *Standard Operating Procedures*, § 5.25 (Apr. 1990); *see also Policy Against Bias and Discrimination in All Facilities and at All Levels of the NYCBOE* (adopted Apr. 28, 1993). Similarly, LBUSD requires that its "programs and activities shall be free from discrimination . . . with respect to . . . sexual orientation" and conditions the use of its facilities on adherence to policies and regulations precluding "[a]ny use which is discriminatory in the legal sense," which, in California, includes discrimination on the basis of sexual orientation. *See* LBUSD Bd. Policy 4030(a) (adopted Apr. 12, 1994);

LBUSD Admin. Reg. 1330(b) (adopted Apr. 12, 1994); Cal. Educ. Code § 200 (West 2000).[7]

4. Public Entities Support BSA's Learning For Life and Explorer Programs.

"Learning for Life" is a classroom-based program created by the Boy Scouts that is conducted on public school grounds, during class time, using school personnel. *See Learning for Life Programs — Program Methods* (visited Mar. 27, 2000) <http://www.ocbsa.org/ocbsa/scouting_program/learning/

7. *See also* L.A. Bd. of Educ. Resolution, *Respectful Treatment of All Persons* (adopted Oct. 10, 1998) (reaffirming "policy that students and adults in both schools and offices should treat all persons equally and respectfully and refrain from the willful or negligent use of slurs against any person on the basis of . . . sexual orientation"); LAUSD *Sexual Harassment Policy/Procedures*, Education Equity Office/General Counsel, Bulletin No. L-5, July 30, 1998 (protecting gay and lesbian students and staff from discrimination); S.D. Bd. of Educ. Policy No. A-3500 (revised Dec. 1, 1992) (stating that "[n]o student shall be excluded from participation in, be denied the benefits of, or otherwise be discriminated against in district educational programs by reason of his/her . . . sexual orientation"); S.F. Bd. of Educ., Res. No. 18-13A6, Policy No. P5163 (adopted Sept. 12, 1991) (mandating that SFUSD "shall not discriminate on the basis of . . . sexual orientation . . . in the provision of educational programs, services and activities"). Public schools in California are also subject to the Student Safety and Violence Prevention Act of 2000, which prohibits discrimination against any student on the basis of sexual orientation. Cal. Educ. Code § 200 (West 2000). The National School Boards Association, which represents 95,000 school board members governing nearly 15,000 school districts across all 50 states, includes in its Beliefs and Policies the mandate that local school boards "should ensure that students are not subjected to discrimination on the basis of . . . sexual orientation." NSBA, Beliefs & Policies, Art. II, § 3.4 (adopted Apr. 1999). Likewise, AASA's Year 2000 Diversity Resolution instructs that children should be taught "that diversity is not something to fear" but that "differences are regarded as exciting opportunities for enrichment," and recommends that school districts address the issue of sexual orientation discrimination on their campuses. AASA, 2000 Platform and Resolutions, Resolution XI.

programmethods.html>. The program provides lesson plans for use by teachers in kindergarten through high school, and is designed to "develop social and life skills, [assist] in character development, and help[] [children] formulate positive values." *Learning for Life* (visited Mar. 27, 2000) <http://www.learning-for-life.com/lfl/about/main.html>. Learning for Life, which is funded substantially by government, now operates in more than 20,000 schools and organizations nationwide, serving 1.4 million youths. *See Learning for Life* (visited Mar. 27, 2000) <http://www.learning-for-life.com/lfl/about/main.html>; Adam C. Smith, *Ministers: Scouts' Values Inappropriate*, St. Petersburg Times, Oct. 12, 1999, at 1B; Dean Geroulis, *Boy Scouts to Get Money to Start School Program on Values*, Chi. Trib., Sept. 21, 1999.

BSA's "Explorer" program is a worksite-based program that is part of "Learning for Life's career education program" for young men and women who are 14 to 20 years old. *Exploring* (visited Mar. 27, 2000) <http://www.learning-for-life.com/exploring/main.html>. The program is operated in conjunction with law enforcement agencies, fire departments and other community organizations across the country. *What is Exploring?* (visited Mar. 27, 2000) <http://www.learning-for-life.com/exploring/index.html>. For example, in New York City, 3,200 Boy Scout Explorers "get weekly immersion in law enforcement groups that also include New York's transit and housing police, and the Drug Enforcement Authority, FBI, Secret Service, and U.S. Customs Service." BSA, *1996 Annual Report*, at 5. BSA boasts that over 90% of all police precincts in New York City have Boy Scout Explorer programs. *Id.* at 4.

5. BSA Relies Upon Its Relationships With Government To Promote Its Organization.

BSA promotes its extensive ties to the government in recruiting new scouts and volunteers. For example, BSA devotes a significant portion of its website to describing its relationships with U.S. Presidents, Congressmen, and other public officials. *See, e.g., Historical Highlights* (visited Mar. 27, 2000) <http://

www.scouting.org/factsheets/02-511/index.html>; *The Congress and Scouting* (visited Mar. 27, 2000) <http://www.scouting.org/factsheets/02-571.html>. In promoting its many government affiliations, BSA has attracted countless boys and young adults to its program. It is beyond doubt that BSA's ties to the government have helped the organization achieve its ubiquitous presence in American culture and a pervasive influence on American youth.

In summary, BSA's connections with governments at all levels are complex and far-reaching. No truly private organization is anything like the Boy Scouts, with its many layers of entanglement with federal, state and local governments. BSA's entanglement with government is an important factor in evaluating BSA's claims that the LAD violates the Boy Scouts' right of expressive association and its right of intimate association.[8]

B. Application of the LAD to BSA's Discriminatory Practices Does Not Infringe Upon BSA's Freedom of Expressive Association.

Contrary to BSA's contention, the LAD does not infringe upon BSA's freedom of expressive association. In *Roberts v. Minnesota Dep't of Human Rights*, 468 U.S. 609 (1984), *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), this Court set forth the framework for analyzing the degree to which the First Amendment right to expressive association shields a group from state anti-discrimination laws. Under this framework, a group must show that it has "specific expressive purposes," *New York State Club Ass'n*, 487 U.S. at 13, and that application of the state law to its discriminatory practices

8. In addition, BSA's extensive entanglement with government controverts BSA's claim that the New Jersey Supreme Court was wrong in extending the LAD to the Boy Scouts' discriminatory practices. *See* Pet. Br. 37-38. An examination of the overwhelming number and character of BSA's relationships with government demonstrates that it is not only appropriate but, indeed, obvious that BSA is a "public accommodation" subject to the LAD.

would impose such "serious burdens" on these specific expressive purposes, *Roberts*, 468 U.S. at 626, that the group's members would be forced to "abandon or alter" their expressive activities or "abandon their basic goals." *Rotary*, 481 U.S. at 548.

Applying this framework to BSA, the New Jersey Supreme Court correctly found that the LAD does not infringe upon BSA's expressive associational rights "because the statute does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views." *Dale*, 734 A.2d at 1223. The court was "not persuaded . . . that a 'shared goal[]' of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral." *Id.* at 1224-25 (citing *Roberts*, 468 U.S. at 622).

1. BSA Does Not Have an Expressive Purpose of Promoting the View That Homosexuality Is Immoral.

If one of BSA's expressive purposes were to teach children that homosexuality is immoral, *amici*, having sponsored or facilitated Boy Scout troops, would know about it.[9] Our schools are familiar with the principles taught by the Boy Scouts. Those principles simply do not include moral condemnation of homosexuality. To the contrary, consistent with the policies of *amici* and other educational institutions with which BSA has long been associated, BSA has always

9. Schools under the supervision of the NYCBOE make school facilities available to the Boy Scouts after school hours by permit, and some allow the Boy Scouts to recruit on campus. Schools in the LAUSD make school facilities available to the Boy Scouts after school hours by permit. Schools in the SDUSD participated in the Boy Scouts' Learning for Life program until 1993 and continue to make school facilities available to the Boy Scouts after school hours. Schools in the SFUSD make school facilities available to the Boy Scouts after school hours by permit. Schools in the LBUSD make school facilities available to the Boy Scouts after school hours and allow the Boy Scouts to recruit on campus during school hours.

been committed to the inclusion of a "diverse and 'representative' membership."[10] *Dale*, 734 A.2d at 1226. Throughout its literature, advertisements and promotional materials, BSA holds itself out as being available to *all boys*, not just heterosexual boys. *See, e.g.*, Boy Scouts of America, *The Boy Scout Handbook, passim* (11th Ed., 1998); *1997 Join Scouting Guidebook*.[11]

If the expressive purposes of the Boy Scouts required the exclusion of homosexuals, BSA surely would not seek financial support and sponsorship from public entities that are prohibited by law and by official policy from discriminating on the basis of sexual orientation. Public entities in New Jersey, including public schools, "are, of course, bound by the LAD." *Dale*, 734 A.2d at 1213 n.7. "Their sponsorship of, or conferring of special benefits on, an organization that practices discrimination would be prohibited." *Id.* Moreover, as previously explained, many public entities such as *amici* have internal policies prohibiting sexual orientation discrimination and would not confer benefits on an organization that practices such discrimination in contravention of their own regulations.

Knowing that many government institutions are subject to anti-discrimination laws and internal policies prohibiting sexual

10. Nowhere does the Boy Scout Handbook, in summarizing "all you need to do to become a Boy Scout," require that a boy be heterosexual. BSA, *The Boy Scout Handbook*, at 4 (11th ed. 1998).

11. Further evidence that BSA lacks a core discriminatory purpose is that BSA has continued to allow troops to operate despite their non-compliance with BSA's anti-gay position. For example, BSA renewed the charter of Troop 260 in San Jose, California, despite the troop's announcement that "it would accept gay people as Scouts and leaders." *See Defiant Scout Troop Gets Charter*, The Courier-Journal (Louisville, KY), Feb. 23, 1992, at 10A. In addition, Boy Scout troops that have voiced opposition to BSA's discriminatory policy have been permitted to continue operating their troops. *See, e.g., Editorial: Local Scouts Set Example*, The Providence Journal-Bulletin, Nov. 28, 1999, at 10F (The Rhode Island and Minnesota chapters of BSA oppose and have urged reconsideration of BSA's anti-gay position.).

orientation discrimination, BSA nevertheless continues to affiliate with these public entities and to use their facilities for programs, troop meetings, and recruiting. For example, in New York City, where BSA boasts that over 90% of all police precincts have Boy Scout Explorer programs, the police department is prohibited by New York City law from discriminating on the basis of sexual orientation. *See* N.Y. Admin. Code § 8-107; BSA, *1996 Annual Report*, at 4.

BSA also holds meetings, recruits members, and operates its Learning For Life program in public schools that are subject to laws and internal policies that prohibit discrimination on the basis of sexual orientation. In some cases, the Boy Scouts' use of public school facilities is expressly conditioned on adherence to the schools' anti-discrimination policies. For example, in New York City, the Boy Scouts have *expressly agreed*, in order to obtain the use of public school facilities after hours, that they will abide by NYCBOE policies banning discrimination.[12] From 1994 to 1999, NYCBOE issued to the Boy Scouts at least 265 permits to use school facilities for Boy Scout activities, and each time the Boy Scouts signed a permit, they expressly agreed to comply with NYCBOE regulations. *See NYCBOE Permit Application — School Buildings*, Form No. 25-2751.00.0 (6/92). Thus, on average, once a week for the past five years, the Boy Scouts have signed such a permit application and thereby agreed to adhere to the NYCBOE's anti-discrimination policy.

12. Organizations such as BSA are permitted to use New York City public school facilities after hours provided that "such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public" and subject to NYCBOE regulations governing such use. N.Y.C. Educ. Law, tit. 1, art. 9, § 414(1)(c). NYCBOE regulations expressly prohibit organizations using school facilities from "exclud[ing] persons on the basis of race, religion or any other impermissibly discriminatory reason," including sexual orientation. *See* NYCBOE, *Standard Operating Procedures*, § 5.25 (Apr. 1990); *see also Policy Against Bias and Discrimination In All Facilities and At all Levels of the NYCBOE* (adopted Apr. 28, 1993).

Similarly, in San Francisco, in order to use public school facilities, the Boy Scouts have signed permit applications in which they have *expressly agreed* to abide by SFUSD rules and regulations, which prohibit sexual orientation discrimination. *See* SFUSD, Application and Permit for the Use of School Property. Moreover, in Los Angeles, Boy Scouts who use school facilities after hours sign permit applications in which they agree that "[m]eetings shall be non-exclusive and shall be open to, and of interest to, the general public." *See* LAUSD Application For Use of School Facilities, Form No. 30.11 (rev. 03/93). Likewise, in Laguna Beach, Boy Scout troops conduct meetings and activities in public school facilities, even though the LBUSD conditions the use of its facilities on adherence to policies and regulations precluding "[a]ny use which is discriminatory in the legal sense," which, in California, includes discrimination on the basis of sexual orientation. *See* LBUSD Admin. Reg. 1330(b); Cal. Educ. Code § 200 (West 2000).

In sum, the Boy Scouts have collaborated with public schools, including *amici*, that have policies prohibiting sexual orientation discrimination and are subject to state anti-discrimination laws. The Boy Scouts have accepted privileges from New Jersey and other states that have anti-discrimination laws. The Boy Scouts have solicited sponsorships from public entities that then provide leadership to members under the Boy Scout banner. Having established such an extensive network of associations with governments at all levels, the Boy Scouts cannot now claim to have an expressive purpose contrary to the laws and policies to which BSA's public sponsors and collaborators are subject.[13]

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13. Even if BSA somehow could show that it has an expressive purpose of promoting the view that homosexuality is immoral and that the LAD infringes upon that purpose, any burden on BSA's First Amendment rights would be outweighed by New Jersey's compelling interest in eradicating discrimination. The LAD "plainly serves compelling state interests of the highest order" since "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent." *See Roberts*, 468 U.S. at 628.

2. BSA's Argument that the LAD Impermissibly Infringes on Its Freedom of Association, If Accepted, Would Require a Radical Departure From Established First Amendment Jurisprudence and Would Render Civil Rights Laws Virtually Meaningless.

Having failed to prove that its discriminatory practices further an expressive purpose of the organization, BSA advances several alternative arguments in an attempt to circumvent this threshold requirement. If, however, BSA were to obtain an exemption from the LAD on First Amendment grounds without proving an infringement upon an expressive purpose, civil rights laws would be eviscerated.

(a) *Hurley* Does Not Apply To This Case.

First, BSA argues that *Hurley* should control this case, rather than *Roberts* and its progeny. *See* Pet. Br. 22-30. *Hurley*, however, involved the application of an anti-discrimination statute to the "inherent[ly] expressive[]" activity of marching in a parade. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In holding that application of an anti-discrimination statute to a St. Patrick's Day parade violated the parade's rights of free speech, the Court compared the act of marching in a parade to a demonstration or a protest march, which are by nature expressive activities. *Id.* at 568, 576. The Court noted that "a parade's dependence on watchers is so extreme" that "if a parade or demonstration receives no media coverage, it may as well not have happened." *Id.* at 568. In contrast, BSA was not formed for the purpose of engaging in speech. BSA was organized to teach boys scouting skills, independence and self-sufficiency. *See* 36 U.S.C. § 30902 (Supp. IV 1994); H.R. Rep. No. 64-506 (1916).

In addition to focusing on the expressive nature of the parade, the Court in *Hurley* examined the purpose of the gay rights organization in seeking to march in the parade. The Court found that the organization's participation was "equally

expressive" because the organization was formed for the very purpose of marching in the parade, and intended to do so to promote a message that there are openly gay, lesbian, and bisexual descendants of Irish immigrants in the community. *Hurley*, 515 U.S. at 570. In contrast, Dale did not join the Boy Scouts for the purpose of propounding a pro-gay philosophy. Dale became a member of the Boy Scouts when he was eight years old. *Dale*, 734 A.2d at 1204. He remained a member of the Boy Scouts for a decade until he was expelled at age eighteen, and has never had a purpose of speaking to other Scouts about any topic relating to sexuality. *Id.* at 1225. Thus, BSA's attempt to fit this case within the framework of *Hurley* not only requires a stretch of the imagination but also a drastic departure from established First Amendment precedent.[14]

(b) If the Court Were to "Give Deference" To BSA's Own Characterization of Its Expressive Purpose, Any Organization Could Become Exempt From Civil Rights Laws By Professing a Purpose To Justify Its Discrimination After the Fact.

BSA also argues that the Court "must give deference" to BSA's own characterization of its beliefs and accept at face value

14. BSA's contention that it should receive First Amendment protection of its discriminatory conduct, if accepted, would also erode the holding of *Runyon v. McCrary*, 427 U.S. 160, 176 (1976). There, the Court held that a federal statute prohibiting racial discrimination did not impermissibly infringe upon the schools' freedom of expressive association because, while the statute prohibited the schools from excluding blacks, the schools could still promote the view that racial segregation is proper. Although the LAD prohibits BSA from excluding members and leaders based on sexual orientation, BSA remains "free to inculcate whatever values and standards [it] deem[s] desirable" for scouting. *See id.* at 177. As in *Runyon*, BSA has not shown that discontinuance of its discriminatory practices "would inhibit in any way the teaching . . . of any ideas or dogma," and BSA's discriminatory practices therefore should not be exempted from the LAD on First Amendment grounds. *See id.* at 176.

BSA's contention that it has an expressive purpose that requires the exclusion of homosexuals. *See* Pet. Br. 26. This argument, if accepted, would render civil rights laws virtually meaningless. If the Court were to defer to an organization's self-serving statements about its professed purposes, any organization could claim, after the fact, to have a racist or sexist or anti-gay purpose and automatically be exempt from civil rights laws. An organization's expulsion of a member could in itself be used to show that the member's beliefs conflict with the organization's "expressive purpose." The determination of whether BSA has an expressive purpose of promoting an anti-gay message must be made on the facts, not on BSA's bare assertion of such a purpose. The facts reveal that BSA's characterization of itself as an anti-gay, quasi-religious organization is in blatant conflict with reality.

(c) BSA's "Leadership" Decisions Are Subject to the Same Analysis as BSA's "Membership" Decisions.

BSA also suggests that the First Amendment should provide *unqualified* protection to BSA's right to choose its leaders. Pet. Br. 34. This contention has no support in First Amendment jurisprudence, and creates a false distinction between members on the one hand and Scout leaders on the other.

The "leadership" of the Boy Scouts is an amorphous category that BSA itself neglects to define. Each of the million plus adult "Volunteers" across the nation that participates in scouting arguably falls within the category of BSA "leadership."[15] *See Fact Sheet: What Is Boy Scouting?* (visited Mar. 27, 2000) <http://www.bsa.scouting.org/factsheets/02-503.html>; *Fact Sheet: What Is Cub Scouting?* (visited Mar. 27, 2000) <http://www.bsa.scouting.org/factsheets/02-502.html>. These volunteer leaders "serve in a variety of jobs — everything from unit leaders to chairmen of troop committees, committee members, merit badge counselors, and chartered

15. James Dale's membership as an adult Volunteer leader was revoked on March 21, 1989. *Dale*, 734 A.2d at 1196.

organization representatives." *Fact Sheet: What Is Boy Scouting?* (visited Mar. 27, 2000) <http://www.bsa.scouting.org/factsheets/02-503.html>.

Presumably, Boy Scout "leaders" would also include the elite division of Eagle Scouts achieved by fewer than 4% of all Scouts, including James Dale. *The Boy Scout Handbook* at 179. The qualifications for becoming an Eagle Scout include serving for 6 months in one or more "positions of responsibility" such as patrol leader, senior patrol leader or troop guide. *The Boy Scout Handbook* at 180-81.

BSA encourages other Scouts to be "leaders" as well. *See What is Boy Scouting? Leadership Development* (visited Mar. 27, 2000) <http://www.scouting.org/factsheets/02-503.html> ("Every Boy Scout has the opportunity to participate in both shared and total leadership situations."). As boys move through the ranks of Scouting, they are encouraged at every stage to be "leaders" to other boys within their troop. *See The Boy Scout Handbook* at 172. The Boy Scout Handbook instructs that the "leadership positions" available to a Boy Scout within his troop include Senior Patrol Leader, Assistant Senior Patrol Leader, Patrol Leader, Order of the Arrow Troop Representative, Instructor, Troop Guide, Quartermaster, Den Chief and Junior Assistant Scoutmaster, in addition to "leadership positions for special projects or events" that a boy's Scoutmaster may offer him. *Id.* Thus, the Boy Scouts includes millions of adults and senior scouts who serve in some type of leadership capacity, making it is impossible to draw a meaningful distinction between Boy Scout "leaders" on the one hand and Boy Scout "members" on the other.

Moreover, BSA's distinction is irrelevant to established First Amendment precedent. The protections of the First Amendment extend to the decisions of an organization to choose *both* its leaders *and* its members, as long as that organization can show that it has an expressive purpose that is burdened by the anti-discrimination statute. *See Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989)

(overturning restrictions on political parties that infringed upon their right to "identify[] the people who constitute the association" and to choose their own leaders). Having failed to establish that it has an expressive purpose that is burdened by the LAD, BSA cannot now carve out a new exception to civil rights laws for its discriminatory "leadership" decisions.

Finally, BSA should have no more right to discriminate in its "leadership" decisions than public schools, including *amici*, and other public agencies with which BSA is affiliated. The LAD and similar anti-discrimination statutes prohibit public schools and governmental agencies from discriminating on the basis of sexual orientation in hiring teachers, administrators and other adult "leaders." *See, e.g.*, N.J. Stat. Ann. § 10:5-4 (West 1999) ("All persons shall have the opportunity to obtain employment . . . [in] any place of public accommodation . . . without discrimination because of . . . sexual orientation."); Cal. Gov. Code § 12940 (West 1999) ("It shall be unlawful . . . [f]or any employer, because of the . . . sexual orientation of any person, to refuse to hire or employ the person."). BSA should be subject to the same rules as the schools and other public entities that sponsor the Boy Scouts and provide them with funding, facilities and numerous other benefits.

3. Because BSA is Extensively Entangled With Government, BSA Can Claim Only Minimal Protection of Its Right of Expressive Association.

Even if this Court finds that the LAD, as applied to the Boy Scouts, does not meet the standard enunciated in *Roberts* and its progeny, BSA is so entangled with federal, state, and local governments that it can claim only minimal protection of its associational rights under the First Amendment.

In other contexts, this Court has considered the degree to which an individual or organization is entangled with the government in determining whether that individual or organization may be subject to various restrictions on speech. At one extreme, government entities and their agents receive little or no First Amendment protection because " 'nothing in

the [First Amendment] guarantee precludes the government from controlling its own expression or that of its agents.' " *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139-140 n.7 (1973) (Stewart, J., concurring) (quoting Professor Thomas Emerson, *The System of Freedom of Expression* 700 (1970)). Thus, the Court has upheld statutes that restrict the political activities of government employees, even when those activities take place outside of the workplace and during non-working hours. *See, e.g., United States Civil Serv. Comm'n v. National Assoc. of Letter Carriers AFL-CIO*, 413 U.S. 548 (1973) (upholding the Hatch Act), *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding a state statute restricting political activities of state employees), *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 95 (1947) (upholding the Hatch Act against First Amendment challenge).

The Court has also allowed greater restriction on the speech of private organizations and individuals that are associated with the government. *See, e.g., Lebron v. National R. R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (holding that, for the purposes of deciding whether a privately owned railroad could be required to accept political advertisements, the railroad was so intertwined with the government that it was "part of the Government for purposes of the First Amendment"). For example, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033 (1991), the Court held that the speech of lawyers "may be regulated under a less demanding standard than for regulation of the press" because "lawyers are key participants in the criminal justice system, [so] the State may demand some adherence to the precepts of that system in regulating their speech." 501 U.S. at 1074 (upholding state court rule prohibiting lawyers from making extrajudicial statements).

The Court went further in *Rust v. Sullivan*, 500 U.S. 173, 179 (1991), upholding restrictions on the speech of private doctors who have no connection to the government other than the receipt of federal funding under Title X of the Public Health Services Act. The Court held that the government was entitled to prohibit recipients of federal funds from advising patients about

abortions or providing referrals for abortions because those activities are outside the scope of Title X. *Id.* at 193-94.

As in those cases, an analysis of BSA's relationship with the government is important in determining whether BSA should be permitted to use the First Amendment as a shield against anti-discrimination laws. In evaluating the associational rights of membership organizations, those organizations that are truly private should be entitled to protection of both the content of their message and the choice of their members, whereas organizations that are substantially entangled with the government should be entitled to "only minimal constitutional protection" of their exclusionary membership policies. *See Roberts*, 468 U.S. at 632-34 (O'Connor, J., concurring).

This approach would be consistent with Justice O'Connor's concurring opinion in *Roberts*. Justice O'Connor focused on the fundamental attributes of an organization and suggested that the Court draw a distinction between commercial associations, entitled to "only minimal constitutional protection of [their] recruitment, training, and solicitation activities," *Roberts*, 468 U.S. at 634, and non-commercial associations "engaged exclusively in protected expression" and therefore entitled to "protection of both the content of [their] message and the choice of [their] members." *Id.* at 633. Under Justice O'Connor's analysis, to be entitled to First Amendment protection, a group must be so "predominantly engaged in protected expression" that "state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard." *Id.* at 635-36. Justice O'Connor reasoned that commercial groups are not so predominantly engaged and stated that "[a]n association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Id.* at 636.

BSA relies on Justice O'Connor's approach in *Roberts* to argue that because it is a non-commercial association, it should receive

the highest level of First Amendment protection. Pet. Br. 34-35. BSA's argument, however, myopically reduces the freedom of expression analysis to a narrow focus on a single factor. Justice O'Connor warned that the standard for determining where an organization falls on the spectrum of First Amendment protection "cannot . . . be articulated with simple precision," *Roberts*, 468 U.S. at 635, and the commercial/non-commercial distinction cannot be the sole and definitive factor in this determination. Indeed, it is equally important to consider the degree to which an organization is entangled with the government, as this Court previously has done. Although BSA is not a commercial enterprise, it is so extensively intertwined with government that it should receive only "minimal constitutional protection" of its expressive association rights. *See id.* at 633-36.

Just as a commercial group avails itself of the benefits of the marketplace and thus loses some of its associational protections, a group such as BSA that chooses to avail itself of government benefits and privileges, is supported and sponsored by the government, and holds itself out as being associated with the government, has entered the public arena and has thus lost "the complete control over its membership that it would otherwise enjoy if it confined its affairs" to the private arena. *Id.* at 636. BSA has chosen the public arena and must play by its rules. Those rules include anti-discrimination laws such as the LAD, which are applicable to the governmental entities with which BSA is so closely connected. At the very least, having sought and received government participation, sponsorship, and funding, BSA should have to prove — and has failed to do so — that the LAD places an actual burden on an actual expressive purpose held by BSA's five million plus members.

C. Application of the LAD to BSA's Discriminatory Practices Does Not Infringe Upon BSA's Freedom of Intimate Association.

Nor does application of the LAD to BSA's discriminatory practices infringe upon BSA's freedom of intimate association. The First Amendment right of intimate association protects "those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life.' " *Rotary*, 481 U.S. at 544 (quoting *Roberts*, 468 U.S. at 619-20). Criteria to be considered in determining whether an organization is "sufficiently personal or private" to warrant First Amendment protection include "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Id.* (citing *Roberts*, 468 U.S. at 620).

The New Jersey Supreme Court correctly found that BSA is large and non-selective. *Dale*, 734 A.2d at 1221. The Boy Scouts is an organization of nearly five million youths and over one million adult volunteers.[16] Since BSA's inception in 1910, more than 99 million young people have been involved in scouting. *News Release: Scouts Present Report to the Nation* (visited Mar. 27, 2000) <http://www.scouting.org/press/990422/index.html>. Rather than choosing its members selectively, BSA has "made a commitment to ensure that its membership is 'representative of all of the population.' " *Dale*, 734 A.2d at 1221. BSA advertises to the public without restriction, attempting to expand scouting to include as many boys as

16. BSA, *1998 Annual Report* (visited Mar. 27, 2000) <http://www.scouting.org/excomm/98annual/yir1998.html>; *Fact Sheet: What Is Boy Scouting?* (visited Mar. 27, 2000) <http://www.bsa.scouting.org/factsheets/02-503.html> (Boy Scouts had over 500,000 leaders in 1998); *Fact Sheet: What Is Cub Scouting?* (visited Mar. 27, 2000) <http://www.bsa.scouting.org/factsheets/02-502.html> (Cub Scouts had over 500,000 leaders in 1998).

possible. *Id.* It is hard to imagine many organizations that are less intimate than BSA.[17]

In addition to BSA's large size and lack of selectivity, the extent of BSA's relationships with the government demonstrates that BSA membership is not truly "intimate" or "private." Rather, BSA has a public character similar to the public entities with which it associates. BSA was chartered by the federal government and receives myriad benefits by statute from federal, state and local governments. BSA reports to Congress annually and also traditionally reports to the President of the United States. BSA itself promotes extensively its ties to the government in its effort to recruit new Scouts.

Even at the local level, BSA maintains extensive ties with governments at all levels. Boy Scout troops receive privileges from federal and state governments. They use public facilities for meetings, recruiting and activities. Boy Scout troops are sponsored by public schools, police departments, fire departments, and numerous other public agencies. BSA has opened its doors to the government, accepted a wealth of public resources from the government, acted in partnership with the government, and actively promoted its associations with the government. In doing so, it has taken on a public quality that renders BSA the antithesis of the "intimate or private relationship[]" that "led to an understanding of freedom of association as an intrinsic element of personal liberty." *See Roberts*, 468 U.S. at 620.

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17. The mere fact that it may be a parent's decision to place her children in the Boy Scouts does not make BSA an intimate association. Many parents choose to place their children in public schools, but the First Amendment does not exempt public schools from anti-discrimination laws. Although parents have a constitutional right to send their children to organizations such as Boy Scouts, they have no constitutional right to provide their children with a scouting experience that is "unfettered by reasonable government regulation." *See Runyon*, 427 U.S. at 177-78.

D. The Court Should Not Expand First Amendment Rights to Intrude Upon State Sovereignty.

Finally, New Jersey "enjoys broad authority to create rights of public access on behalf of its citizens." *See Roberts*, 468 U.S. at 625. Thus, BSA should not be permitted to hide behind the First Amendment to exempt itself from New Jersey's Law Against Discrimination. *Cf. Acara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (noting the "fallacy of seeking to use the First Amendment as a cloak for obviously unlawful . . . conduct by the diaphanous device of attributing protected expressive attributes to that conduct").

This Court has recently affirmed in a variety of contexts the rights of states to retain a significant degree of sovereignty over their own affairs. *See, e.g., Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (upholding the state's sovereign immunity from suits by private individuals under the ADEA); *Alden v. Maine*, 527 U.S. 706 (1999) (finding that the Constitution prohibited Congress from subjecting a state to suit in state court without its consent); *United States v. Lopez*, 514 U.S. 549 (1995) (prohibiting Congress from forcing states to comply with the Gun-Free School Zones Act); *New York v. United States*, 505 U.S. 144 (1992) (finding that Congress could not require states to provide for disposal of radioactive waste); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (ruling that Congress could not infringe on the state's right to determine the qualifications of its government officials).

Remedying the evils of discrimination is one of the areas that goes to "the heart of representative government" on the state level. *Gregory*, 501 U.S. at 461 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)). Many federal anti-discrimination statutes recognize the states' historical interest in remedying discrimination by requiring that victims exhaust state remedies or notify the state before seeking federal relief. *See, e.g.*, 42 U.S.C.A. § 2000a-3(c) (Supp. IV 1994) (requiring notification to state before discrimination victim can seek remedy under federal statute); 42 U.S.C.A. § 2000e-5(c)

(Supp. IV 1994) (providing that no charge of discrimination may be processed by the EEOC until the state remedy has first been invoked). New Jersey has exercised its sovereignty by promulgating an anti-discrimination law that on its face clearly applies to BSA. *See Gregory*, 501 U.S. at 457 ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.").

If BSA were permitted to shield its discriminatory practices behind the veil of the First Amendment, the states would be rendered powerless to combat discrimination in a variety of contexts. New Jersey has acted well within its rights and within the limits of the First Amendment in applying the LAD to the Boy Scouts. This Court should reaffirm its commitment to state sovereignty by holding that states such as New Jersey may shield their citizens from invidious discrimination in places and organizations of public accommodation, such as the Boy Scouts of America.

CONCLUSION

For the foregoing reasons, the decision of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

MITCHELL A. KARLAN
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
48th Floor
New York, NY 10166
(212) 351-4000

Counsel for Amici Curiae

Of Counsel:

RANDY M. MASTRO
LAURIE A. MCLAUGHLIN
S. ELIZABETH FOSTER
GRANT S. THOMPSON

FOR ARGUMENT

49

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Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

BRIEF OF SOCIETY OF AMERICAN LAW TEACHERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

DAVID COLE
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9078

NAN D. HUNTER
Counsel of Record
250 Joralemon Street
Brooklyn, N.Y. 11201
(718) 780-7517

Attorneys for Amicus Curiae
Society of American Law Teachers

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3 HPR

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. NEW JERSEY'S ANTI-DISCRIMINATION LAW DOES NOT COMPEL THE BOY SCOUTS TO EXPRESS ANY VIEWS INIMICAL TO THEIR OWN. 6

A. The Boy Scouts Expelled Dale for His Status, Not for His Views. 7

B. *Hurley* Protects the Right to Speak, Not the Practice of Status-Based Discrimination. 9

II. NEW JERSEY'S ANTI-DISCRIMINATION LAW DOES NOT VIOLATE THE BOY SCOUTS' RIGHT OF ASSOCIATION. 13

A. The Boy Scouts' Right of Expressive Association Does Not Encompass a Right to Discriminate Based on Status. 14

B. Opposition to Homosexuality is Not So Central to the Boy Scouts' Function That a Nondiscrimination Requirement Will in Itself Substantially Undermine Their Expressive Purposes. 17

C. The Boy Scouts Are Not an Intimate Association. 21

D. Any Limitation on the Boy Scouts' Expressive Associational Rights Is Justified By New Jersey's Compelling Interest in Eradicating Invidious Discrimination 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte,
481 U.S. 537 (1987) 8, 14, 15, 22

Bob Jones Univ. v. United States – Goldsboro Christian Sch., Inc.,
461 U.S. 574 (1983) 25

Boyd v. Harding Academy of Memphis, Inc.,
88 F.3d 410 (6th Cir. 1996) 12

Brown v. Board of Education,
347 U.S. 483 (1954) 14

Cline v. Catholic Diocese of Toledo,
No. 98-3527, 2000 WL 272258 (6th Cir. Mar. 14, 2000) 12

Cohen v. Cowles Media Co.,
501 U.S. 663 (1991) 25

Edwards v. South Carolina,
372 U.S. 229 (1963) 10, 11, 12

Ganzy v. Allen Christian Sch.,
995 F. Supp. 340 (E.D.N.Y. 1998) 12

Harvey v. Young Women's Christian Ass'n,
533 F. Supp. 949 (W.D.N.C. 1982) 13

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 23

Hishon v. King & Spalding,
467 U.S. 69 (1984) 14, 15

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,
515 U.S. 557 (1995)..... passim

M.P. v. S.P.,
169 N.J. Super. 425, 404 A.2d 1256 (App. Div. 1979)..... 24

Matter of Adoption of Child by J.M.G.,
267 N.J. Super. 622, 632 A.2d 550 (Chancery Div. 1993)..... 24

Matter of Adoption of Two Children by H.N.R.,
285 N.J. Super. 1, 666 A.2d 535 (App. Div. 1995)..... 24

McKennon v. Nashville Banner Publ'g Co.,
513 U.S. 352 (1995)..... 8

Moore v. City of East Cleveland, Ohio,
431 U.S. 494 (1977)..... 22

New York State Club Ass'n, Inc. v. City of New York,
487 U.S. 1 (1988)..... passim

Norwood v. Harrison,
413 U.S. 455 (1973)..... 14

Pruneyard Shopping Ctr. v. Robins,
447 U.S. 74 (1980)..... 23

Railway Mail Ass'n v. Corsi,
326 U.S. 88 (1945)..... 15

Roberts v. United States Jaycees,
468 U.S. 609 (1984)..... passim

Romer v. Evans,
517 U.S. 620 (1996)..... 23, 25

Runyon v. McCrary,
427 U.S. 160 (1976)..... passim

Shuttlesworth v. City of Birmingham,
394 U.S. 147 (1969)..... 10

V.C. v. M.J.B.,
319 N.J. Super. 103, 725 A.2d 13 (App. Div. 1999)..... 24

West Virginia State *Bd. of Educ. v. Barnette*,
319 U.S. 624 (1943)..... 13

Wooley v. Maynard,
430 U.S. 705 (1977)..... 13

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267 (1986)..... 12

Statutes

N.J. STAT. ANN. § 10:2-1 (West 1999)..... 23

N.J. STAT. ANN. § 10:5-12 (West 1999)..... 12, 23

N.J. STAT. ANN. § 10:5-3 (West 1999)..... 25

N.J. STAT. ANN. § 10:5-4 (West 1999)..... 2

N.J. STAT. ANN. § 2A:53A-21 (West 1999)..... 24

N.J. STAT. ANN. § 2C:33-4 (West 1999)..... 24

Other Authorities

Florio Exec. Order No. 39 (Aug. 16, 1991) 23

Frank Newport, *Some Change Over Time in American Attitudes Towards Homosexuality, but Negativity Remains*, THE GALLUP ORGANIZATION (Mar. 1, 1999) <http://www.gallup.com/poll/releases/pr990301b.asp.> 20

Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959) 14

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ROBERT T. MICHAEL, ET AL., SEX IN AMERICA, 176 (1994) 20

STATEMENT OF INTEREST[1]

The Society of American Law Teachers (SALT) is an association of more than 800 individual law faculty members at over 150 law schools, which was founded in 1974 by a group of leading law professors dedicated to improving the quality of legal education by making it more responsive to societal concerns. As a membership organization of law teachers, SALT is particularly sensitive to the historic role the courts have played in upholding both nondiscrimination and anti-censorship principles. SALT has filed amicus briefs in federal and state courts on behalf of historically under-represented groups to support their claims to equal access to education, employment, and health care, and to full participation in civic life. SALT has also supported individuals and groups asserting First Amendment rights in courts and elsewhere. SALT is filing this brief because it supports the distinction this Court has drawn between viewpoint-based restrictions on membership, which the First Amendment protects, and status-based discrimination, which the First Amendment generally does not protect.

STATEMENT OF FACTS

James Dale was a model Boy Scout. Before his expulsion, he had been a Boy Scout for 12 years, earning every honor and accolade available in Scouting. He is an Eagle Scout, and at age 19, became an Assistant Scoutmaster at the Boy Scouts' invitation.

In July 1990, however, the Boy Scouts learned that Dale was gay as a result of his appearance in a local

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[1] Written consent to the filing of this brief from the counsel of record for the parties has been lodged with the Court. Pursuant to Rule 37.6, counsel for Amici state that no counsel for a party authored this brief in whole or in part. The only monetary contribution to the production of the brief was made by the firm of Milbank, Tweed, Hadley & McCloy LLP, in the form of donated paralegal services and printing costs. The firm does not represent any party in the case.

newspaper article about a gay student group at Rutgers University, where Dale was a sophomore. The article identified Dale as a co-president of the Rutgers University Lesbian/Gay Alliance, but did not report any information regarding Dale's views. Upon learning this information, and only this information, the Boy Scouts expelled Dale.

The Boy Scouts have not sought to expel heterosexual leaders who have expressed public opposition to the Boy Scouts' view that homosexuality is immoral. The record here includes the declarations of several longstanding Boy Scout leaders who state that they believe homosexuality is not immoral. J.A. at 647-57 (Aff. of William Kirkner, BSA Asst. District Commissioner), 658-64 (Aff. of David Rice, BSA Asst. Scoutmaster), 665-74 (Aff. of Robert Smith, BSA Asst. Scoutmaster). None of them has been expelled. In addition, an entire troop has formally stated that "we do not agree that sexual orientation such as male or female homosexuality is immoral." J.A. at 627. The Boy Scouts renewed that troop's charter and have not sought to exclude its members or leaders. J.A. at 628. And the Boy Scouts are sponsored by several religious denominations that hold that homosexuality is not immoral and/or that gays and lesbians should not be discriminated against, including the Lutherans, J.A. at 556-61, and Presbyterians, J.A. at 562-66. The Boy Scouts have made no effort to disassociate themselves from these sponsoring denominations.

Dale sued under New Jersey's Law Against Discrimination (LAD), which prohibits public accommodations from discriminating on the basis of "race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation" N.J. STAT. ANN. § 10:5-4 (West 1999). The LAD's only requirement is that public accommodations not discriminate based on the identity or status of a member of a protected group. The LAD does not prohibit groups from expressing messages of any kind, nor from excluding persons who express messages contrary to the group's ideology.

The New Jersey Supreme Court unanimously concluded that the Boy Scouts were a "public accommodation" under New Jersey law because: (1) they engaged in broad public solicitation of members, stating that they were "open to all boys"; (2) they maintained close relationships with federal and state governmental bodies; and (3) they were similar to other recognized public accommodations, such as Little League, day camps, and private schools.[2] Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 15a-16a. These state law determinations are not subject to review here.

The Court also unanimously determined that application of the LAD to the Boy Scouts did not violate their rights of association or speech, concluding that the Boy Scouts were not an intimate association, and that the requirement that they not discriminate on the basis of a person's sexual orientation did not impermissibly infringe their expressive rights. This Court granted a writ of certiorari on that issue.

SUMMARY OF ARGUMENT

When the Boy Scouts expelled James Dale in 1990, they knew that he had been an exemplary Boy Scout for 12 years. They knew that he had been admitted to the Order of the Arrow, reserved for "those Scout campers who best exemplify the Scout Oath and Law in their daily lives." They knew that he had become an Eagle Scout, and then, at the Boy Scouts' invitation, an Assistant Scoutmaster. They knew that he had taken or administered the Scout Oath on thousands of occasions, and that upon becoming an Assistant Scoutmaster, had committed himself to the Scout Oath and Law and the

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[2] The court also found that the Scouts did not fall into any of the LAD's three specified exceptions for (1) "distinctly private" groups; (2) religious educational facilities; and (3) individuals who act *in loco parentis*.

Declaration of Religious Principle. They also knew that he was gay.

It was on the basis of the last fact alone that the Monmouth Council expelled Dale, despite his exemplary record and demonstrated commitment to Scouting values and principles. As the Monmouth Council explained in a contemporaneous letter, the Boy Scouts "specifically forbid membership to homosexuals." Pet. App. at 12a-13a.

The question here is whether the Boy Scouts' First Amendment rights trump New Jersey's prohibition on such status-based discrimination. There is an inescapable tension between First Amendment rights of association and anti-discrimination laws. This Court, however, has consistently resolved that tension by drawing a clear line: It zealously protects private groups' ability to discriminate on the basis of *expression* as a necessary corollary of the right to speak, but it has never protected private discrimination on the basis of *status*.

That line requires affirmance of the unanimous opinion of the New Jersey Supreme Court. The LAD does not compel the Boy Scouts to express any views whatsoever, nor to accept as members or leaders any persons who express views contrary to their own. It merely provides that the Boy Scouts cannot expel Dale because of his identity as a gay man. Thus, this case is clearly distinguishable from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), where the law as applied required a private parade to include a *message* to which the parade organizer objected.

Recognizing this Court's consistent fidelity to the distinction between permissible state laws that require private groups not to discriminate on the basis of status and impermissible state laws that compel groups to accept persons whose views or speech they find objectionable, the Boy Scouts go to great lengths to portray Dale's expulsion as motivated by his views rather than his status. But their

contemporaneous explanation referred only to Dale's gay identity, not to his views. All the evidence they had of his views at the time, developed from 12 years of Scouting, was that he was fully committed to Scouting principles and values. Nothing he has said since then alters that. And indeed, had they expelled Dale for his views rather than his identity, the LAD would not have been violated. The fact that Dale was one of the Boy Scouts' 1.5 million adult "leaders" rather than one of 4 million youth members does not alter the analysis, because the Boy Scouts retain every right to require Dale to conform to their message.

The same analysis defeats the Boy Scouts' second defense, based on a right of association. While the Scouts do associate for some expressive functions, the requirement that they not discriminate on the basis of status does not impermissibly interfere with their expressive activities. Equally expressive private entities, including private schools and civic organizations, have advanced the same associational defense against civil rights laws; but where the discrimination was based on status rather than speech, this Court has consistently rejected those claims. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Runyon v. McCrary*, 427 U.S. 160 (1976). To prevail here, the Boy Scouts would have to show what no other association has ever been able to show: that their expressive rights are undermined by a law that permits them to say anything they please, and merely bars them from excluding persons on the basis of status.

In rare cases where the organization's primary message is exclusion *per se*, the First Amendment right of association may protect status-based exclusionary policies. The Ku Klux Klan, for example, may well have a First Amendment right not to admit African American members. But any such exemption from an otherwise generally applicable neutral nondiscrimination law must be narrowly drawn if equality norms are to be preserved. In fact, the Court has *never* recognized a private organization's claim that it has a constitutional right to discriminate on the basis of status,

even where the organizations were deeply committed to inculcating particular moral values and excluding certain classes of persons. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Runyon v. McCrary, 427 U.S. 160 (1976).*

The Boy Scouts are not like the Ku Klux Klan. They are not an organization whose central self-definition requires exclusion of openly gay youth and men. Indeed, their contention that admitting gay persons would undermine their expressive rights is fatally undermined by the fact that they do not even require members or leaders to subscribe to their views on homosexuality, and have not sought to expel heterosexual leaders who have publicly dissented from their policy. Instead, they have simply declared that gay youth and men, irrespective of their views, are ineligible for membership in the Boy Scouts. That is the essence of discrimination, not speech.

ARGUMENT

I.

NEW JERSEY'S ANTI-DISCRIMINATION LAW DOES NOT COMPEL THE BOY SCOUTS TO EXPRESS ANY VIEWS INIMICAL TO THEIR OWN.

The Boy Scouts initially argue that their First Amendment right to speak has been infringed by the application of New Jersey's Law Against Discrimination. They maintain that this case is controlled by *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), on the theory that here, as there, application of an anti-discrimination law compels them to express messages with which they disagree.

In fact, application of the LAD in this case compels no speech whatsoever. The LAD does not impede the Boy Scouts' right to express the view that homosexuality is immoral and to require that their members and leaders adhere

to that view. It prohibits only discrimination based on status, not viewpoint, and the Boy Scouts have engaged in the former.

A. The Boy Scouts Expelled Dale for His Status, not for His Views.

Petitioners' effort to shoehorn the facts of this case into the *Hurley* paradigm ignores the Court's fundamental distinction between a private group's right to control its own speech, and a private group's exclusion of persons simply because of their status as members of a minority group.

Hurley upheld a private parade organizer's right to exclude marchers who sought to express messages contrary to the parade organizer's message. Central to the Court's holding was the fact that the private parade organizers "disclaim[ed] any intent to exclude homosexuals as such." *Hurley*, 515 U.S. at 572. Here, the Boy Scouts assert a right to do precisely what the parade organizers in *Hurley* forswore: to exclude individuals based solely on their identity as gay.

Unlike the gay contingent in *Hurley*, Dale was expelled for his identity, not his views. He was expelled based on a newspaper article that reported only that he was gay and involved in a gay student group. As the petitioners admitted in a contemporaneous letter, Dale was expelled because of a policy barring "membership to homosexuals." J.A. at 137. Petitioners' attempt to focus on Dale's speech at this stage of the litigation is entirely *post hoc*, based on statements Dale made long after he was expelled. And even those statements do not express any view on the morality of homosexuality. The statements merely assert what this lawsuit itself asserts, namely that Dale opposes the Boy Scouts' exclusionary policy, and is proud to be gay.[3]

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[3] The Boy Scouts rely on two statements that Dale made to the press well after his expulsion. Brief for Petitioners ("Pet. Br.") dated Feb. 28, 2000 at 9-10. The quotations say nothing more than that Dale

The Boy Scouts had no basis other than a stereotypical presumption about gay men for believing that Dale would express any message contrary to the Boy Scouts' views as an Assistant Scoutmaster.[4] He had successfully adhered to the Scouting code for over a decade, and there was no reason to believe that he would not continue to do so. Under Boy Scout policy, adult leaders are asked to defer questions about sexuality to the boy's family and religion. Pet. App. at 10a-11a. There is no basis in the record to believe that Dale would ignore that principle and advocate his own personal views about homosexuality.

Indeed, this case would not be here had Dale been expelled for his views. The LAD does not prohibit the Boy Scouts from excluding persons for expressing points of view contrary to the Scouts' philosophy. It only prohibits them

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is proud to be gay, and that he believes the Boy Scouts' exclusionary policy is wrong. If that were sufficient to justify a First Amendment defense, no anti-discrimination lawsuit would ever survive, for the very filing of the lawsuit announces that the plaintiff believes the exclusionary policy is wrong, and is proud to be a member of the protected class to which he belongs.

In any event, the statements are "after-acquired evidence," and therefore even if the Court deemed them relevant, they could be relied upon only to limit prospective relief, and only if the Boy Scouts met the heavy burden of showing that they would have expelled Dale for such statements irrespective of his gay identity. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995). The latter showing would be defeated here by the fact that the Boy Scouts have not sought to expel similarly situated heterosexual leaders who have expressed disagreement with the Boy Scouts' views on homosexuality. *See* Statement of Facts *supra*.

[4] The Court has condemned the use of stereotypes to justify exclusions such as the one here. *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548-49 (1987); *Roberts*, 468 U.S. at 627-28.

from excluding persons because of their "race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation," *i.e.*, because of their *status*. N.J. STAT. ANN. § 10:5-4. As this Court described a similar law: "If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead the Law . . . prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of . . . legitimate criteria for determining membership." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988).

The Boy Scouts seek to collapse the line between status and speech by using the terms "avowed homosexuals" or "openly gay" persons. But that conflation does not transform the Boy Scouts' status-based discrimination into speech-based discrimination. Avowal of identity does not lead to expulsion from the Boy Scouts unless the person is gay. Just as it would be no defense to a race-based exclusionary policy to state that the policy applies only to persons who identify themselves as black despite their ability to "pass" as white, or to persons who say they are proud to be black, it is no defense for the Boy Scouts to limit their exclusionary policy to "avowed homosexuals."

B. *Hurley* Protects the Right to Speak, Not the Practice of Status-Based Discrimination.

Because Dale was expelled for his status, not his views, *Hurley* does not control here. On the contrary, that decision relies on and reaffirms the very distinction that the petitioners seek to elide: between permissible speech-based exclusion and impermissible status-based discrimination.

The parade organizers in *Hurley* sought to exclude a gay contingent from marching not because its members were gay, but because they sought to use the parade to express a message contrary to the organizers'. The Court held that a

parade is by definition "a form of expression" and an exercise of First Amendment rights " 'in their most pristine and classical form.' "[5] It likened a parade organizer to a newspaper editor, and recognized that the organizer's First Amendment right to define the message of the parade necessarily includes the right to exclude those who express a contrary point of view.

The parade context was critical in *Hurley* because the parade organizers had no practical ability to dissociate themselves from the messages communicated by each contingent. In parades and protest marches, "each unit's expression is perceived by spectators as part of the whole." *Hurley,* 515 U.S. at 577. A membership organization, by contrast, has multiple methods easily available for making its own views clear, and apart from the "practice of discrimination," the LAD does not limit any of them.

The risk of compelled speech was heightened in *Hurley* by the gay contingent's express intent to use the parade as a platform for its views. The organization's very purpose for being was to express a message by marching in the St. Patrick's Day Parade. Here, the record contains no evidence that Dale intends to use his Scouting position as a platform, nor would the LAD preclude the Boy Scouts from expelling him if he did.

The flaw in petitioners' reasoning is illustrated by their contention that forcing them to reinstate Dale would be equivalent to forcing them to appoint a Ku Klux Klan member as an adult leader. Pet. Br. at 28. This ignores the very distinction between identity and viewpoint that governs here. Klan members are drawn together by philosophical beliefs, most centrally white supremacy. A person who

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[5] *Hurley*, 515 U.S. at 568-69 (quoting *Edwards v. South Carolina,* 372 U.S. 229, 235 (1963)); *see also Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969).

advances the idea of white supremacy cannot insist upon a right to join an organization espousing racial equality.

Gay men and lesbians, by contrast, are drawn together only by identity, not by philosophical beliefs. Like sex, race, and national origin, gay or lesbian identity presupposes no set of beliefs whatsoever. Dale is more analogous to a person of color than to a Ku Klux Klan member. Of course, he believes in his own self-worth as a gay man, as did the African-Americans who sought to integrate facilities from which they had been excluded, and the women who challenged their sex-based exclusion from the United States Jaycees.[6] But if statements of pride in one's own identity were sufficient to transform impermissible status discrimination into protected expression, the prohibition on discrimination would be meaningless.

The Boy Scouts stress that Dale was a "leader," and therefore, they argue, he would speak for the organization whenever he donned his Boy Scout uniform. Pet. Br. at 19, 24. The Boy Scouts' emphasis on Dale's "leadership" position is somewhat disingenuous, however, because *all* of Scouting's 1.5 million adult members are "leaders," and the exclusionary policy applies indiscriminately to youth "members" and adult "leaders." Pet. App. at 3a, 11a.

It is simply not plausible to believe that every Assistant Scoutmaster will necessarily be perceived as always speaking for the Boy Scouts. Just as it is unlikely that an Assistant Scoutmaster who says he is a vegetarian would be perceived to speak for the Boy Scouts on issues of meat-eating, it is unlikely that a Scoutmaster who says he is gay would be perceived to be expressing Boy Scout policy on sexuality.[7]

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[6] One placard in an early civil rights demonstration stated simply, "I am proud to be a Negro." *Edwards,* 372 U.S. at 231.

[7] The view that homosexuality is not immoral might well carry far more weight for a boy if he heard it from a straight Scoutmaster

In fact, there is no reason to believe that boys who knew of a scoutmaster's gay identity would attribute any greater meaning to it than they would to the gay identity of a school teacher. Under the LAD, private schools in New Jersey are prohibited from refusing to hire openly gay or lesbian teachers.[8] "Role model" concerns do not generally justify deviation from equality mandates. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986) (rejecting "role model theory" for justifying race-based layoff decisions under affirmative action policy). The Boy Scouts should be treated no differently from a private school.[9]

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than if he heard it from a gay Scoutmaster. Yet the Scouts have not sought to expel heterosexual leaders who have expressed precisely that view, and affirmatively renewed the charter of an entire troop the expressed the view that homosexuality is moral. *See* Statement of Facts, *supra*

[8] N.J. STAT. ANN. §§ 10:5-12(a)-(e).

[9] Petitioners rely on a string of cases allowing organizations to employ leaders who maintain the organization's values. Pet. Br. at 33 n.9. Those cases, however, adhere to the very line we insist upon here, by holding that an organization cannot use its "value system" as a pretext for firing based on status. Specifically, unwed pregnancy cannot be used as the sole proxy for inconsistency with values, when that results in firing only unwed mothers and not unwed fathers. *Cline v. Catholic Diocese of Toledo*, No. 98-3527, 2000 WL 272258, at *3 (6th Cir. Mar. 14, 2000) ("Because discrimination based on pregnancy is a clear form of discrimination based on sex, religious schools cannot discriminate based on pregnancy.") (citations omitted); *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (holding that the exemption from Title VII for religious organizations "does not . . . exempt religious educational institutions with respect to all discrimination"); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 349 (E.D.N.Y. 1998) ("Restrictions on pregnancy are not permitted because they are gender discriminatory by definition.") (citation omitted). In *Harvey v. Young Women's Christian Association*, 533 F. Supp. 949 (W.D.N.C. 1982), the court upheld the firing of a counselor at a community service organization not merely because she was pregnant, but because she affirmatively sought to use her pregnancy to promote an "alternative lifestyle" to her young charges -- teenage girls in the neighborhood. *Id.* at 955. Dale does not seek to "model an alternative lifestyle" to his charges, and the Boy Scouts expelled him without any evidence concerning his views or intentions.

In short, to characterize this as a case about compelled speech is to stretch that term beyond its limits. The Court has protected the right not to speak where the state commanded citizens to express a message, by displaying a motto on a license plate,[10] saluting a flag,[11] or including a banner in a parade.[12] But complying with a mandate not to engage in status-based discrimination does not require an endorsement of a belief in anything, including the correctness of that law. The Boy Scouts remain free to say whatever they please about homosexuality, and to expel members or leaders who express contrary views. The dictate not to discriminate, without more, does not compel speech.

II.

NEW JERSEY'S ANTI-DISCRIMINATION LAW DOES NOT VIOLATE THE BOY SCOUTS' RIGHT OF ASSOCIATION.

All anti-discrimination laws trench on associational concerns to some extent, for they bar persons and groups from acting on their desires not to associate with members of

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[10] *Wooley v.* Maynard, 430 U.S. 705, 722 (1977).

[11] *West Virginia* State *Bd. of Educ. v. Barnette*, 319 U.S. 624, 670-71 (1943).

[12] *Hurley*, 515 U.S. at 573-75.

various minority groups.[13] But if that fact were sufficient to invalidate anti-discrimination provisions, the private sector would be immune from equality mandates. Thus, while "'[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.'"[14]

Instead, the Court has examined status-based nondiscrimination laws to determine whether they infringe on intimate or expressive association, and if so, whether they are narrowly tailored to further a compelling state interest.[15] As the New Jersey Supreme Court unanimously found, the Boy Scouts are not an intimate association. While the Boy Scouts are an expressive association, the requirement that they not discriminate on the basis of homosexual status does not impermissibly interfere with their expressive rights.

A. The Boy Scouts' Right of Expressive Association Does Not Encompass a Right to Discriminate Based on Status.

The Boy Scouts undoubtedly associate for some expressive purposes, and it is critically important to protect

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[13] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). Every act of discrimination can be characterized as the exercise of the right not to associate, from the maintenance of segregated schools, *Brown v. Board of Education*, 347 U.S. 483 (1954), to the decision by a law firm to deny partnership to a female attorney, *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

[14] *Runyon*, 427 U.S. at 176 (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

[15] *Board of Dirs. of Rotary Int'l*, 481 U.S. at 548-49; *Roberts*, 468 U.S. at 622-29; *see also New York State Club Ass'n, Inc.*, 487 U.S. at 13.

their First Amendment rights and those of similar private voluntary groups. But that is only the beginning, not the end, of the inquiry. The Boy Scouts must show that the requirement that they not expel members for homosexual *status* meaningfully impedes their *expressive* function.

In navigating the tension between nondiscrimination provisions and associational rights, the Court's cases draw a relatively bright line: where a group seeks to exclude persons based on their *expressing messages* contrary to the group's message, the First Amendment protects the group's right to do so. *Hurley*, 515 U.S. at 573-75. But where groups seek to exclude solely because of an individual's *status* or *identity*, the Court has uniformly rejected a First Amendment defense. *Roberts*, 468 U.S. at 622-29. This case squarely falls on the latter side of the line.

The Court has frequently confronted the claim that a law prohibiting status-based discrimination violates the right not to associate. It has just as frequently rejected the claim, whether presented by a labor union,[16] a private school,[17] a law firm,[18] or a civic organization.[19] In doing so, the Court has suggested that in all but the most extreme cases, a mere requirement not to discriminate on the basis of *status* does not violate the First Amendment.

In *Runyon v. McCrary*, 427 U.S. 160 (1976), for example, the Court expressly rejected a right of association objection to a law that barred status-based discrimination, even where the defendant was, like the Boy Scouts, centrally engaged in morals inculcation. There, an association of private schools maintained that the practice of excluding

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[16] *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945).

[17] *Runyon*, 427 U.S. at 175-76.

[18] *Hishon*, 467 U.S. at 78.

[19] *New York State Club Ass'n, Inc.*, 487 U.S. at 8-9; *Board of Dirs. of Rotary Int'l*, 481 U.S. at 539; *Roberts*, 468 U.S. at 612-13.

African-American students was constitutionally protected by the right of association and the parents' right to direct the education of their children. This Court acknowledged that private schools and parents may be deeply committed to teaching the propriety of racial segregation, but rejected the argument that the schools' right to *practice* segregation was protected. "[I]t may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle." *Id.* at 176.

At the same time, the Court has repeatedly said that the First Amendment prohibits laws that require a group to admit members whose *ideology* or *political views* are contrary to the group's own expression. Thus, in upholding the application of a nondiscrimination provision to the United States Jaycees' exclusion of women, the Court stressed that "[t]he Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude *individuals with ideologies or philosophies different from those of its existing members*." *Roberts*, 468 U.S. at 627 (emphasis added; citation omitted). Similarly, in *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1 (1988), the Court noted that the nondiscrimination provision "erect[ed] no obstacle" to a club that "seeks to exclude individuals *who do not share the views that the club's members wish to promote*." 487 U.S. at 13 (emphasis added). And in *Hurley*, the Court noted that "a private club could exclude an applicant whose *manifest views* were at odds with a position taken by the club's existing members." 515 U.S. at 580-81 (emphasis added).

Here, as in *Runyon* and the *Roberts* trilogy, the law at issue is not addressed to speech or message, and the group's challenged exclusionary policy is based on status, not

message. Accordingly, the requirement that the Boy Scouts admit gay members and leaders does not interfere with their expressive rights. They remain free to say what they want, and to dictate to any member or leader what he may and may not say on any given political or sexual issue. [20]

B. Opposition to Homosexuality is Not So Central to the Boy Scouts' Function That a Nondiscrimination Requirement Will Substantially in Itself Undermine Their Expressive Purposes.

Amici agree with Justice O'Connor that "there may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background, or who share some other such common bond." *New York State Club Ass'n, Inc.*, 487 U.S. at 19. Unless the anti-discrimination laws are to be rendered nugatory, however, that exception must be narrowly confined to groups centrally organized around a message of exclusion that would be directly undermined by the nondiscrimination requirement. The Boy Scouts, a large, multifaceted national organization "open to all boys," not organized for the purpose of advancing any specific message, and not even committed to enforcing its

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[20] The Boy Scouts argue that the LAD nonetheless trenches on their expressive rights because their membership criteria are themselves a form of expression, and Dale quite plainly disagrees with those criteria. Pet. Br. at 21. But if such a disagreement were sufficient to defeat a nondiscrimination law, the First Amendment would always trump nondiscrimination statutes. The women who sought admission to the Jaycees, the Rotary Club, and the various clubs associated in the New York State Club Association all obviously disagreed with those organizations' views on whether women should be admitted. But there, as here, the key fact was that the exclusions were not based on that philosophical disagreement, but on the applicants' *status* as women.

leaders to adhere to its message on homosexuality, do not fit within this narrow exception.

In this regard, the Boy Scouts are usefully contrasted with the Ku Klux Klan. The latter group is expressly organized around an exclusionary principle of white supremacy. To require the Klan to admit blacks would substantially undermine the Klan's central expressive purpose. But to their credit, the Boy Scouts, a huge inclusive organization numbering millions of members, are not the Ku Klux Klan. And as such, requiring them to admit gay members and leaders will not undermine their core expressive purposes.[21]

The Boy Scouts assert that their "moral code" includes a belief in the immorality of homosexuality. As the *Roberts* trilogy and *Runyon* illustrate, however, an organization's sincere belief that it should exclude certain categories of people, or that admitting such people will undermine its expressive function, is not sufficient to trump the application of an anti-discrimination law. The issue is not whether the Boy Scouts have this belief, but whether the belief is so central to their existence that the mere requirement that they not exclude applicants for being gay would so compromise their core function as to warrant an exemption from an otherwise generally applicable nondiscrimination law.

Courts must be wary about second-guessing the views of private organizations, and cannot substitute their views of a group's philosophy for that of the group itself. However, the Court cannot avoid the responsibility of assessing whether

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[21] A claim that the Boy Scouts must admit girls, by contrast, would be a more difficult case. There is no question that the Boy Scouts are centrally organized around the principle of fellowship specifically among boys. The determinative issue under *Roberts* would be whether mandating the admission of girls would substantially undermine the Boy Scouts' expressive function.

the mere application of an anti-discrimination law will undermine the group's expressive function so fundamentally that the First Amendment compels an exemption. Thus, in *Roberts,* the Court did not simply accept at face value the Jaycees' argument that because the Jaycees' core purpose was "to advance the interests of young men only," requiring them to admit women "would effectively destroy the Jaycees' ability to achieve its core purpose, namely furthering the interest of young men."[22] Rather, it independently reviewed the record, and found "no basis in the record for concluding that admission of women . . . will impede the organization's ability to . . . disseminate its preferred views." *Roberts,* 468 U.S. at 627.

The record here similarly shows that the LAD will not impede the Boy Scouts' ability to disseminate its views on homosexuality. The Boy Scouts have many ways to communicate their views to their members and the public, including the Oath and Laws that every Boy Scout is required to learn and follow, the handbooks distributed to all youth who join, a separate handbook for adult leaders, and numerous other publications. Yet it is striking that *none* of their many existing publications even expresses the Boy Scouts' belief that homosexuality is immoral. Instead, the Boy Scouts strain to rely on vague terms like "clean" and "morally straight," terms that the Scouting materials themselves define in ways that do not implicate homosexuality one way or another.

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[22] Br. of Appellee, United States Jaycees at 8, 9, *Roberts v. United States Jaycees*, 468 U.S. 609; *see also* Br. of Appellant, New York State Club Ass'n, Inc. at 34, *New York State Club Ass'n, Inc.*, 487 U.S. 1 (arguing that applying nondiscrimination law to clubs that exist primarily for the purposes of espousing unpopular ethnic, racial or gender related positions plainly interferes with the "right of expressive association").

More importantly, the Boy Scouts do not require members or leaders to commit to the view that homosexuality is immoral. The Scouts have a formal application process for those seeking to become adult leaders.[23] Yet they impose *no* requirement that prospective leaders hold or express any view on the morality of homosexuality. The Scouts have not sought to expel members, leaders, and even entire troops who state publicly that they believe homosexuality is moral. *See* Statement of Facts, *supra*. Instead, they have expelled only gay Boy Scouts. If the Boy Scouts tolerate heterosexuals who openly contradict the Scouts' view that homosexuality is immoral, they cannot credibly maintain that merely being required to admit a homosexual will undermine their expressive function.

Under the LAD, the Boy Scouts are free to require all members to commit to the view that homosexuality is immoral. That requirement would likely have the effect of excluding most gay men. (It would not, however, exclude all gay men, because no doubt some gay men believe that homosexual sexual conduct is immoral, just as many heterosexuals engage in sexual activities that they believe are immoral.) But such a requirement would also exclude many heterosexual men. Indeed, given the proportion of the population believed to be gay,[24] and the number of straight men who believe that homosexuality is not immoral,[25] it is

[23] Pet. App. at 174a-175a; *see also* Pet. Br. at 4.

[24] According to the most comprehensive recent study on sexuality, 2.8 percent of men self-identify as "homosexual." ROBERT T. MICHAEL, ET AL., SEX IN AMERICA, 176 (1994).

[25] According to a recent Gallup poll, 50 percent of respondents to a poll answered that "homosexuality should be considered an acceptable alternative lifestyle." Frank Newport, *Some Change Over Time in American Attitudes Towards Homosexuality, but Negativity Remains*, THE GALLUP ORGANIZATION (Mar. 1, 1999) <http://www.gallup.com/poll/releases/pr990301b.asp>.

likely that such a policy would disqualify more straight men than gay men. It might also repel a significant number of the organizations upon which the Boy Scouts rely to serve as troop sponsors.[26]

But that is not what the Boy Scouts have done. Instead, they seek to enjoy all the advantages that accrue from broad public solicitations for membership and financial support,[27] while selectively invoking a viewpoint defense in order to justify expelling certain individuals because of their status. If the Boy Scouts do not compel their leaders or members to adhere to their views on homosexuality, they cannot use that justification as an exemption to an otherwise applicable nondiscrimination law.

C. The Boy Scouts Are Not an Intimate Association.

The Boy Scouts' contention that requiring them not to exclude gay members and leaders violates their right of intimate association is easily dismissed. For starters, this argument proves too much: if the Boy Scouts are right that they are an intimate association, they would be equally free to expel all black members. In fact, the Boy Scouts are not the type of intimate association that is largely immune from nondiscrimination laws.

The Supreme Court has acknowledged that it may be unconstitutional to legislate with respect to certain intimate associations, such as those of the family. *Roberts*, 468 U.S.

[26] Pet. App. at 55a-56a.

[27] Membership in the Boy Scouts totals approximately 5 million. According to independently reported data, the Boy Scouts of America had total revenue in 1998 of more than $250 million, net income of almost $70 million and net assets of more than $450 million. It employed 500 persons. Hoover's Online, *Boy Scouts of America Capsule* (last visited Mar. 23, 2000) <http://www.hoovers.com/co/capsule/2/0,2163,56152,00.html>.

at 618-19; *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 498-99 (1977) (plurality opinion). But it has also refused to extend the mantle of intimate association to groups that are in all material respects identical to the Boy Scouts. In *Board of Dirs. of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 546 (1987), the Court found that the Rotary Club, a national organization made up of local chapters that were as small as "fewer than 20" members, was not an intimate association. In *Roberts*, the Court held that the Jaycees were not an intimate association, where its local chapters were "neither small nor selective," and it invited nonmembers to many functions. In both cases, the Court relied heavily on the fact that the organizations had open and inclusive membership policies. 468 U.S. at 621.

The Boy Scouts are similarly a national organization, comprised of local troops of between 15 and 30 members, with an open and inclusive membership policy. The Boy Scouts state that they are "open to all boys," and "[n]either the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy." Pet. App. at 78a (citation omitted). Moreover, the Boy Scouts routinely invite nonmembers to functions. J.A. at 406; *see also* J.A. at 176-77. In addition, the Boy Scouts' extensive links to both federal and state governmental entities undermines any claim that they are an intimate organization.

D. Any Limitation on the Boy Scouts' Expressive Associational Rights Is Justified By New Jersey's Compelling Interest in Eradicating Invidious Discrimination.

Even where a nondiscrimination law infringes on the right of association by intruding on the group's "internal structure and affairs," the right "is not absolute." *Roberts*, 468 U.S. at 623. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved

through means significantly less restrictive of associational freedoms." *Id.* (citations omitted). As in the *Roberts* trilogy, that test is easily met here.

First, as in *Roberts*, the LAD serves a "compelling interest in eradicating discrimination." *Id.* It embodies New Jersey's legislative will to require equal access to the fullest range of activities in the public sphere, interactions that Justice Kennedy described as "ordinary civic life in a free society." *Romer v. Evans*, 517 U.S. 620, 631 (1996). It cannot be disputed that such anti-discrimination laws serve a compelling state interest. See *Hurley*, 515 U.S. at 571-72; *Roberts*, 468 U.S. at 625-26; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-62 (1964).[28]

New Jersey's interest in eradicating discrimination on the basis of sexual orientation is especially compelling. New Jersey has outlawed such discrimination in virtually every facet of public life. It is unlawful in New Jersey to refuse to hire, fire or promote a person based on sexual orientation, both in public and private workplaces.[29] It is unlawful to refuse "to contract with . . . or otherwise do business with" a person based on sexual orientation.[30] Family courts may not

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[28] The fact that the Court has not decided whether sexual orientation discrimination is subject to strict scrutiny under the Equal Protection Clause does not affect the determination that a state's interest in eradicating such discrimination is compelling. *See, e.g.*, *Hurley*, 515 U.S. at 571-72 (noting historic pedigree of anti-discrimination laws); *Roberts*, 468 U.S. at 625-26 (same). New Jersey's right to take concerted steps to eradicate sexual orientation discrimination should be viewed as an aspect of state sovereignty, and not subject to downgrading based on this Court's assessments of scrutiny levels under the Fourteenth Amendment. *Cf. Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

[29] N.J. STAT. ANN. §§ 10:5-12(a)-(e); N.J. STAT. ANN. § 10:2-1; Florio Exec. Order No. 39 (Aug. 16, 1991).

[30] N.J. STAT. ANN. § 10:5-12(l).

deny or curtail custody or visitation rights to a gay or lesbian parent solely because of that parent's sexual orientation.[31] An adoption petition may not be denied based on the adoptive parent's sexual orientation.[32] Moreover, natural parent-same sex partner couples who seek to adopt as a couple are entitled to equal treatment with natural parent-stepparent couples seeking to adopt.[33] Sale, purchase or rental of private residences cannot be made subject to an individual or couple's sexual orientation,[34] nor can credit be denied on that basis.[35] Both criminal[36] and civil[37] liability attaches to bias crimes that are targeted at lesbians or gay men. In short, the command of equal treatment for lesbians and gay men permeates "ordinary civic life" in New Jersey.

Anti-discrimination law effectuates a state's interest in maintaining a level playing field in market relations, but also in ending the stigma that pervades the full range of an individual's life in the public sphere.[38] That is all the more true when the organization at issue is extremely large and nonselective, advertises itself so strongly as a developer of good citizens, and has historically proclaimed its partnership

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[31] *V.C. v. M.J.B.*, 319 N.J. Super. 103, 118-19, 725 A.2d 13, 22-23 (App. Div. 1999); *M.P. v. S.P.*, 169 N.J. Super. 425, 432-33, 404 A.2d 1256, 1260 (App. Div. 1979).

[32] *Matter of Adoption of Two Children by H.N.R.*, 285 N.J. Super. 1, 8-9, 666 A.2d 535, 538 (App. Div. 1995); *Matter of Adoption of Child by J.M.G.*, 267 N.J. Super. 622, 629-30, 632 A.2d 550, 553-54 (Chancery Div. 1993).

[33] *id.*

[34] N.J. STAT. ANN. §§ 10:5-12(f)-(h).

[35] N.J. STAT. ANN. § 10:5-12(i).

[36] N.J. STAT. ANN. § 2C:33-4.

[37] N.J. STAT. ANN. § 2A:53A-21.

[38] *Roberts*, 468 U.S. at 625.

with agencies of the state so frequently, as the Boy Scouts.[39] In enacting the LAD, the legislature found that discrimination based on sexual orientation "menace[d] the institutions and foundation of a free democratic State."[40] As is true of other civil rights statutes, New Jersey's lawmakers concluded that sexual orientation discrimination "violates a most fundamental [state] public policy."[41]

Second, the LAD's compelling interest is "unrelated to the suppression of ideas." *Roberts*, 468 U.S. at 623. As noted above, the LAD prohibits only discrimination on the basis of status, and leaves groups free to discriminate on the basis of speech. "[G]enerally applicable laws do not offend the First Amendment simply because their enforcement . . . has incidental effects" on expression. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). The LAD is a neutral law of general applicability that bars a particular form of harmful conduct – discrimination based on sexual orientation – irrespective of the message that conduct expresses. *Cf. Romer v. Evans*, 517 U.S. 620 (1996).

Finally, New Jersey's interest in eradicating discrimination on the basis of sexual orientation could not "be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623 (citations omitted). Like the laws upheld in the *Roberts* trilogy, the LAD prohibits only status-based discrimination, and does not seek to limit in any way what organizations can say. It exempts organizations that are "distinctly private" or have a religious educational function, and individuals serving *in loco parentis*.

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[39] Pet. App. at 24a-31a.

[40] N.J. STAT. ANN. § 10:5-3.

[41] *Bob Jones Univ. v. United States – Goldsboro Christian Sch., Inc.*, 461 U.S. 574, 593 (1983).

As described above, the Boy Scouts have ample opportunities to express their condemnation of homosexuality. No law bars the Boy Scouts from forbidding specific conduct or statements by members or leaders during any of its activities. New Jersey has barred only acts of status-based discrimination, and has not sought to extend that bar in any way to expression-based action.

CONCLUSION

Enforcement of the New Jersey civil rights law in this case will not undercut the expressive rights of private organizations to advocate their views. The Boy Scouts will be barred from engaging in the practice of status-based discrimination, but that obligation does not compel them to express any view, does not undermine their freedom to communicate their own message about homosexuality, and does not preclude them from denying membership to those boys or adults who dissent from the Boy Scouts' message. Rather than exercising their constitutional right to control their message by restricting membership to those who share that viewpoint, they have simply sought to purge the organization of openly gay youth and men. That is precisely what anti-discrimination laws prohibit.

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Respectfully submitted,

Nan D. Hunter
Counsel of Record
250 Joralemon Street
Brooklyn, NY 11201
(718) 780-7517

David Cole
600 New Jersey Ave., N.W.
Washington, DC 20001
(202) 662-9078

Counsel for Amicus Curiae[*]

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IN THE
Supreme Court of the United States

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,
v.
JAMES DALE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF *AMICI CURIAE* PARENTS, FAMILIES, AND FRIENDS OF LESBIANS AND GAYS, INC., NATIONAL 4-H COUNCIL, NATIONAL EDUCATION ASSOCIATION, NATIONAL YOUTH ADVOCACY COALITION, GAY, LESBIAN, AND STRAIGHT EDUCATION NETWORK, NATIONAL ASSOCIATION FOR MULTICULTURAL EDUCATION, AND THE MATTHEW SHEPARD FOUNDATION IN SUPPORT OF RESPONDENT

JOHN H. PICKERING
DANIEL H. SQUIRE
Counsel of Record
STUART F. DELERY
VAN W. ELLIS
CAROL J. BANTA
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Attorneys for *Amici Curiae*

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37 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. NEW JERSEY'S COMPELLING INTEREST IN ERADICATING THE "CANCER OF DISCRIMINATION" IS SUPPORTED BY EXTENSIVE SOCIAL SCIENCE RESEARCH ESTABLISHING THE HARM TO YOUTH CAUSED BY ANTI-GAY DISCRIMINATION	7
A. Anti-Gay Discrimination Leads to Suicide and Other Self-Destructive Behavior Among Gay Youth, Promotes Violence, and Harms Society as a Whole	7
1. *The Pattern*	8
2. *The Statistics*	10
3. *The Causes*	12
B. The Social Science Evidence Supports New Jersey's Determination That a Ban on Anti-Gay Discrimination Serves a Compelling State Interest	16
II. NEW JERSEY'S INTEREST IS PARTICULARLY STRONG IN THIS CASE BECAUSE OF THE SIGNIFICANT SPECIAL BENEFITS BSA RECEIVES FROM GOVERNMENT	19
A. BSA Receives Special Benefits from Government	20
B. BSA's Connection with Government Gives New Jersey a Strong Regulatory Interest in Applying Its Anti-Discrimination Mandate	22

TABLE OF CONTENTS—Continued

	Page
III. THIS CASE IS ABOUT DISCRIMINATION AGAINST GAY SCOUTS AND SCOUTMASTERS, NOT ABOUT FREEDOM OF SPEECH	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

	Page
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TABLE OF AUTHORITIES—Continued

	Page
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Page

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BRIEF OF *AMICI CURIAE*

Boy Scouts of America ("BSA") is one of the great organizations devoted to the growth and development of America's youth. For nearly a century, BSA has provided incalculable benefit to generations of boys, teaching millions how to put up tents and survive in the wilderness, and how to be productive citizens in our civil society. BSA has sought and forged a close relationship with government at all levels, from Congress to towns and schools across the country, and it holds a special place in the life of many communities. It is precisely because of this unique history as a broad-based, ubiquitous American institution that BSA's practice of discrimination against gay scouts and scoutmasters is particularly harmful to the youth BSA was formed to nurture. *Amici curiae* respectfully submit this brief (1) to underscore the important social values reflected in New Jersey's Law Against Discrimination ("LAD"), which forbids discrimination based on sexual orientation, and in the judicial application of that statute to BSA, and (2) to call to the Court's attention the massive body of evidence supporting the LAD and showing the devastating effect that anti-gay discrimination has on youths of Boy Scout age.

INTEREST OF *AMICI CURIAE*[1]

Parents, Families, and Friends of Lesbians and Gays, Inc. ("PFLAG") is a national, non-profit family organization with a grassroots network of over 77,000 member households and supporters, and 440 affiliates in the United States. Formed in 1981, PFLAG promotes the health and well-being of gay, lesbian, bisexual and transgendered persons, and their families and friends, through

[1] This brief was authored in its entirety by undersigned counsel for *amici curiae*. No person or entity, other than the named *amici curiae* and their counsel and members, made any monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief are on file with the Clerk of this Court.

support, education, and advocacy to end discrimination. PFLAG acts to create a society that is healthy and respectful of human diversity, and to assist young people in achieving their full potential. For the last several years, one of PFLAG's top priorities has been its Safe Schools program, which works at the national, state, and local levels to end harassment and violence against gay adolescents.

National 4-H Council ("Council") is a not-for-profit organization that is the private partner of the public 4-H youth development program nationwide. In 1999, 4-H reached almost 6.5 million youth through over 93,000 clubs and other programs. Council fosters innovation and shared learning for the youth workers and young leaders of 4-H, and Council holds as a fundamental belief that discrimination in any form limits the realization of the potential of young people. Council participates in this case as a non-profit organization, not on behalf of the nationwide 4-H program.

The National Education Association ("NEA") is a nationwide employee organization with a current membership of more than 2.4 million teachers and other education employees, the vast majority of whom are employed by public school districts, colleges, and universities. NEA has long opposed and condemned discrimination on the basis of sexual orientation, especially by programs offered in, or sponsored by, public schoc. Because many public school districts sponsor or support Boy Scout troops, NEA's interest in opposing BSA's discriminatory practice is directly implicated in this case.

The National Youth Advocacy Coalition ("NYAC") and Gay, Lesbian, and Straight Education Network ("GLSEN") are national membership organizations working to end anti-gay bias against youth and to protect the physical and emotional well-being of young people. NYAC's 117 community-based member groups represent

33 states and the District of Columbia, and range from large national professional organizations to comprehensive service agencies to small support groups. GLSEN is the largest national organization whose sole mission is to end anti-gay bias in K-12 schools throughout the United States. Through its growing network of 85 chapters in 35 states, GLSEN strives to assure that each member of every school community is valued and respected, regardless of sexual orientation or gender identity. GLSEN has extensive experience with the effects of anti-gay bias in our nation's schools.

The National Association for Multicultural Education ("NAME") is the primary membership organization addressing issues of multicultural education throughout the United States. NAME was formed to bring people together from all levels of education, from organizations, businesses and communities, who are committed to achieving education that is multicultural and a society which is fair to all.

The Matthew Shepard Foundation was created in December 1998 by Dennis and Judy Shepard to honor the memory of their son. The goals of the Matthew Shepard Foundation include supporting diversity programs in education and helping youth organizations establish places where young people can feel safe and be themselves.

SUMMARY OF ARGUMENT

This is a case about exclusion of gay scouts and scoutmasters from BSA programs simply because they are gay, and about New Jersey's compelling state interest in ending the harm to gay youth caused by anti-gay discrimination by BSA and other quasi-public organizations in the State. The Supreme Court of New Jersey persuasively concluded, based on the facts in the record, that preventing BSA from excluding gay scouts and troop leaders from the organization would not infringe BSA mem-

bers' right to associate in pursuit of shared views. *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1223 (N.J. 1999). Although the selection of an organization's members is a crucial part of an organization's identity, *see Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984), there is no reason for this Court to disturb the New Jersey Supreme Court's careful factual findings.

New Jersey's interest in eradicating what its courts have called the "cancer of discrimination" based on sexual orientation is compelling and outweighs any burden the neutral, generally-applicable LAD might impose on BSA's First Amendment interests. Research from numerous fields of social science confirms New Jersey's legislative judgment that anti-gay discrimination exacts a terrible cost on youth—gay and straight alike. Gay youth are two to three times more likely to attempt suicide than their peers, and they account for approximately 30% of all adolescent suicides. Between one-third and one-half of gay students in a range of studies had experienced significant harassment, threats, or physical violence; the resulting alienation and fear contribute to alarming rates of depression, poor school performance, and truancy. Anti-gay discrimination by organizations like BSA grants to each rising generation of young people tacit permission to hate, sowing the seeds of violence researchers describe as "epidemic" in schools.

The damage caused by BSA's exclusion is particularly great, and New Jersey's interest in ending it correspondingly strong, because BSA has extensive connections with, and receives special benefits not generally available from, governments at all levels. BSA is not the "purely private" organization it portrays itself to be for purposes of this litigation. The factual record shows that: (1) BSA was chartered by Congress and receives supplies and assistance from the military and other federal agencies; (2) hundreds of scout troops in New Jersey and thousands

across the country are sponsored by public schools, police and fire departments, and other public entities; and (3) BSA has sought and gained privileged access to public schools across the country for instruction during the school day. These connections create the very real risk that the State will be viewed as sanctioning BSA's practice of excluding gay youth and leaders.

The New Jersey Supreme Court's decision is entirely consistent with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), which held that organizers of Boston's St. Patrick's Day parade could exclude a gay rights group that sought to march under its own banner. The Court specifically noted, however, that the organizers had *permitted* gays to march as part of other groups in the parade, and that the organizers would exclude *any* group (gay or straight) that expressed support for gays because such a message of tolerance was inconsistent with the organizers' views regardless of the identity of the speaker. Here, the reverse is true: BSA excludes gay scouts and scoutmasters based solely on their sexual orientation, not based on their advocacy of a message. Although BSA asserts that it wants to "avoid association with a message with which it does not agree," (Br. 19), BSA excludes only *gay* youth and adults—not the many straight participants and sponsoring organizations that publicly disagree with BSA's asserted "message" about the value of gay youth. *Amici* fully understand the importance of the freedoms of speech and association—and jealously guard those freedoms. But here the line between unprotected discrimination reflected in BSA's practice and a protected clash of viewpoints could not be more clear.

ARGUMENT

BSA and its *amici* completely fail to acknowledge the existence, much less the needs, of gay youth in Scout troops, and in the schools and communities by which

these troops are sponsored. BSA seeks to make this case exclusively about leadership, but its own practice of excluding gays makes no distinction between scouts and scoutmasters. The practice targets "known" as well as "avowed" gay members—even when they are simply kids seeking to abide by the Scout Oath and Law, and struggling to get the support and training that BSA has to offer. But New Jersey has not forgotten these gay youth. Its anti-discrimination policy recognizes, as this Court has, that "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984).

In *Roberts* the Court set out the test for determining when a State may act to prevent discrimination in an organization's membership: infringements on expressive association "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623; *accord Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987). New Jersey's state interest in preventing discrimination against gay youths outweighs any burden the statute imposes on BSA's rights of expressive association.[2]

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[2] The Supreme Court of New Jersey properly rejected BSA's intimate association claim. Under this Court's clear precedents, the organization's unselective, open admissions policy and practice of including non-members in scouting activities mean that BSA is not "the kind of intimate or private relation that warrants constitutional protection." *Rotary Club*, 481 U.S. at 546. Because the state court's thorough analysis, *see Dale*, 734 A.2d at 1219-22, accords fully with this Court's precedents, we do not address the intimate association claim in this brief.

I. NEW JERSEY'S COMPELLING INTEREST IN ERADICATING THE "CANCER OF DISCRIMINATION" IS SUPPORTED BY EXTENSIVE SOCIAL SCIENCE RESEARCH ESTABLISHING THE HARM TO YOUTH CAUSED BY ANTI-GAY DISCRIMINATION.

The purpose of the LAD is simple, and clear: "[T]he overarching goal of the [LAD] is nothing less than the eradication 'of the cancer of discrimination'" in all its forms. *Fuchilla v. Layman*, 537 A.2d 652, 660 (N.J. 1988) (quoting *Jackson v. Concord Co.*, 253 A.2d 793, 799 (N.J. 1969)). In 1991, the New Jersey Legislature amended the LAD to prohibit "sexual orientation" discrimination, recognizing that anti-gay discrimination is harmful and in fundamental conflict with New Jersey's public policy—and that the State has a compelling interest in ending it. The legislative judgment, reached by many other states and localities across the country, is confirmed by social science research on the harms of anti-gay discrimination to society as a whole, and particularly to individual gay and straight adolescents.

A. Anti-Gay Discrimination Leads to Suicide and Other Self-Destructive Behavior Among Gay Youth, Promotes Violence, and Harms Society as a Whole.

The national face of anti-gay violence belongs to 21-year-old college student Matthew Shepard, who was beaten in October 1998 by two men (one of whom was an Eagle Scout), then lashed to a fence near Laramie, Wyoming, and left to die, all because his attackers believed him to be gay. *See* Tom Kenworthy, *Neighbors Trace Two Men's Journey to a Wyoming Jail*, Wash. Post, Oct. 22, 1998, at A2. Unfortunately, the effects of discrimination on gay youth extend far beyond that one tragic case. Health care professionals, educators, and social workers have found that discrimination contributes to the alienation and fear many gay adolescents feel, putting them at high risk for substance abuse, homeless-

ness, depression and suicide, with resulting devastation to their families and friends. It also feeds the cycle of violence that caused Matthew Shepard's gruesome death and assaults on countless others.

The practice of excluding gays from an organization as well-known, widespread, and otherwise inclusive as BSA contributes to the "cancer of discrimination." When young Scouts—whether in a public school troop, the local fire department troop, or any other—see their leaders and peers banned from scouting based on sexual orientation, the message is clear: They should tolerate people of all races, whether African-Americans or Asians; of all religions, whether Methodists or Buddhists; of all talents, whether music or athletics; of all personalities, whether bookish or brash; and of all shapes and sizes—in short, they are taught *everyone* is worthy of acceptance, friendship, and training in the Boy Scout program to become valued members of the community, everyone *except* gays. This act of disapproval lands a devastating blow to the self-esteem of the excluded gay youth, and confers a license to hate on the Scouts that remain. The consequences of both are severe.

1. *The Pattern.*

For a striking example of the pattern of harassment that too many gay youth face on a regular basis, the Court need look no further than the Seventh Circuit's opinion in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), upholding the right of a gay student to pursue a Section 1983 claim against school officials for failure to afford him equal protection of the laws. Beginning around age 13, and continuing for years, Jamie Nabozny was subjected to various forms of verbal and physical abuse on buses going to and from school, on playgrounds, in hallways, and even in classrooms. *Id.* at 451-52. On one occasion, Nabozny was pushed to the floor in a science classroom and subjected to a mock rape; his attackers

claimed that he should enjoy it. *Id.* at 451. Later Nabozny was savagely beaten by a group of eight boys outside the school library while other students looked on laughing; he collapsed from internal bleeding as a result of the beatings. *Id.* at 452. Nabozny missed weeks of school and attempted suicide twice because of the harassment. *Id.* at 451-52. School officials refused to take adequate steps to stop the harassment and violence, despite repeated pleas for help by Nabozny. Instead, the school principal "said that 'boys will be boys' and that if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students." *Id.* at 451. What happened to Jamie Nabozny was not an isolated incident, nor was it much different from the harassment that happens every year across the country.

The Safe Schools Coalition of Washington State, a public-private partnership of seventy-four state agencies and private organizations (including PFLAG's Seattle chapter, GLSEN's Washington state chapter, and the Washington Education Association) recently conducted one of the most extensive surveys of harassment and violence directed at gay youth. Over a five-year period, the project collected 111 narratives detailing years of harassment and threats, and many incidents of physical violence. Safe Schools Coalition of Washington State, *They Don't Even Know Me: Understanding Anti-Gay Harassment and Violence in Schools* 1 (1999). One seventh grader was left with a broken arm and sprained ankle, among other injuries, after a game of "smear the queer." *Id.* at 34. A ninth grader reported that he was repeatedly beaten by classmates emboldened after a gym teacher asked, "What's the matter, don't you like girls?" Eventually, one day after school, he was attacked by two students who stripped him, raped him, and urinated on him. *Id.* at 44. Many students reported that the harassment and violence made them feel unsafe at school, feel more isolated and lonely, avoid parts of the school building, and have a harder time

paying attention in class. Twelve of the gay adolescents changed schools to try to escape the abuse, ten respondents dropped out of school, ten attempted suicide, and two succeeded in killing themselves. *Id.* at 2.

2. *The Statistics.*

The Court need not rely on compelling narratives to understand the scope of the problem. The numbers reported by a wide range of researchers paint a bleak picture of the harassment and violence gay adolescents face, and the consequences that too often result.

Harassment and Violence. Numerous researchers have concluded that "lesbian and gay youths experience a hostile climate of harassment and violence that enforces their invisibility in schools," and that "[b]oth adults and students in schools engage in harassment of lesbian and gay students." Joyce Hunter & Robert Schaecher, *Gay and Lesbian Adolescents, in* Encyclopedia of Social Work 1055, 1058 (19th ed. 1995). According to one survey of the literature, "[b]etween 33% and 49% of those [gay students] responding to community surveys report being victimized in school." Anthony R. D'Augelli, *Lesbian, Gay and Bisexual Development During Adolescence and Young Adulthood, in* Textbook of Homosexuality and Mental Health 267, 276 (Robert P. Cabaj & Terry S. Stein eds., 1996) (citing K. T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, 5 J. Interpersonal Violence 274 (1990)).[3] Indeed, leading researchers have called violence and harassment against

[3] *See also* Massachusetts Dep't of Education, *Massachusetts Youth Risk Behavior Survey* § 5 & Figure 5G (1997) (28.1% of gay high school students surveyed had been threatened or injured with a weapon at school, compared to 6.6% of their peers); Abby Abinati, *Legal Challenges Facing Lesbian and Gay Youth, in* Helping Gay and Lesbian Youth 149, 156 (Teresa DeCrecenzo ed., 1994); Neil W. Pilkington & Anthony R. D'Augelli, *Victimization of Lesbian, Gay, and Bisexual Youth in Community Settings*, 23 Am. J. Community Psychol. 34 (1995).

gay students "endemic" at the high school and junior high school levels. Emery Hetrick & A. Damien Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, 14 J. Homosexuality 25, 29 (1987).

Suicide. Gay youth attempt suicide at a truly alarming —and disproportionately high—rate. And too often they succeed. According to studies by the federal government, gay youth are several times more likely to attempt suicide than other young people, and as many as 3000 gay youth take their lives each year. *Colin v. Orange Unified Sch. Dist.*, —— F. Supp. 2d ——, 2000 WL 19467, at *16 (C.D. Cal. Feb. 4, 2000) (citing federal study finding gay youth six times more likely to attempt suicide); Paul Gibson, *Gay Male and Lesbian Youth Suicide, in* Report of the Secretary's Task Force on Youth Suicide 3-110, 3-115 (U.S. Dep't of Health & Human Services Pub. No. (ADM) 89-1623) (1989) (finding two to three times more likely).[4] Recent data show that gay youth account for approximately 30% of all completed adolescent suicides. Robert Garofalo et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-Based Sample of Adolescents*, 101 Pediatrics 895 (1998).

Other Harms. Gay youth also engage in self-destructive behavior short of suicide at disproportionately high rates. Because of the harassment they face, gay students are far more likely than their peers to skip classes and drop out

[4] *See also* Gary Remafedi et al., *The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study*, 88 Am. J. of Public Health 57 (1998); Mass. Dep't of Education at § 8 (study of 3,982 Massachusetts high school students found that 37% of gay students had attempted suicide, compared to 8% of their peers); Michael Radkowsky & Lawrence J. Siegal, *The Gay Adolescent: Stressors, Adaptations, and Psychosocial Interventions*, 17 Clinical Psychol. Rev. 191, 206-07 (1997); American Academy of Pediatrics, *Homosexuality and Adolescence*, 92 Pediatrics 631-34 (1993); Gibson at 3-111; Hunter & Schaecher, *Gay and Lesbian Adolescents* at 1060.

of school, *see* Mass. Dep't of Education at § 5; Radkowsky & Siegal at 200; to abuse alcohol and drugs, *see* Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1059; and to run away from home, Caitlin Ryan & Donna Futterman, *Lesbian & Gay Youth: Care and Counseling* 25 (1998); Radkowsky & Siegal at 200.[5] The consequences of such self-destructive behavior are often severe: "Rejected by family and friends, with no place to go, many of these 'throwaway' youths end up on the streets, putting them at high risk for prostitution and drug abuse." Hunter & Schaecher, *Stresses*, at 186.

3. *The Causes.*

What accounts for these astonishing statistics? Educators, health care professionals, and social workers who work with young people have spent considerable time and effort studying the problem. They overwhelmingly identify the root cause as the profound lack of emotional and social support that results from anti-gay isolation and ostracism. Discrimination against gays by leading organizations in the community such as BSA is directly and indirectly responsible for creating a climate of harassment and violence.

Gay Youth. Researchers have identified a basic internal conflict confronting gay youth: "For the adolescent, an identity crisis occurs that can be understood as the conflict produced by the juxtaposition of the negative ideas about homosexuality learned throughout childhood with the new awareness of homosexual attractions and identity that is developing." Anderson at 15. *See also* Ilan H. Meyer,

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[5] *See also* Dennis A. Anderson, *Lesbian and Gay Adolescents: Social and Development Considerations*, High Sch. J. 13, 18 (1993) ("Low self-esteem, academic inhibition, truancy, substance abuse, social withdrawal, [and] depressed mood . . . are not unusual."); Joyce Hunter & Robert Schaecher, *Stresses on Lesbian and Gay Adolescents in Schools*, 9 Social Work in Educ. 180, 184 (1987).

Minority Stress and Mental Health in Gay Men, 36 J. Health & Social Behavior 38, 40 (1995); Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & Sexuality 133, 145 (1991); Hetrick & Martin at 26-27; Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1057. To this internal conflict gay youth must add exclusion from peer groups and community institutions like BSA. When a gay scout (or prospective scout) sees his peers thrown out of the troop in a practice enforced by a teacher or community leader—or sees a respected former Eagle Scout excluded as unfit to be a leader—the resulting stigma corrodes the self-worth and self-esteem of the gay youth. As this Court recognized in *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) discrimination reaching children "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *See also Heckler v. Mathews*, 465 U.S. 728, 739-40 & n.7 (1984) (citing cases). Gay adolescents "soon learn that knowledge of their sexual orientation may have a negative effect on their treatment in all sectors of society, including the family, school, job opportunities, and so forth." Hetrick & Martin at 29. *See also* American Academy of Pediatrics et al., *Just the Facts About Sexual Orientation & Youth*, at 3 (1999).

In addition to reinforcing broader social stigma, exclusion from organizations like BSA deprives gay youth of the chance to make connections with their peers (and vice-versa). In one extensive study of the difficulties faced by gay adolescents, "[t]he most frequent presenting problem was isolation [and] . . . the socially isolated young person reported having no one to talk to, feeling alone within every social situation, including the family, peers, school, and church or synagogue." Hetrick & Martin at 31. Rejection by social institutions as broad-based and respected in the community as BSA compounds this iso-

lation. Meyer at 41; Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1057.

The literature reveals a strong correlation between experiences by gay youth of stigma, prejudice and violence and various forms of emotional distress, such as depression and threats of suicide. According to the American Academy of Pediatrics Committee on Adolescence, "[t]he psychosocial problems of gay and lesbian adolescents are primarily the result of societal stigma, hostility, hatred, and isolation." *Homosexuality and Adolescence*, 92 Pediatrics 631-34 (1993).[6] The ostracism of gay adolescents produces many signs of clinical depression—pervasive loss of pleasure, change of appetite, sleep disturbance, slowing of thought, lowered self-esteem with increased self-criticism, and feelings of guilt and failure. A. Damien Martin & Emery S. Hetrick, *The Stigmatization of the Gay and Lesbian Adolescent*, 15 J. Homosexuality 163, 172 (1988); Linda Garnets et al., *Violence and Victimization of Lesbians and Gay Men*, 5 J. Interpersonal Violence 366, 370-71 (1990); Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1057.

Families and Friends. Anti-gay discrimination also harms the families and friends of gay youth. They suffer from seeing their children, siblings, or friends being attacked, committing suicide or other self-destructive behaviors, struggling with depression, and so on. *See* Garnets at 374 (Family and friends "also must deal with the victimization experience . . . . [T]hey must deal with the survivor's immediate reactions (including her or his displaced feelings of displaced anger). They must make sense of the event for themselves and deal with their own self-blame."); *PFLAG Policy Statement: Legalized Discrimination*

[6] *See also* Meyer at 51-52; Ryan & Futterman at 4-5; Radkowsky & Siegal at 200; Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1060; Gibson at 3-110; Martin & Hetrick at 172.

(adopted Sept. 7, 1992) <www.pflag.org/press/policy/discrim.html> ("Loving family relationships are threatened when some members are stigmatized and labeled 'abnormal' and 'perverse.' "); *see* Dennis A. Anderson, *Family and Peer Relations of Gay Adolescents, in* 14 Adolescent Psychiatry: Developmental and Clinical Studies 162, 165 (S. Feinstein ed. 1987).

Straight Youth. Anti-gay discrimination also has serious harmful effects on straight youth. Such discrimination "hurts [youth] who are not gay or lesbian because they are taught to hate and discriminate." Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1059. Exclusion of gays from community organizations like BSA conveys what the historian C. Vann Woodward called "permissions to hate." *The Strange Career of Jim Crow* 81 (2d ed. 1966). The connection between discrimination and violence occurs at many levels, and frequently starts with a tolerance of discrimination by the government and by important societal institutions, such as BSA, that set community standards. Herek, *Myths About Sexual Orientation*, at 171. With the tolerance of anti-gay discrimination, "school environments become the breeding ground for bigotry." Abinati at 156. When anti-gay remarks and more serious forms of harassment and discrimination go unchecked other students are more likely to join in. Hunter & Schaecher, *Gay and Lesbian Adolescents*, at 1058. Indeed, "[w]hen adults tolerate abusive language, the next step is often physical violence." Hunter & Schaecher at 1057. Marginalization and exclusion "simultaneously makes lesbians and gay men inivsible and legitimizes hostility, discrimination, and even violence against them." Garnets at 369.

In fact, this case itself has demonstrated the wafer-thin distance that separates anti-gay violence from discrimination like BSA's exclusion of gay scouts and scout-

masters. The day after the New Jersey Supreme Court's decision last August, a scoutmaster at a camp in Rhode Island tore a picture of James Dale (the Respondent here) from a newspaper article about the decision and used it for target practice. Larry Hatfield, *Scout Leader Fired for Gay Gun Target*, S.F. Examiner, Aug. 13, 1999, at A1. The scoutmaster soon left the camp, *id.*, but not before vividly illustrating what New Jersey's Legislature was trying to avoid when it amended the LAD to prohibit anti-gay discrimination.

B. The Social Science Evidence Supports New Jersey's Determination That a Ban on Anti-Gay Discrimination Serves a Compelling State Interest.

This Court has frequently turned to social science evidence when weighing a State's asserted interest in a constitutional analysis. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 855 (1990); *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (citing "the judgment found in the relevant literature"); *Brown*, 347 U.S. at 494 & n.11 (reliance on "modern authority"). As the preceding section demonstrates, discrimination on the basis of sexual orientation is as invidious in its own way, particularly when directed at young people, as discrimination on the basis of race which this Court repeatedly has condemned. Under *Roberts*, States have the constitutional leeway to address this problem if they choose, so long as they do not target expression.

New Jersey is unmistakably of the opinion that the eradication of sexual orientation discrimination is a state interest of the highest order because it has consequences for the immediate victims and society as a whole.[7] With-

[7] In addition, the LAD was enacted to promote New Jersey's interest in the general welfare of its population, as well as the physical and emotional well-being of individuals. N.J. Stat. Ann. § 10:5-3. States have a "compelling interest in the maintenance of domestic peace" and "'in protecting the health and well-being of [their] citizens.'" *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 742 (1983) (citation omitted). This interest is especially strong where the health and welfare of children and teenagers are at stake. *See, e.g., Craig*, 497 U.S. at 855 (state has a "traditional and transcendent interest in protecting the welfare of children") (internal quotation marks and citation omitted); *Nunez v. City of San Diego*, 114 F.3d 935, 946 (9th Cir. 1997) ("The City's interest in protecting the safety and welfare of its minors is also a compelling interest."). That interest includes not only the physical health and safety but also the "psychological well-being" of minors. *Osborne*, 495 U.S. at 109.

out targeting expression, New Jersey has determined that "'affectional or sexual orientation [is] a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundations of a free democratic State.'" *Dale*, 734 A.2d at 1227-28 (quoting N.J. Stat. Ann. § 10:5-3).[8] In passing the LAD, a law of general applicability, the Legislature also expressed its intent to protect and ensure "the economic prosperity and general welfare of the inhabitants of the State," and determined that "because of discrimination, people suffer personal hardships . . . [including] physical and emotional stress; and in some cases severe emotional trauma, illness, . . . career, educational, family and social disruption; and adjustment problems . . . ." N.J. Stat. Ann. § 10:5-3. As one court recognized in addressing a similar law: "The compelling interests . . . that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all."

[8] This public policy is also reflected in prohibitions against discrimination on the basis of sexual orientation by state agencies, *see* New Jersey Executive Order No. 39 (Aug. 16, 1991), and by state courts, *see* New Jersey Code of Judicial Conduct Canon 3A(4) (1993).

Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1, 37 (D.C. App. 1987).

New Jersey joins a growing list of states and cities extending protections against discrimination based on sexual orientation. In *Romer v. Evans*, 517 U.S. 620 (1996), Justice Kennedy's opinion for the Court described the "emerging tradition of statutory protection" by States and municipalities against sexual orientation discrimination and found "nothing special" in those protections. "These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* at 631. *See also Roberts*, 468 U.S. at 624 (noting that many States have "progressively broadened the scope of [their] public accommodations law in the years since [they were] first enacted, both with respect to the number and type of covered facilities and with respect to the groups against whom discrimination is forbidden") (citation omitted); *Gay Rights Coalition*, 536 A.2d at 33.[9]

This Court has repeatedly recognized States' compelling interest in eradicating discrimination, and has held that "[a] state enjoys broad authority to create rights of public access on behalf of its citizens." *Roberts*, 468 U.S. at 625

[9] As of October 1999, nine states (including New Jersey) and the District of Columbia, along with 92 cities and counties in 24 States, included sexual orientation in their laws prohibiting discrimination in public accommodations. In addition, many states, cities, and counties barred discrimination in public employment, private employment, and/or education. For comprehensive listings of these statutes and ordinances, see Lambda Legal Defense and Education Fund, *Summary of States, Cities and Counties Which Prohibit Discrimination Based on Sexual Orientation*, <http://www. lambdalegal.org/cgi-bin/pages/documents/record?record=217>; Policy Institute of the National Gay and Lesbian Task Force, *Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States* 4, 83 (2000).

(citation omitted); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 609 (1982); *PruneYard Shopping Ctr v. Robins*, 447 U.S. 74, 81-88 (1980).[10]

It is not the case that only a "national" policy against discrimination based on sexual orientation can constitute a compelling *state* governmental interest. In *Roberts*, the Court noted that the state law against sex discrimination was more extensive than its federal counterpart, but nevertheless concluded that it was supported by "compelling state interests of the highest order" that outweighed any burden on the First Amendment rights of the organizations. 468 U.S. at 424-26. *See also Gay Rights' Coalition*, 536 A.2d at 38 n.25 (rejecting "national policy" requirement). The New Jersey legislature's reasoned judgment that discrimination based on sexual orientation threatens not only the welfare of individual New Jersey inhabitants but also the state's own institutions and foundation was the state's determination to make, based on its attention to local concerns.

II. NEW JERSEY'S INTEREST IS PARTICULARLY STRONG IN THIS CASE BECAUSE OF THE SIGNIFICANT SPECIAL BENEFITS BSA RECEIVES FROM GOVERNMENT.

Although the New Jersey Supreme Court conclusively determined that BSA is a "place of public accommodation" under the LAD, *Dale*, 734 A.2d at 1218, BSA now complains (Br. 37), that it is inappropriate to apply a state

[10] *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (noting that city's asserted purpose was "to ensure the basic human rights of members of groups that have historically been subjected to discrimination" and concluding that "[w]e do not doubt that these interests are compelling"); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987); *Alfred L. Snapp & Son*, 458 U.S. at 609 ("This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils.").

public accommodation law to an organization like BSA because BSA is "neither public nor quasi-commercial." Despite BSA's suggestion, the record (and common experience in cities and towns across the country) unequivocally demonstrates that BSA is not a purely private organization. It is widely seen as a unique American institution, thanks to its close and special connections to government at all levels. When a group so tightly identified in the community with public authorities discriminates, it exacerbates the harm to youth described in the social science literature. It is, therefore, particularly appropriate for New Jersey to subject BSA to its command forbidding anti-gay discrimination, in order to avoid any actual or perceived government endorsement of BSA's exclusion of gay scouts and scoutmasters. And applying the LAD to an organization like BSA that has unique and special connections to government would not trigger the parade of horribles that BSA and its *amici* fear.

A. BSA Receives Special Benefits from Government.

The Supreme Court of New Jersey carefully detailed the record evidence that BSA "maintains close relationships with federal and state governmental bodies." *Dale*, 734 A.2d at 1211. In fact, the BSA's contacts with government entities are unique and pervasive.

To begin, "[i]t is clear that Boy Scouts benefits from a close relationship with the federal government." *Dale*, 734 A.2d at 1212. BSA was chartered by Congress in 1916 under Title 36 of the United States Code, "Patriotic and National Observances, Ceremonies, and Organizations," to "promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues . . . ." 36 U.S.C. § 30902. BSA is required to make a yearly report to Congress of its "proceedings." It also receives significant equipment, supplies

and services from the federal government. The Department of Defense and other agencies are authorized to lend BSA cots and blankets, flags, and other equipment, and to furnish services and medical supplies without reimbursement. 10 U.S.C. § 2544. Scout troops use facilities on military installations for shows, meetings, and training activities, and BSA itself brags that "military personnel serve Scouting in many capacities." *Dale*, 734 A.2d at 1212.

BSA also has significant entanglements with state and local governments, which "have contributed to Boy Scouts' success." *Dale*, 734 A.2d at 1212. "A large percentage of scouting units nationally, as well as in New Jersey, are chartered by public schools and affiliated organizations." *Id.* at 1212-13. In New Jersey, for example, public schools and school-affiliated groups sponsor close to 500 scouting units and constitute about one-fifth of the chartering organizations in the State. *Id.* at 1201. Moreover, BSA makes extensive use of public school facilities for recruiting purposes: "Boy Scouts currently recruits many of its members through its presence in and use of school facilities," and "public schools and community colleges often host scouting meetings, activities, and recruiting events such as 'School Nights,'" at which an open scout meeting is held at a school to encourage students to join. *Id.* at 1212-13. Increasingly, public schools allow scout troops to use their facilities during the school day on conditions not generally available. Indeed, "[a]ccording to Boy Scouts, '[m]ore and more of our schools are becoming available for other than formal education. . . . In-school Scouting, where the pack, troop, team, or post meets during the school day, is recognized in many areas.'" *Id.* at 1213. In addition, "BSA's 'learning for life' program has been installed in many public school classrooms throughout the country," *Dale v. Boy Scouts of America*, 706 A.2d 270, 282 (N.J.

App. Div. 1998), reaching close to 700,000 students nationwide in 1992, *Dale*, 734 A.2d at 1213.

BSA's connections with state and local government in New Jersey and elsewhere extend beyond the schools. Other agencies are important supporters of Scouting:

> Local governmental agencies, such as fire departments and law enforcement agencies, serve Boy Scouts by sponsoring scouting units. Nationally, over 50,000 youth members belong to units sponsored by fire departments, whereas in New Jersey alone over 130 units are sponsored by fire departments and over 100 units are sponsored by law enforcement agencies.

Dale, 734 A.2d at 1212. New Jersey has also authorized its fish and wildlife agency to "stock with fish any body of water in this state that is under the control of and for the use of the . . . Boy Scouts," N.J. Stat. Ann. § 23:2-3, and has exempted BSA from motor vehicle registration fees, N.J. Stat. Ann. § 39:3-17.

B. BSA's Connection with Government Gives New Jersey a Strong Regulatory Interest in Applying Its Anti-Discrimination Mandate.

BSA's entanglement with public institutions, especially schools, is significant in at least two respects. First, given the epidemic of harassment and violence gay adolescents suffer, BSA's special connection to the State makes the harm from its anti-gay practices all the greater. When BSA is active in a school, its anti-gay practices confer permission to hate and contribute to the transformations of schools from safe zones into battle zones for gay youth. It is likely that adolescents—gay and straight alike—view BSA's exclusion of gay scouts and scoutmasters as sanctioned by the State and community. This powerful message of stigmatization exacerbates the harms educators and social scientists have identified. Emery Hetrick & A. Damien Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, 14 J. Homosexuality 25, 28 (1987). As this Court has recognized in other contexts, governments can cause significant injury by appearing to endorse the discrimination of an individual or group.[11] Because BSA's practice contradicts New Jersey's public policy, this stigmatization provides a strong justification for application of the LAD to BSA.

Second, the extra benefits BSA receives from government place it squarely within the category of organizations that *Roberts* and its progeny permit to be covered by the LAD. This is not to say that these connections with government transform BSA into a state actor. But they do dispose of BSA's claim that it is impermissible to apply civil rights laws to BSA at all. In *Roberts*, the Court rejected the argument that the public accommodations statute "could be used to restrict the membership decisions of wholly private groups organized for a wide variety of political, religious, cultural, or social purposes." 468 U.S. at 630. The Court was satisfied by "limiting constructions that would exclude private groups from the statute's reach" and that would avoid "an unacceptable risk of application to a substantial amount of protected conduct." *Id.* at 630-31. The same is true of the New Jersey courts' application of the criteria in the LAD to ensure that the statute only reaches organizations that can fairly be called public accommodations.

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[11] *See, e.g., Edmondson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991) (in use of peremptory challenges by civil litigants to exclude jurors based on race, "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself"); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (Establishment Clause prohibits government practices that have the effect of endorsing religion because "'[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community'") (citation omitted).

Justice O'Connor drew a distinction in *Roberts* between commercial organizations and other forms of expressive associations, noting that States have greater latitude under the First Amendment to prohibit discrimination by commercial entities. Her opinion described a sliding scale of First Amendment protection, with purely private expressive associations at one end and purely commercial activities on the other. As Justice O'Connor explained, "[o]nce [an organization] enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Id.* at 636 (O'Connor, J., concurring in part and concurring in the judgment). Of course, the line between commercial and private expressive organizations is not always clear: "[m]any associations cannot readily be described as purely expressive or purely commercial" because "[n]o association is likely ever to be exclusively engaged in expressive activities" and "innumerable commercial associations also engage in some incidental protected speech or advocacy." *Id.* at 635 (O'Connor, J., concurring in part and concurring in the judgment).[12]

In many cases, asking whether an organization is at least partially "commercial" serves as a proxy for asking whether it is open to the public; the commercial vs. non-

[12] Justice O'Connor referred to BSA in a footnote when she noted that "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Id.* at 636. Justice O'Connor went on to say that "[t]he considerations that may enter into the determination of when a particular association of persons is predominantly engaged in expression are therefore fluid and somewhat uncertain," *id.* at 637, and she did not decide how those considerations apply to BSA. The fully-developed record here makes clear that BSA has sought and obtained special benefits from government; as a result, it is not the type of "association . . . constitutionally protected in the selection of its membership" described in Justice O'Connor's concurring opinion. *Id.* at 633.

commercial distinction parallels the quasi-public vs. private entity distinction that separates organizations a State properly may subject to a public accommodations statute from those it may not. But focusing on commercial activities alone does not capture all of the quasi-public entities whose discrimination a State has a legitimate interest in preventing. A similar distinction should be drawn under the First Amendment between "purely private" expressive organizations, on the one hand, and those that choose to obtain special benefits from (and wear the sponsorship of) the government on the other. In balancing the constitutional rights of the organization against the State's interest in preventing harm to its citizens, the court below said it "cannot ignore the BSA's historic partnership with various public entities and public service organizations" *Dale*, 706 A.2d at 282. Where a group seeks and receives extra benefits from the government that are not available to all organizations, it is reasonable for a State to act to prevent discrimination in the group's membership. This limiting principle would avoid BSA's feared application of the LAD so that "almost any organization could find itself the target," no matter how private. (Br. 37.)

III. THIS CASE IS ABOUT DISCRIMINATION AGAINST GAY SCOUTS AND SCOUTMASTERS, NOT ABOUT FREEDOM OF SPEECH.

BSA argues principally that the State's highest court put this case in the wrong doctrinal "box," and that it should be analyzed under this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), instead of under the *Roberts* framework. BSA attempts to recast its practice of excluding gay scouts and troop leaders as an attempt by Scouting "to control the conduct of *its* message." (Br. 24.) But this argument collapses under the weight of the facts. BSA's exclusion of James Dale (and all other gay scouts and scoutmasters) was based on his *status* as

a gay man, and not on the viewpoints that he may hold. There is a line between an attack on some members of a quasi-public organization because of their identity, which a State may forbid, and a disagreement between a group and its members about core views of the group, which is protected by the First Amendment. That line may be difficult to discern in some cases, but not here.

Hurley involved a refusal by organizers of Boston's St. Patrick's Day parade to allow a gay organization to march in the parade. The Court held that inclusion of the group in the parade as an expressive contingent would violate the organizers' First Amendment rights because "a speaker has the autonomy to choose the context of his own message." 515 U.S. at 573. In holding the application of the Massachusetts public accommodations statute unconstitutional as applied to the parade, the Court noted that the statute "had been applied in a peculiar way" because the organizers "disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the [organizers] had approved to march." *Id.* at 572. In *Hurley*, in other words, the parade organizers would let gays march, but not a group—whether gay or straight—that expressed a viewpoint with which the parade organizers disagreed. The organizers' decision would have been the same if, for example, a group of parents of gays had tried to march under a banner promoting tolerance and respect for their children.

In this case, by contrast, BSA excludes gay scouts and scoutmasters based solely on their sexual orientation, not based on their advocacy of a message promoting tolerance of gay youth. Indeed, while excluding gay scouts and scoutmasters, BSA does not exclude the thousands of straight scouts and scoutmasters who affirm the worth of gay scouts and teach tolerance, and who believe (as Dale

does) that BSA's discriminatory practice is wrong. The letter Dale received from BSA told him that "Boy Scouts of America does not admit avowed homosexuals to membership in the organization." (J.A. 138.) It did not say that BSA excludes people who believe or teach that Scouts can be gay as well as "clean" and "morally straight" at the same time. Indeed, if viewpoint were truly the issue, BSA also would have expelled the regional Scout Councils that have publicly opposed BSA's policy of discrimination,[13] as well as numerous straight Scouts and Scout leaders who have done the same; [14] would have disassociated itself from the religious organizations that sponsor scout troops and appear in this Court as *amici* in support of Dale; and would have severed ties to the public schools and fire and police departments who by law must eschew discrimination. But, of course, BSA has not done so, seeking to have it both ways. The state courts made the correct finding of fact: BSA's expulsion

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[13] Two state chapters of BSA, the Narragansett Council (Rhode Island) and the Minnesota Council, have publicly urged the national officials to reconsider its practice of banning gays. *See* Jennifer Levitz, *Scouts Dragging Feet on Gay Policy Review*, Providence J., Mar. 24, 2000. Individual troops have done the same. *See, e.g.*, Affidavit of Michael Cahn, M.D. ¶¶ 17-18 (charter for Troop 260 in Santa Clara, California, renewed even though regional council and BSA were aware of resolution opposing BSA's exclusion of gay scouts and scoutmasters). (J.A. 628.)

[14] *See, e.g.*, Affidavit of William A. J. Kirkner ¶ 20 ("Because I believe that this policy is directly contrary to my moral, ethical and religious duties and obligations, I have tried to work within the Scouting movement to change the policy. . . . I have been assured that merely voicing my opposition to a policy that I believe is unfair and unjust is not grounds for revocation of my Scouting membership.") (J.A. 655); Affidavit of Robert L. Smith, Jr. ¶ 22 ("Despite my open opposition to the Scouting policy of excluding homosexuals from membership, I have been asked to continue in my role as an adult leader in Scouting. No one in Scouting has ever questioned whether I would be an appropriate role model for young Scouts in light of my opposition to the policy.") (J.A. 674.)

of Dale was "solely because of his status as a homosexual." *Dale*, 734 A.2d at 1229.

In this key respect, BSA's practice of excluding gays is different from the examples BSA and its *amici* give in conjuring up a parade of horribles: the specter of B'nai B'rith forced to accept anti-semites, (Br. 28), or PFLAG forced to accept someone who believes gays should be "cured," (Br. of Gays and Lesbians for Individual Liberty 26). In those situations, the decision to exclude would be based on the individual's active expression of a viewpoint that is fundamentally inconsistent with the group's central tenets and purposes—not on the person's *status* as a member of any group. Applying the *Roberts* analysis does not, as BSA would have the Court believe, (Br. 19-20), require that every group in society be "equally diverse." It simply ensures that an empty invocation of the First Amendment cannot serve as the pretext for a quasi-public entity to exclude members based on discrimination inconsistent with state law.

The evidence in this case fails to demonstrate that admitting gays to scout troops "will affect in any significant way the existing members' abilities to carry out their various purposes." *Rotary Club*, 481 U.S. at 548. The New Jersey Supreme Court explained in some detail the extent to which BSA's "policy" excluding gays from scouting is largely a recent litigation position unsupported by a review of BSA's public messages. As that court explained, "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality." *Dale*, 734 A.2d at 1223. As a result, "[t]he organization's ability to disseminate its message is not significantly affected by Dale's inclusion." *Id.*

In fact, the hatred, shame, violence, and self-destructive behavior caused by BSA's exclusion of gays violates the traditional Boy Scout values of honesty, friendliness, kindness and fair play, and BSA's stated mission to nurture the development of all boys. BSA seeks to teach youth to become ethical and productive members of society, and prominently espouses tolerance and inclusiveness in its guiding principles. For example, Scout Law sets forth that each Scout "is a brother to other Scouts. He seeks to understand others. He respects those with ideas and customs that are different from his own. . . . He treats others as he wants to be treated." (J.A. 188, 221-22.) Similarly, the *Boy Scout Handbook* adds that a "morally straight" youth "[r]espect[s] and defend[s] the rights of all people." (J.A. 218; *see also id.* at 196.) The *Handbook* specifically discourages the kind of hatred that discrimination engenders:

> Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are the targets of insults.

(J.A. 226.) These official statements teaching tolerance and openness—embraced by the schools and other community institutions that BSA's diverse members have aggressively recruited as troop sponsors—contradicts BSA's own discriminatory practice.

Because the record shows that BSA excludes homosexuals based on their status and not on their message, that the LAD's prohibition on anti-gay discrimination does not significantly affect BSA's own message, and, indeed, that accepting gay scouts and scoutmasters would actually be *consistent* with BSA's own stated core pur-

poses, New Jersey's strong interest in ending the harms to youth that anti-gay discrimination causes easily outweighs any burden on BSA's First Amendment interests.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

JOHN H. PICKERING
DANIEL H. SQUIRE
Counsel of Record
STUART F. DELERY
VAN W. ELLIS
CAROL J. BANTA
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Attorneys for *Amici Curiae*

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BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENT

JAMES L. MCHUGH
GENERAL COUNSEL
NATHALIE F.P. GILFOYLE
AMERICAN PSYCHOLOGICAL ASSOCIATION
750 First Street, NE
Washington, D.C. 20002
(202) 336-5500

PAUL M. SMITH*
NORY MILLER
JENNER & BLOCK
601 Thirteenth Street, NW
Washington, D.C. 20005
(202) 639-6000

March 29, 2000

*Counsel of Record

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE NATURE OF SEXUAL ORIENTATION 4

A. What Causes a Particular Sexual Orientation? 4

B. Can Sexual Orientation Be Changed? 7

II. THE SEXUAL ORIENTATION OF ADULTS DOES NOT ADVERSELY AFFECT THE CHILDREN IN THEIR CARE OR THE CARE THEY PROVIDE 8

A. Homosexuality Is Not a Mental Disorder And Does Not Affect Someone's Ability To Be a Responsible Member of Society 8

B. Gay Adults Do Not Present a Heightened Danger of Sexual Abuse 11

C. Sexual Orientation Is Not a Predictive Factor For Parenting Skills or Children's Outcomes ... 13

1. Parenting skills and philosophies 14

2. Sexual and gender development 17

3. Psychological and social adjustment 20

III. THE CONTINUING PREJUDICE AGAINST GAY PEOPLE REQUIRES, AND WILL BE ABATED BY, ANTI-DISCRIMINATION LEGISLATION 24

A. Gay People Face Prejudice and Discrimination .. 24

B. Anti-discrimination Laws Can Reduce Prejudice as Well as its Effects 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Baker v. Wade, 106 F.R.D. 526, 536 (N.D. Texas 1985) 13

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MISCELLANEOUS:

http://hatewatch.org/klan/klan.html> (visited Feb. 8, 2000) 2

http://www.psych.org/news_stand/rep_therapy.html> (visited Feb. 22, 2000) 7-8

http://www.fbi.gov/ucr/98hate.pdf> (visited Mar. 20, 2000) 27

INTEREST OF *AMICUS CURIAE*[1/]

The American Psychological Association ("APA"), a voluntary, nonprofit, scientific and professional organization founded in 1892, is the major association of psychologists in the United States, with more than 155,000 members and affiliates. Among the APA's major purposes is to increase and disseminate knowledge regarding human behavior, and to foster the application of psychological learning to important human concerns. Issues at the heart of this case – prejudice, sexual orientation, child development – have been the subject of significant research by psychologists.

The APA submits this brief to present relevant scientific knowledge[2/] that provides a context for this Court's review of whether the Boy Scouts's policy of excluding gay youths and adults survives state law aimed at reducing prejudice and discrimination against homosexuals. The APA has urged elimination of discrimination against gay, lesbian and bisexual people, and adopted resolutions recognizing the "profound psychological consequences" of "hate crimes" motivated by anti-gay prejudice, urging governmental action to reduce such bias-related crimes and to eliminate "policies that perpetuate them,"[3/] and declaring that discrimination against gay people "is detrimental to mental health and the public good."[4/]

1/ Letters of consent have been filed with the Clerk. No party authored this brief in whole or part and no one, other than *amicus*, its members, or its counsel contributed to the preparation or submission of this brief.

2/ Research cited in this brief includes data from studies conducted using the scientific method. Such research typically is subject to critical review by outside experts, usually during the peer review process preceding publication in a scholarly journal.

3/ American Psychological Association, *Minutes of Annual Meeting of the Council of Representatives*, 43 Am. Psychologist 527, 528 (1988).

4/ American Psychological Association, *Minutes of Annual Meeting of the Council of Representatives*, 49 Am. Psychologist 628, 628 (1994).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Boy Scouts claim a broad right of association that relieves organizations from following anti-discrimination laws, and potentially any statutory requirements, if it adopts a "moral position" or makes an "expressive decision" that is incompatible. Such a rule confers an unlimited power for organizations to insulate themselves from legislation because every decision reflects the decisionmaker's point of view.[5/]

Focusing solely on decisions reflecting a "moral position" does not provide a useful limit. Prejudice and "moral" judgments have historically been closely intertwined. Entire races have been condemned as being of a lesser moral character. Until quite recently, South Africa prohibited sexual interaction between a white person and an African, Indian or person of mixed background under legislation that was called the "Immorality Amendment." The current meaning of "sinister" derives from a much earlier prejudice against the left-handed.[6/] Members of minority religions have historically been regarded as immoral. In some circles, they are still.[7/]

5/ The Jaycees's and the New York clubs's decisions to exclude women, for example, reflected the view that men and women should have separate clubs. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). Such decisions earlier reflected the view that women should remain at home, far from business, world or cultural affairs.

6/ *See* William and Mary Morris, *Dictionary of Word and Phrase Origins* 318 (1962) ("Sinister, which comes from the Latin word of identical spelling, is one of the several words in the English language which reflect an unreasoning prejudice against left-handed persons."). Even today, a "left-handed" compliment means one that is dubious.

7/ *See, e.g.*, <http://hatewatch.org/klan/klan.html> (visited Feb. 8, 2000) (quoting from the White Camelia Knights of Ku Klux Klan's website a complaint that "Our White National Holidays" are being

The decision to exclude people on the basis of sexual orientation is not different in nature than a decision to exclude people on the basis of race, gender or religion. It is a decision based on the status of those excluded, albeit often disguised by unfounded allegations of dangerous or antisocial behavior.[8/]

The considerable body of relevant scientific research provides a context in which to assess the issues in this case. The research, for example, demonstrates that sexual orientation bears no relation to someone's ability to contribute to the community and to influence children to become responsible members of society. Although there is no direct research on gay troop leaders, or gay men in precisely analogous roles, there is extensive scientific research on closely related subjects such as the parenting abilities of homosexual adults and their partners and the psychological and social development of their children. Any assumption that a homosexual orientation adversely affects the ability of an adult to provide responsible leadership for children and youths is contrary to that research. The research also indicates that for most people – especially men – sexual orientation is not "voluntary." The core aspects of sexual orientation typically emerge by early adolescence and are highly resistant to change.

In addition, the research strongly supports New Jersey's concern with the effects of discrimination on those who are excluded. Exclusion, and other forms of discrimination, based on sexual orientation present the same risks of psychological and other harms as discrimination on the basis of race, or

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replaced with "Pro-Black" and "Jewish (Satanic) Holidays."

8/ Jews, for example, were accused of killing Christian babies for their Passover ceremonies, and of causing the Black Plague. Similarly, the Family Research Council and other *amici* frame their anti-gay mission in pseudo-scientific allegations of antisocial behavior. *See, infra*, pp. 12-13.

religion, or gender. Further, the research provides considerable support for anti-discrimination legislation, such as N.J.S.A. 10:5-1 to 5-49, as a means to reduce prejudice in addition to reducing overt discrimination, by increasing interpersonal contact between members of the majority and minority groups.

Conferring broad-based organizations with a readily available means to insulate themselves from anti-discrimination legislation thwarts state policy aimed at alleviating the potentially significant negative psychological, as well as physical and economic, effects of discrimination and prejudice.

ARGUMENT

I. THE NATURE OF SEXUAL ORIENTATION

A. What Causes a Particular Sexual Orientation?

Scientific research and clinical experience indicate that sexual orientation is not "voluntary" for most people. Most people – especially men – do not experience their sexual orientation as the result of conscious choice.[9/] The available studies of gay men indicate that the core feelings and attractions that form the basis for adult sexual orientation

9/ For example, 80% of the 60 gay men in one community sample said they had "no choice at all" about their sexual orientation. *See* Gregory M. Herek, J.C. Cogan, J.R. Gillis & E.K. Glunt, *Correlates of internalized homophobia in a community sample of lesbians and gay men*, 2 J. Gay and Lesbian Med. Ass'n 17-25 (1998). In a larger, not-yet-published study, the same researchers found 72% of the 898 gay men studied reported having "no choice," and another 13% reported "very little choice" (on file with the APA). Summarizing the prevalent view, one researcher explained: "The concept of voluntary choice is as much in error here as in its application to handedness or native language." John Money, *Sin, Sickness or Status? Homosexual Gender Identity and Psychoneuroendocrinology*, 42 Am. Psychologist 384 (1987).

typically emerge by early adolescence.[10/] For some people, adult sexual orientation is predictable by early childhood.[11/] "By the time boys and girls reach adolescence, their sexual preference is likely to be already determined, even though they may not yet have become sexually very active."[12/]

Scientific investigation into developmental precursors of adult sexual orientation has not yet consistently identified those factors for the population as a whole.[13/] It is not yet clear to what extent and in what way genetic, other biological traits, or early childhood experience may contribute to its development. Studies of identical twins have found that "heritabilities were substantial under a wide range of assumptions."[14/] However,

10/ See Alan P. Bell, Martin S. Weinberg & Sue Kiefer Hammersmith, *Sexual Preference: Its Development in Men and Women* 186-87 (1981); Richard R. Troiden, *The Formation of Homosexual Identities*, 17 J. Homosexuality 43, 43-73 (1989) (reviewing research literature).

11/ See J. Michael Bailey & Kenneth J. Zucker, *Childhood Sex-Typed Behavior and Sexual Orientation: A Conceptual Analysis and Quantitative Review*, 31 Dev. Psychol. 43 (Jan. 1995); Richard Green, *The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis*, 16 J. Psychiatry & L. 537 (1988); Richard Green, *The "Sissy Boy Syndrome" and the Development of Homosexuality* 370 (1987).

12/ Bell *et al.*, *supra* note 10, at 186.

13/ *See* Bell *et al.*, *supra* note 10, at 193-211.

14/ J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 Archives Gen. Psychiatry 1089 (1991). Bailey and Pillard's study, which has since been replicated, found: where one identical twin was gay, the other was gay in 52% of the cases; where one fraternal twin was gay, the other was also gay in 22% of the cases; and where one brother by adoption was gay, his adoptive brother was gay in just 11% of the cases. *Id.* at 1089. *See also* J. Michael Bailey and Khytam Dawood, *Behavioral Genetics, Sexual Orientation, and the Family, in Lesbian, Gay, and Bisexual Identities in Families* 3 (Charlotte J. Patterson and Anthony R. D'Augelli eds. 1998) (reviewing research); J.

molecular studies of one aspect of DNA have reached inconsistent conclusions with respect to a linkage with sexual orientation.[15/] Another study, as yet unreplicated, reported differences between heterosexual and gay men in the volume of a cell group in the anterior hypothalamus, a brain structure involved in sexual behavior.[16/] Results of a study of women suggests that women who were exposed to certain prenatal estrogens are more likely to be lesbian or bisexual.[17/] Other researchers, critical of this research, have proposed an "interactionist" model, in which genetic factors are

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Michael Bailey, Richard C. Pillard, Michael C. Neale & Yvonne Agyei, *Heritable Factors Influence Sexual Orientation In Women*, 50 Archives Gen. Psychiatry 217 (1993); J. Michael Bailey & Deana S. Benishay, *Familial Aggregation of Female Sexual Orientation*, 150 Am. J. Psychiatry 272 (1993); Frederick L. Whitam, Milton Diamond & James Martin, *Homosexual Orientation in Twins: A Report of 61 Pairs and Three Triplet Sets*, 22 Archives Sexual Behav. 187 (1993).

15/ *See* Dean H. Hamer, Stella Hu, Victoria L. Magnuson, Nan Hu & Angela M.L. Pattatuci, *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 Science 321 (1993) (study of 76 gay males and 40 gay brother pairs); Stella Hu *et al.*, 11 Nature Genet. 248 (1995) (follow-up study of 33 additional gay brother pairs); William J. Turner, *Homosexuality, Type 1: An Xq28 Phenomenon*, 24 Archives Sexual Behav. 109 (1995); *but see* George Rice, Carol Anderson, Neil Risch & George Ebers, *Male homosexuality: Absence of linkage to microsatellite markers at Xq28*, 284 Science 665-667 (1999) (attempting, but failing, to replicate the Hamer *et al.* results with a sample of 52 gay sibling pairs).

16/ Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 Science 1034 (1991); *see also* Simon LeVay, *The Sexual Brain* (1993).

17/ See Heino F.L. Meyer-Bahlburg, Anke A. Ehrhardt, Laura R. Rosen & Rhoda S. Gruen, *Prenatal Estrogens and the Development of Homosexual Orientation*, 31 Developmental Psychology 12 (1995).

conceptualized as indirect influences on the development of sexual orientation.[18/]

B. Can Sexual Orientation Be Changed?

Once established, sexual orientation is highly resistant to attempts to change it.[19/] Although some therapists report that their clients changed their sexual orientation in treatment, no scientific comparison with a control group has been reported. Closer scrutiny has shown that such changes were more likely among bisexuals who were highly motivated to reject a homosexual behavior pattern. Many interventions aimed at changing sexual orientation have succeeded only in reducing or eliminating homosexual behavior rather than in creating heterosexual attractions. One scholar concluded upon review of reports on "conversion therapy" that there is no reliable evidence that "sexual orientation is amenable to redirection or significant influence from psychological intervention."[20/]

18/ William Byne & Bruce Parsons, *Human Sexual Orientation: The Biologic Theories Reappraised*, 50 Archives Gen. Psychiatry 228 (1993).

19/ *See* Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psych. 221 (1994) [hereinafter Haldeman, *Practice*]; Douglas C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination, in Homosexuality: Research Implications for Public Policy* 149-60 (John C. Gonsiorek & James D. Weinrich eds. 1991) [hereinafter *Homosexuality*]; A. Damien Martin, *The Emperor's New Clothes: Modern Attempts to Change Sexual Orientation, in Innovations in Psychotherapy with Homosexuals* 23-58 (E.S. Hetrick & T.S. Stein eds. 1984).

20/ Haldeman, *Practice*, *supra* note 19, at 224. Moreover, attempts to change someone's sexual orientation runs a risk of causing depression, anxiety, and self-destructive behavior. *See* American Psychiatric Ass'n, No. 98-56, *Position Statement on Psychiatric Treatment and Sexual Orientation* (Dec. 11, 1998) (opposing psychiatric treatment based on the assumption that a patient should change sexual orientation). <http://

II. THE SEXUAL ORIENTATION OF ADULTS DOES NOT ADVERSELY AFFECT THE CHILDREN IN THEIR CARE OR THE CARE THEY PROVIDE.

A. Homosexuality Is Not a Mental Disorder and Does Not Affect Someone's Ability to Be a Responsible Member of Society.

The psychiatric, psychological, and social work professions do not consider homosexual orientation to be a disorder. That conclusion is based on extensive empirical research demonstrating that earlier assumptions about homosexuality cannot be justified by scientific observation. A quarter century ago, the American Psychiatric Association removed "homosexuality" from its list of mental disorders,[21/] declaring that "homosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."[22/] Following a rigorous review of the scientific evidence, in 1975, *amicus* adopted the same position, urging all mental health professionals to work to dispel the stigma of mental illness long associated with homosexual orientation.[23/] In the classic study on the subject, a researcher administered Rorschach tests to homosexual and heterosexual men matched

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www.psych.org/news_stand/rep_therapy.html> (visited Feb. 22, 2000).

21/ A mental disorder is "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (*e.g.*, a painful symptom) or disability (*i.e.*, impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom." American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) at xxi (1994).

22/ *Resolution of the American Psychiatric Association* (Dec. 15, 1973), *reprinted in* 131 Am. J. Psychiatry 497 (1974).

23/ *See* American Psychological Ass'n, *Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychologist 620, 633 (1975).

for age, IQ, and education. The two independent experts evaluating the results could not distinguish the sexual orientation of the subjects at a level better than chance, leading the researcher to conclude that "homosexuality as a clinical entity does not exist."[24/] Dozens of studies since support the conclusion that there is no inherent association between someone's sexual orientation and level of mental health."[25/]

Research has demonstrated that "gay people have an overall potential to contribute to society similar to that of heterosexual people."[26/] Empirical studies have shown that gay people are employed productively in a wide range of occupations and professions.[27/] Researchers have found that many gay men also "participate actively in civic, church,

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24/ Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 121 J. Projective Tech. 18, 19-20 (1957) (two-thirds of *each* group were found to be in the highest three categories of adjustment).

25/ *See* John C. Gonsiorek, *The Empirical Basis of the Demise of the Illness Model of Homosexuality, in Homosexuality, supra* note 19, at 115-36; Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 Law & Sexuality 133, 142 (1991) [hereinafter Herek, *Myths*].

26/ Gary B. Melton, *Public Policy and Private Prejudice*, 44 Am. Psychologist 933, 936 (1989); Alan P. Bell & Martin S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 141-48 (1978) [hereinafter Bell & Weinberg, *Diversity*].

27/ *See*, M.V. Lee Badgett & M.C. King, *Lesbian and gay occupational strategies, in Homo Economics: Capitalism, Community, and Lesbian and Gay Life* 73 (A. Gluckman & B. Reed eds. 1997); R.A. Buhrke, *A matter of justice: Lesbians and gay men in law enforcement* (1996); B. Powers & A. Ellis, *A manager's guide to sexual orientation in the workplace* (1995); J.D. Woods & J. H. Lucas, *the corporate closet: The professional lives of gay men in America* (1993).

neighborhood, and political life, most often alongside their non-gay neighbors and friends."[28/]

Like married people, gay couples form deep emotional attachments and commitments, that endure for decades.[29/] A 1991 review of the literature on gay and lesbian couples concluded that "[r]esearch has shown that most lesbians and gay men want intimate relationships and are successful in creating them."[30/] A major study of heterosexual and gay couples in the United States concluded in the early 1980s that "[c]ouplehood, either as a reality or an aspiration, is as strong among gay people as it is among heterosexuals."[31/] Empirical studies have found that between 40% and 70% of gay men and between 60% and 80% of lesbians are involved in steady relationships at a given time.[32/] Because convenience samples tend to underrepresent older persons (who are more likely to be coupled), these figures are probably conservative.[33/] Studies

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28/ David Parr McWhirter & Andrew M. Mattison, *The Male Couple: How Relationships Develop* 286 (1984).

29/ *See* Lawrence A. Kurdek, *Lesbian and Gay Couples, in Lesbian, Gay, and Bisexual Identities Over the Lifespan* 243 (Anthony R. D'Augelli & Charlotte J. Patterson eds. 1995) (reviewing literature).

30/ Letitia Anne Peplau, *Lesbian and Gay Relationships*, in *Homosexuality, supra* note 19, at 195.

31/ P. Blumstein & P. Schwartz, *American Couples* 45 (1983).

32/ *See, e.g.*, Rochelle L. Klinger, *Lesbian Couples, in Homosexuality and Mental Health* 339, 340 (Robert P. Cabaj & Terry S. Stein eds 1996); Kurdek, *supra* note 29, at 243; Bell & Weinberg, *Diversity, supra* note 26; J. Harry, *Gay Couples* (1984).

33/ Peplau, *Lesbian and Gay Relationships, supra* note 30, at 195.

that have included older persons in the samples report relationships lasting decades.[34/]

B. Gay Adults Do Not Present a Heightened Danger of Sexual Abuse.

One manifestation of prejudice has been the allegation that gay men pose a particular danger to children. However, all available research data and clinical experience indicates that gay men are not more likely than heterosexual men to sexually abuse children. A study of children seen for sexual abuse in a one-year period at a Denver children's hospital, for example, found that less than one percent of the identified adult offenders were gay or lesbian. Of the 219 abused girls, only one instance of abuse had been attributed to a lesbian. Of the 50 abused boys, only one instance of abuse had been attributed to a gay man. In contrast, 88 percent of the offenders had documented heterosexual relationships and most were heterosexual partners of a family member (77 percent of those who abused the girls and 74 percent of those who abused the boys).[35/]

One source of confusion in this area is that many men who sexually abuse boys are not themselves homosexual. Rather, they are attracted, entirely or predominately, to children. These men have never developed a mature sexual orientation, either heterosexual or homosexual.[36/] One study of 175 adult males who had been convicted in Massachusetts for sexual assault of

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34/ *See, e.g.*, Bryant & Demian, *Relationship Characteristics of American Gay and Lesbian Couples: Findings from a National Study*, 1 J. Gay & Lesbian Soc. Sci. 101 (1994).

35/ *See* Carole Jenny *et al.*, *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 Pediatrics 41 (July 1994) (study of 269 sexually abused children when an adult offender was identified).

36/ *See* D. Finkelhor & S. Araji, *Explanations of pedophilia: A four factor model*, 22 J. Sex Research 145-161 (1986).

a child found that 47 percent were exclusively interested in children, 40 percent were regressed heterosexuals, and 13 percent were regressed bisexuals.[37/] None had an exclusively homosexual orientation, and none of those who were bisexual were primarily attracted to men.[38/]

Assertions to the contrary by Family Research Council and others cannot be considered reliable. These *amici* seriously mischaracterize research[39/] and rely on dubious sources.[40/]

37/ *See* A.N. Groth & H.J. Birnbaum, *Adult sexual orientation and attraction to underage persons*, 7 Archives Sexual Behav. 175 (1978).

38/ *Id.* at 180. Another study, of priests and other clergy sent or self-committed to a residential treatment facility over a 25-year period, found that those who had been involved in age-inappropriate sexual activity and those who had been involved in adult homosexual relationships were "two quite distinct groups," with "[s]triking differences, and statistically significant ones." John Allan Loftus & Robert J. Camargo, *Treating the Clergy*, 6 Annals of Sex Research 287, 295 (1993).

39/ For example, the Council mischaracterizes Freund and Watson as finding that one-third of child molesters are gay. *See* FRC Br. at 23. In contrast, the study found that one-third of the abused *children* studied were male, and specifically cautioned: "This, of course, should not be understood as saying that androphiles [gay men] may have a greater propensity to offend against children than do gynephiles [heterosexual men], a myth refuted in an earlier study." K. Freund and R.J. Watson, *The Proportions of Heterosexual and Homosexual Pedophiles Among Sex Offenders Against Children: An Exploratory Study*, J. of Sex & Marital Therapy 41 (1992). The Council's misciting of Marshall, FRC Br. at 25, is equally egregious. The study does not support a presumption that homosexuality is linked to abuse. It found only that of 34 men who had abused boys, 31had abused only boys – not that those 31 were homosexual. Only 2 of the 34 reported regular homosexual behavior with adults. Similarly, PAUS *et al.* misrepresent Bell and Weinberg's study as supporting its claim that young teenagers are "recruited" through affairs with older homosexuals. PAUS Br. at 25. Although the study found that 60% of white homosexual respondents identified their first partner in an affair as older than they were, the same paragraph makes clear that the vast majority of the respondents were at least 20 years old at the time.

Their presumption that homosexual men are pedophiles is contrary to the legitimate research in the field, just as any such presumption about heterosexual men would be.[41/]

C. Sexual Orientation Is Not a Predictive Factor for Parenting Skills or Children's Outcomes.

The considerable body of research on the children, and the parenting abilities, of gay men and lesbians has consistently found that they are as good parents as their heterosexual counterparts and that their children do not differ appreciably from children raised by heterosexuals.[42/]

40/ The Council, for example, relies on the long discredited work of Paul Cameron, FRC Br. at 24-25. *See Minutes of the Nebraska Psychological Ass'n* (Oct. 19, 1984) (adopting a resolution dissociating itself from writings and views of Mr. Cameron on sexuality); *Baker v. Wade*, 106 F.R.D. 526, 536 (N.D. Tex. 1985) (referring to Mr. Cameron's testimony that homosexuals abuse children at greater rate than heterosexuals as misrepresentation and fraud on the court). *See also* FRC Br. at 23-24 (relying on statements from anti-gay organization NARTH not based on empirical data). Similarly, reliance on the journalistic work by Jay and Young reporting survey responses by gay and bisexual men that they had sex "at some time" with boys 16-19 years old or younger, FRC Br. at 23, PAUS Br. at 24, is questionable on several grounds. The survey did not distinguish between respondents who had experienced a sexual encounter with an age-mate *as a teenager* from any who had encounters with teenagers *as adults*. The authors also used inadequate methodologies that would not be relied on by scientists.

41/ Moreover, warranted suspicions that any particular scout has or would abuse children would constitute grounds for exclusion. The Council's suggestion that only *convicted* pedophiles could be excluded, FRC Br. at 29-30, is not supported by the state laws under review.

42/ Because of the impossibility of proving a negative, researchers have approached these questions by attempting to find differences between children of homosexual parents and those of heterosexual parents and differences between the parenting approaches of homosexual

1. Parenting skills and philosophies

Scientific research indicates that gay parents are little different from heterosexual parents.[43/] Several studies have evaluated the parenting philosophies and skills of gay men and have concluded that "gay fathers are similar to nongay fathers in their overall parenting abilities and skills."[44/] Such research suggests that the "gay fathers are at least equal to heterosexual fathers in the quality of their parenting."[45/] Indeed, two researchers reviewing the scientific literature in this area

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and heterosexual parents. The more that different studies by different researchers consistently fail to find statistically significant differences, the more likely it is that differences between groups truly do not exist. It is therefore useful to consider the entire body of empirical research in this area, to move beyond the idiosyncrasies of sample or methodology of any one study. A consistent pattern from different samples and different methods provides a basis for confidence in the results.

43/ *See* G. Dorsey Green & Frederick W. Bozett, *Lesbian Mothers and Gay Fathers, in Homosexuality, supra* note 19, at 213 (reviewing studies) [hereinafter Green & Bozett, *Lesbian Mothers*]; *see also* Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 Child Dev. 1025 (1992) (reviewing studies) [hereinafter Patterson, *Children*]; Mary B. Harris & Pauline H. Turner, *Gay and Lesbian Parents*, 12 J. Homosexuality 101, 104 (1985-86) (study of gay, lesbian and heterosexual parents).

44/ Jerry J. Bigner & R. Brooke Jacobsen, *Parenting Behaviors of Homosexual and Heterosexual Fathers*, 18 J. Homosexuality 173, 181 (1989) [hereinafter Bigner & Jacobsen, *Parenting Behavior*].

45/ Jerry J. Bigner & Frederick W. Bozett, *Parenting by Gay Fathers*, 14 Marriage & Fam. Rev. 155 (1989), *reprinted in Homosexuality and Family Relations* 155, 173 (Frederick W. Bozett & Marvin B. Sussman eds., 1990) [hereinafter Bigner & Bozett, *Parenting by Gay Fathers*]; *see also* Frederick W. Bozett, *Gay Fathers: A Review of the Literature*, 18 J. Homosexuality 137 (1989), *reprinted in Psychological Perspectives of Lesbian and Gay Male Experiences* 437, 453 (Linda D. Garnets & Douglas C. Kimmel eds., 1993) [hereinafter Bozett, *Gay Fathers*] (reviewing research).

concluded: "It is evident . . . that both lesbians and gay men who are parents are as sufficient in the roles as heterosexuals, and that the home life they provide is at least of equal quality."[46/] Some researchers have found that gay fathers make greater efforts to create a stable home environment and positive relationship with their children than heterosexual fathers.[47/]

One study found no differences between homosexual and heterosexual fathers in their degree of involvement with their children or in the level of intimacy they had with their children. The differences the study did find were that homosexual fathers were more likely to set and enforce limits on their children's behavior, were more responsive to their children's needs, and were more likely to explain the reasons for rules.[48/]

Another study comparing gay and heterosexual fathers' responses to standard measures of parental attitudes and responses concluded: "no discernible parenting style could be found to distinguish one group from the other."[49/] Similarly, a

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46/ Green & Bozett, *Lesbian Mothers, supra* note 43, at 197; *see also* Susan Golombok *et al., Children Raised in Fatherless Families from Infancy: Family Relationships and the Socioemotional Development of Children of Lesbian and Single Heterosexual Mothers*, 38 J. Child. Psychiat. 787, 789 (1997) [hereinafter Golombok *et al., Infancy*] (finding the parenting skills of lesbians and female heterosexuals comparable).

47/ Robert L. Barret & Bryan E. Robinson, *Gay Dads, in Redefining Families: Implications for Children's Development* 157, 163 (Adele Eskeles Gottfried & Allen W. Gottfried eds., 1994) [hereinafter Barret & Robinson, *Gay Dads*].

48/ Bigner & Jacobsen, *Parenting Behavior, supra* note 44, at 179-80 (comparing responses of 33 gay fathers and 33 heterosexual fathers on Iowa Parenting Behavior Inventory.)

49/ Jerry J. Bigner & R. Brooke Jacobsen, *Adult Responses to Child Behavior and Attitude Toward Fathering: Gay and Nongay Fathers*, 23 J. Homosexuality 99 (1992) (comparing 24 gay and 29 heterosexual

study comparing gay and lesbian parents to heterosexual parents found "no significant differences in the relationships of the two sets of parents with their children."[50/] With respect to sexual identity and sex role aspects of parenting, "no differences were found" on the parents' encouragement of same-sex friends or in their encouragement of gender-typed toys for their own children.[51/]

There is an even larger body of research on lesbian mothers that compares their parenting skills and attitudes to those of heterosexual mothers. These studies consistently demonstrate a "remarkable absence of distinguishing features between the life-styles, child-rearing practices, and general demographic data" of lesbian mothers and heterosexual mothers.[52/] This research provides additional support for the conclusion that sexual orientation is not an important variable in predicting parenting ability.[53/]

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fathers).

50/ Harris & Turner, *supra* note 43, at 111.

51/ Harris & Turner, *supra* note 43, at 110. As an overall matter, only a minority of heterosexual or homosexual parents of either gender encouraged play with gender-typed toys.

52/ Beverly Hoeffer, *Children's Acquisition of Sex-Role Behavior in Lesbian Mother Families*, 51 Am. J. Orthopsychiatry 536, 537 (1981) [hereinafter Hoeffer, *Children's*].

53/ *See, e.g.*, David K. Flaks *et al.*, *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 Dev. Psychol. 105 (Jan. 1995); Martha Kirkpatrick *et al.*, *Lesbian Mothers and Their Children: A Comparative Study*, 51 Am. J. Orthopsychiatry 545, 546 (1981).

2. Sexual and gender development

Research into the three aspects of sexual identity -- gender identity, gender role, and sexual orientation -- consistently demonstrates no differences between children of gay or lesbian parents and children of heterosexual parents.[54/] Research involving children of gay fathers indicates that these children develop gender role identifications (self-identification as male or female) that are consistent with their biological sex.[55/] Similarly, comparisons of children raised by lesbian and heterosexual mothers found no appreciable differences.[56/] Most

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54/ *See, e.g.*, Julie S. Gottman, *Children of Gay and Lesbian Parents*, 14 Marriage & Fam. Rev. 177 (1989), *reprinted in Homosexuality and Family Relations* (Frederick W. Bozett ed. 1990) ("children of lesbian mothers and gay fathers appear to be normal in gender identity, gender role, sexual orientation, and social adjustment").

55/ Green & Bozett, *Lesbian Mothers*, *supra* note 43, at 200 (reporting on findings of researchers Turner, Scadden and Harris, presented at First Future of Parenting Symposium, Chicago, Illinois, March 1985); Gottman, *supra* note 54, at 177, 191.

56/ *See, e.g.*, Susan Golombok *et al.*, *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. Child Psychol & Psychiat. 551, 568 (1984) [hereinafter Golombok *et al.*, *Appraisal*]; Gottman, *supra* note 54, at 189; Kirkpatrick *et al.*, *supra* note 53, at 551; Richard Green, *The Best Interests of the Child With A Lesbian Mother*, 10 Bull. AAPL 7, 14 (1982) [hereinafter Green, *Best Interests*]; Richard Green *et al.*, *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 Archives of Sexual Behav. 167 (1986) [hereinafter Green *et al.*]; *see also* Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 Am. J. Psychiatry 692 (1978) [hereinafter Green, *Sexual Identity*] (studying sexual identities of children raised by both transsexual men and lesbians).

children in both groups identified with their biological sex[57/] and indicated satisfaction with their gender.[58/] Likewise, the comparisons revealed no appreciable differences in gender role behavior (tendency to engage in activities traditionally regarded as masculine or feminine).[59/]

Research indicates that the same prevalence rates for heterosexuality and homosexuality holds for children of gay and lesbian parents as for children of only heterosexual parents.[60/] For example, a study of 82 sons (17 years or older) of 55 gay or bisexual fathers concluded that 91 percent of those whose sexual orientation could be rated were heterosexual. Furthermore, the sons' sexual orientations were unrelated to the amount of time they spent living with their fathers, the frequency of their contact with their fathers, the degree to which they accepted their father's sexual orientation or the

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57/ *See, e.g.*, Kirkpatrick *et al.*, *supra* note 53, at 551; Green *et al.*, *supra* note 56, at 174, 179-80; Green, *Sexual Identity, supra* note 57, at 693, 696-97.

58/ *See, e.g.*, Green *et al.*, *supra* note 56, at 176.

59/ Charlotte J. Patterson, *Children of the Lesbian Baby Boom: Behavioral Adjustment, Self-Concepts, and Sex Role Identity, in Lesbian and Gay Psychology: Theory Research and Clinical Applications* 156, 168-69 (Beverly Greene & Gregory M. Herek eds. 1994) [hereinafter Patterson, *Baby Boom*]; Golombok *et al.*, *Appraisal, supra* note 56, at 568; Gottman, *supra* note 54, at 189; Kirkpatrick *et al.*, *supra* note 53, at 551; Hoeffer, *Children's*, *supra* note 52; Green, *Best Interests*, *supra* note 56, at 14.

60/ *See* Charlotte J. Patterson & Raymond W. Chan, *Gay Fathers and Their Children, in Textbook of Homosexuality and Mental Health* (Robert P. Cabaj & Terry S. Stein eds., 1997) 371, 382 (summarizing research); Herek, *Myths*, *supra* note 25, at 133, 157-61; Bozett, *Gay Fathers*, *supra* note 45, at 442.

quality of the father-son relationship.[61/] Another study of 40 gay fathers and their children determined that, of the 21 sons who were old enough for sexual orientation to be assessed, only one was gay.[62/] These findings corroborate other research indicating that the sexual orientation of the father or the relationship between child and gay father is not predictive with respect to the child's sexual orientation.[63/]

Similarly, studies of children raised by lesbian mothers have found that these children "are generally no more likely than their peers from heterosexual mother families to identify themselves as gay or lesbian or to be attracted to someone of the same gender."[64/] Thus, researchers have concluded: "The

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61/ J. Michael Bailey *et al.*, *Sexual Orientation of Adult Sons of Gay Fathers*, 31 Dev. Psychol. 124, 126 (Jan. 1995) (finding that the gay sons had lived with their fathers for somewhat shorter periods than had the heterosexual sons but the difference was not statistically significant).

62/ Brian Miller, *Gay Fathers and Their Children*, 28 Family Coordinator 544, 546 (1979) (finding also that three of the 27 daughters were lesbian).

63/ *See* Patterson & Chan, *supra* note 60, at 382 (summarizing research); Bozett, *Gay Fathers*, *supra* note 45, at 442; Barret & Robinson, *Gay Dads, supra* note 47, at 161-62; Robert L. Barret & Bryan E. Robinson, *Gay Fathers* 80 (1990).

64/ Fiona L. Tasker & Susan Golombok, *Growing Up in a Lesbian Family* 132 (1997) (comparing adult sons and daughters who had been raised by lesbian and heterosexual mothers, as part of a longitudinal study in which the sample was recruited before the children's sexual orientation was established). Other studies of children raised by a lesbian parent or couple have likewise found no statistically significant difference between these children's expressed sexual orientation and that of children raised by a heterosexual parent or parents. *See, e.g.*, Gottman, *supra* note 54, at 177, Green, *Best Interests*, *supra* note 56, at 13-14; Sharon Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers, reprinted in Homosexuality and the Family* 123, 132-35 (Frederick W. Bozett ed.,

truth is that most children of homosexual men and women turn out to be heterosexual."[65/] A reverse study of the sexual orientation of 702 parents of gay men and lesbians revealed that 90 percent of the parents were heterosexual, 4 percent were bisexual, and only 6 percent were homosexual.[66/]

3. Psychological and social adjustment

As relatively few single fathers generally, including gay fathers, have historically received custody of their children, research on children raised by homosexual parents has focused mostly on children being raised by a lesbian mother (and in many cases her partner). The consistent conclusion drawn from these studies is that the children demonstrate no appreciable differences in intellectual development[67/] or in psychological well-being or social adjustment from children raised by heterosexual parents.[68/] Fewer studies have been made of

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1989).

65/ Barret & Robinson, *Gay Fathers, supra* note 63, at 40.

66/ *Id.* (citing B.E. Robinson, *et al.*, *Response of Parents to Learning that their Child is Homosexual and Concern Over and AIDS: A National Study*, 18 J. Homosexuality 59-80 (1989)).

67/ Green *et al.*, *supra* note 56, at 174 (reporting that the intelligence quotient of children is not appreciably different when they are raised by a lesbian mother as opposed to a heterosexual mother).

68/ *See, e.g.*, Tasker & Golombok, *supra* note 64, at 1 (a twenty-year longitudinal study of parents and children in the UK); Flaks *et al.*, *supra* note 53, (studying parents and children in Pennsylvania); Green *et al.*, *supra* note 56 (studying parents and children in both rural and urban areas in Connecticut, Florida, Illinois, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, and Wisconsin).

children of gay fathers, but the results of those studies are consistent with the studies of children of lesbian parents.[69/]

Although concern is sometimes voiced that children of gay men and lesbians will suffer dysfunction as a result of their parents' sexual orientation, research does not bear this out.[70/] Two scientists reviewing studies in this area have commented:

> [A] striking feature of the research on lesbian mothers, gay fathers, and their children . . . is how similar the groups of gay and lesbian parents and their children are to the heterosexual parents and their children that were included in the studies.[71/]

The more extensive research on children being raised by lesbian parents provides consistent evidence that the sexual orientation of parents is not a predictive variable in the psychological and social development of children. In studies of single-parent households produced by divorce, children raised by lesbian mothers and by heterosexual mothers demonstrated largely identical levels of psychological adjustment.[72/] No statistically significant differences were found in the prevalence of emotional or behavioral problems

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69/ *See, e.g.*, Bozett, *Gay Fathers, supra* note 45, at 454; Barret & Robinson, *Gay Dads, supra* note 47, at 168.

70/ *See* Bigner & Bozett, *Parenting by Gay Fathers, supra* note 45, at 163 ("There is no evidence of any kind that demonstrates that living with a homosexual parent has any significant negative effects on children."); Gottman, *supra* note 54, at 191 ("Parental homosexuality does not appear to directly or indirectly harm the child.").

71/ Green & Bozett, *Lesbian Mothers, supra* note 46, at 197, 213; *see also* Patterson, *Children, supra* note 43, at 1036 (comprehensively reviewing research on the subject and drawing similar conclusion).

72/ *See, e.g.*, Kirkpatrick *et al.*, *supra* note 53, at 545-51; Golombok *et al.*, *Appraisal, supra* note 56.

such as unsociableness, emotional difficulty, hyperactivity, or conduct problems.[73/] Similarly, a study of children raised by divorced mothers in two-adult households concluded there was no difference in the self-concepts and levels of self-esteem of adolescents who lived with a lesbian mother and her same-sex partner and adolescents who lived with a mother and her opposite-sex partner. All fell within the normal range.[74/]

Following such children into adulthood, researchers found that those raised by lesbian mothers were no more likely to experience anxiety or depression, no more likely to have sought professional help for mental health problems, and no more likely to have experienced periods of unemployment than adults raised by heterosexual mothers.[75/] Another study of adult daughters found no higher incidence of emotional problems among those who had been raised by a lesbian mother than among those raised by a heterosexual mother.[76/]

73/ Golombok *et al.*, *Appraisal*, *supra* note 56, at 565, 570.

74/ Huggins, *supra* note 64, at 132-35.

75/ Tasker & Golombok, *supra* note 64, at 135, 138, 143-44 (data gathered from same sample in 1976 and 1991). Responses from children raised by lesbian mothers and from children raised by heterosexual mothers to standardized measures of anxiety and depression were not only comparable to each other, but also closely comparable to U.S. norms. *Id.* at 135. Those, from both groups, who had experienced mental health problems were youths whose mothers had reported poor mental health at the time of the 1976 study. *Id.* at 144, 147.

76/ Gottman, *supra* note 54, at 177-96. This study in fact concluded that adult daughters of lesbians felt more secure in relationships and in the world in general than adult daughters raised by heterosexual mothers. Adult daughters raised by heterosexual mothers exhibited greater apathy and cautiousness than their peers raised by lesbians, who were freer of disillusionment and doubt and tended to have fewer complaints and worries than the women raised by heterosexual mothers. *Id.* at 189-90.

Consistent with the results of research on children of divorced parents, the research on children raised from birth in lesbian households has also found psychological parity between these children and their peers from heterosexual households. In a recent study comparing children raised from birth in lesbian households with matched children raised in heterosexual households, the researchers found it "impossible to distinguish" between the groups of children on the basis of social competence or behavior problems.[77/] The study concluded that "[p]resent data are consistent with the notion that parenting ability and sexual orientation are unrelated."[78/] A study comparing children raised from birth by a lesbian couple with matched children raised by married heterosexual parents, found no differences in behavioral functioning, cognitive abilities, developmental progress, social skills, or school performance.[79/] And a study comparing children raised from birth by a lesbian mother with children raised by a single heterosexual mother also found no differences in the children's psychological well-being or behavior.[80/]

A recent review of the research concluded that children raised by lesbian mothers or lesbian couples "have play and activity preferences that are similar to children raised in heterosexual households, and do not show heightened anxiety,

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77/ Raymond W. Chan *et al.*, *Psychosocial Adjustment Among Children Conceived Via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 Child Dev. 443 (April 1998).

78/ *Id.*

79/ Flaks *et al.*, *supra* note 53, at 16-20, 24.

80/ Golombok *et al.*, *Infancy*, *supra* note 46 (the only statistically significant difference between the two groups was greater interaction between the lesbian mothers and their children). *See also* Patterson, *Baby Boom*, *supra* note 59, at 156, 165-67.

depression, or behavior problems."[81/] All the scientific research to date also indicates that children raised by lesbian parents do not differ appreciably from children of heterosexuals with respect to maternal ratings of the children's leadership qualities and popularity, the children's self-ratings of popularity, or overall social adjustment.[82/]

III. THE CONTINUING PREJUDICE AGAINST GAY PEOPLE REQUIRES, AND WILL BE ABATED BY, ANTI-DISCRIMINATION LEGISLATION.

A. Gay People Face Prejudice and Discrimination.

New Jersey's anti-discrimination law addresses a genuine concern. Homosexuality has been subject to intense prejudice and discrimination. Extreme prejudice and even persecution were common in Europe from at least the Middle Ages.[83/] In America, prejudice and discrimination against gay men and

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81/ Jeffrey J. Haugaard *et al.*, *Lesbian-Headed Households*, 1 Adoption Q. 93, 100-01 (1998) (noting that these children "do not show indications of abnorma! development"). *See also* Gail S. Goodman *et al.*, *Developmental Psychology and Law: Divorce, Child Maltreatment, Foster Care, and Adoption*, *in Handbook of Child Psychology* 775, 846 (William Damon *et al.* eds., 1998) ("there is no evidence that children raised by gay or lesbian parents develop abnormally").

82/ Green *et al.*, *supra* note 56, at 178; Golombok *et al.*, *Appraisal*, *supra* note 56, at 565-67.

83/ *See* Richard Posner, *Sex and Reason* 346 (1992) ("[H]omosexuals–who, like Jews, are despised more for what they are than for what they do–were frequently bracketed [with Jews] in medieval persecutions."); John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (1980). Thousands of gay people were exterminated along with Jews, Roma, and Jehovah's Witnesses in Nazi concentration camps. *See, e.g.*, Heinz Heger, *The Men with the Pink Triangle* (David Fernbach trans., 1980).

lesbians has been widespread since colonial times.[84/] Indeed, "lesbians and gay males have been the object of some of the deepest prejudice and hatred in American society."[85/] Until 1990, gay people were frequently excluded from emigrating to the United States under a statute denying entry to persons "afflicted with psychopathic personality, or sexual deviation,"[86/] even though the disciplines of psychiatry and psychology had rejected the view that homosexuality is a mental disorder in the 1970s. *See, supra,* pp. 8-9.

Intense prejudice against gay men and lesbians remained widespread throughout much of the twentieth century, and public opinion studies routinely showed that, among large segments of the public, gay people were the target of strong antipathy.[87/] Although a pronounced shift in public opinion

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84/ *See, e.g.*, George A. Chauncey, Jr., *Gay New York: Gender, Urban Culture and the Making of the Gay Male World, 1890-1940* (1994); Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (1991); Allan Berube, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* (1990); John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (1983); Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* (1976).

85/ Melton, *supra* note 26; *see also* Posner, *supra* note 83, at 291 ("In the United States . . . , not only is there a strong residue of hostility to homosexuals, but they labor under a series of legal disabilities.").

86/ *See* 8 U.S.C. § 1182(a)(4)(1988); *see Boutilier v. Immigration & Naturalization Serv.*, 387 U.S. 118, 122 (1967).

87/ *See*, Gregory M. Herek, J. Gillis & J. Cogan, *Psychological sequelae of hate crime victimization among lesbian, gay, and bisexual adults*, 67 J. Consulting & Clinical Psych. 945 (1999) [hereinafter Herek *et al.*]; W. Schneider & I.A. Lewis, *The straight story on homosexuality and gay rights*, 2/3 Public Opinion 16-20, 59-60 (1984); C. De Boer, *The polls: Attitudes toward homosexuality*, 42 Public Opinion Q. 265 (1978).

occurred in the 1990s concerning homosexuality,[88/] hostility toward gay men and lesbians remains common in contemporary American society.[89/] Discrimination in such critical areas as employment and housing appears to be widespread.[90/] And even though eleven states, including New Jersey, and several cities have enacted applicable anti-discrimination laws, such discrimination remains lawful in most jurisdictions.

A particularly severe outcome of this prejudice is the consistently high rate of anti-gay harassment and violence.

88/ Growing numbers regard homosexuality as an alternative lifestyle and a majority favors protecting homosexuals from discrimination and abuse. *See* K. Sherrill & A. Yang, *From outlaws to in-laws: Anti-gay attitudes thaw*, 11 Public Perspective 20 (2000); A. Yang, *Trends: Attitudes toward homosexuality*, 61 Public Opinion Q. 477-507 (1997).

89/ *See* Sherrill & Yang, *supra* note 88, at 21 ("gay people remain the most systematically and intensely disliked of all the groups measured" in the ongoing American National Election Studies).

90/ A study published by the National Gay and Lesbian Task Force Policy Institute, reviewing a national and 20 city and state surveys of gay, lesbian, and bisexual people conducted between 1980 and 1991, found that 16% to 44% of respondents reported experiencing employment discrimination. A majority said they feared discrimination or concealed their sexual orientation to try to avoid it. The study's authors noted that discrimination was also common in housing, public accommodations, and health care. M.V. Lee, Colleen Donnelly & Jennifer Kibbe, *Pervasive Patterns of Discrimination against Lesbians and Gay Men: Evidence from Surveys Across the United States* (1992). A 1997 research review found 27% to 68% of gay, lesbian, and bisexual people reporting losing jobs or promotions because of sexual orientation. Even those in supposedly tolerant professions (*e.g.*, law, medicine, academia) reported discrimination. M.V. Lee Badgett, *Vulnerability in the Workplace: Evidence of Anti-Gay Discrimination*, 2 Angles: J. Inst. Gay and Lesbian Strategic Studies 1 (1997). *See also* Martin P. Levine, *Employment Discrimination Against Gay Men*, 9 Int'l Rev. Mod. Soc. 151 (1979); Martin P. Levine & Robin Leonard, *Discrimination Against Lesbians in the Work Force*, 9 Signs: J. Women Culture & Soc. 700 (1984).

Numerous surveys indicate that verbal harassment is a nearly universal experience.[91/] Although physical violence is less common, substantial numbers report having experienced crimes against their person or property because of their sexual orientation.[92/] In 1998, the most recent year for which FBI statistics are available, there were 1,248 reported hate crimes against gay men, lesbians, or bisexuals.[93/] That figure likely represents only some fraction of such crimes because reporting of hate crimes by law enforcement agencies is voluntary, the thoroughness of police statistics differs widely among jurisdictions, and many victims do not report their experiences to police because they fear further harassment or lack

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91/ *See* Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 20 (Gregory M. Herek & Kevin T. Berrill eds. 1992) (median proportion of respondents, in 24 surveys, who had been verbally harassed was 80%); *see also* Gregory M. Herek, J.R. Gillis, J.C. Cogan & E.K. Glunt, *Hate crime victimization among lesbian, gay, and bisexual adults*, 12 J. Interpersonal Violence 195-215 (1997) (finding that 82% of gay, lesbian, and bisexual respondents reported having experienced verbal abuse related to their sexual orientation); N.W. Pilkington & Anthony R. D'Augelli, *Victimization of lesbian, gay, and bisexual youth in community settings*, 23 J. Community Psychology 34-56 (1995) (80% of respondents in multi-state sample of adolescents and young adults reported experiencing verbal harassment).

92/ *See, e.g.*, Kevin T. Berrill, *supra* note 91 (across 24 separate studies a median of 44% of gay, lesbian, and bisexual respondents reported having been threatened with violence because of their sexual orientation, 19% had their property vandalized, 17% had been physically assaulted)); Herek *et al.*, *supra* note 87 (28% of gay men and 19% of lesbians had experienced an antigay crime in adulthood, based on study of 2,259 gay men, lesbians, and bisexuals); Gary David Comstock, *Violence Against Lesbians and Gay Men* (1991); Special Issue, *Violence Against Lesbians and Gay Men: Issues for Research, Practice, and Policy*, 5 J. Interpersonal Violence 267-543 (1990).

93/ <http://www.fbi.gov/ucr/98hate.pdf> at 7 (visited Mar. 20, 2000).

confidence that the assailants will be caught.[94/] Gay people subjected to violence based on their sexual orientation appears to experience even greater psychological trauma than with other types of violent crime.[95/]

B. Anti-discrimination Laws Can Reduce Prejudice as Well as its Effects.

The relevant scientific research supports the conclusion that New Jersey's regulatory approach is likely to ameliorate prejudice and discrimination against gay people. Although the specific forms of prejudice against minority groups differ, the psychological processes underlying heterosexuals' prejudices against gay people are similar to those underlying racial, ethnic, gender, and religious prejudices.[96/]

Empirical research consistently demonstrates that having personal contact with an openly gay person is one of the most powerful influences on heterosexuals' tolerance and acceptance of gay people. Anti-gay attitudes have been found to be

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94/ Herek *et al.*, *supra* note 87 (study of 2,259 gay men, lesbians, and bisexuals, found that gay men had reported only 46% of hate-crime victimizations but 72% of other victimizations, and lesbians had reported only 36% of hate-crime victimizations but 68% of other victimizations).

95/ Herek *et al.*, *supra* note 87, found that victims of antigay violent crimes showed significantly more symptoms of depression, anger, anxiety, and post-traumatic stress, and significantly more crime-related fears and beliefs, a lower sense of mastery, and more attributions of their setbacks to prejudice than did lesbian and gay victims of other violent crimes during the same time period. *See also* Linda D. Garnets, Gregory M. Herek & Barrie Levy, *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J. Interpersonal Violence 366 (1990), *reprinted in Psychological Perspectives on Lesbian and Gay Male Experiences* (Linda D. Garnets & Douglas C. Kimmel eds., 1993).

96/ *See, e.g.*, S.L. Franzoi, *Social Psychology* 382-427 (1995); K. Gergen & M. Gergen, *Social Psychology* 140-41 (1981).

significantly less common among the one-third of the population who has a friend, relative, or acquaintance who is known by the person to be gay.[97/] A meta-analysis of hundreds of studies of contact and prejudice, based on sexual orientation, nationality, race, age, or disability, found a highly significant inverse relationship between contact and prejudice for all studies, samples, and tests.[98/] The analysis found that more rigorous studies (based on observed contact rather than reported contact) yielded greater effects; that contact changed attitudes toward the entire "outgroup" not just toward those with whom subjects had contact, and that majority group participants experienced greater changes in attitude than minority group

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97/ See Gregory M. Herek & John P. Capitanio, *Some of my best friends: Intergroup contact, concealable stigma, and heterosexuals' attitudes toward gay men and lesbians*, 22 Personality & Social Psych. Bull. 412-24 (1996) (national survey demonstrated that those with interpersonal contact with gay men and lesbians were more likely to have positive attitudes toward gay people; more and closer relationships correlated with more positive attitudes); Gregory M. Herek & Eric K. Glunt, *Interpersonal Contact and Heterosexuals' Attitudes Toward Gay Men: Results from a National Survey*, 30 J. Sex Research 239 (1993) (interpersonal contact predicted attitudes toward gay men better than did any other demographic or social psychological variable tested); *Familiarity Encourages Acceptance*, 11 Public Perspective 31(2000) (reporting data from a 1998 survey by Princeton Survey Research Associates for Newsweek, showing that greater personal familiarity with gay people was associated with stronger support for gay rights).

98/ Thomas F. Pettigrew & Linda R. Tropp, *Meta-analytic Tests of Intergroup Contact Theory*, presented at Society for Experimental Social Psychology Conference, Oct. 1999 (on file with the APA); Thomas F. Pettigrew & Linda Tropp, *Does intergroup contact reduce prejudice?, in Reducing Prejudice and Discrimination: Social Psychological Perspectives* (Stuart Oskamp ed. 2000).

members. Of all the types of prejudice studied, interaction with homosexuals yielded the greatest reductions in prejudice.[99/]

Exclusion by an institution like the Boy Scouts, which undertakes to serve the whole community and is sponsored in many places by government entities such as public schools and police departments, interferes with this process and serves instead to reinforce individual hostility against the excluded minority. It is precisely at such institutions that New Jersey's legislation is aimed, in order to further its purposes of reducing discrimination and prejudice.

CONCLUSION

For these reasons, *amicus* urges the Court to affirm the decision below.

Respectfully submitted,

JAMES L. MCHUGH
GENERAL COUNSEL
NATHALIE F.P. GILFOYLE
AMERICAN PSYCHOLOGICAL ASSOCIATION
750 First Street, NE
Washington, D.C. 20002
(202) 336-5500

PAUL M. SMITH*
NORY MILLER
JENNER & BLOCK
601 Thirteenth Street, NW
Washington, D.C. 20005
(202) 639-6000

March 29, 2000

**Counsel of Record*

99/ *Id.*

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

—v.—

JAMES DALE,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF OF DEANS OF DIVINITY SCHOOLS AND RABBINICAL INSTITUTIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

DAVID A. SCHULZ
Counsel of Record
WESLEY R. POWELL
DARREN ROSENBLUM
CLIFFORD CHANCE ROGERS
& WELLS LLP
200 Park Avenue
New York, New York 10166
(212) 878-8000

Attorneys for Amici Curiae

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TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

THERE IS NO AGREEMENT AMONG THE DIVERSE RELIGIOUS INSTITUTIONS THAT SPONSOR BOY SCOUT TROOPS AND WHOSE MEMBERS BECOME SCOUTS THAT A HOMOSEXUAL CANNOT BE "MORALLY STRAIGHT" AND "CLEAN" 5

A. There Is No Consensus Among Religious Scholars That Homosexuality Is Immoral 8

1. Biblical Scholarship 8

2. Religious History 12

3. Religious Ethicists 14

B. A Number of Major American Religious Institutions Have Moved Toward Acceptance, Not Condemnation, of Homosexuals 18

1. Full Acceptance 19

2. Moving Toward Acceptance 20

3. Debates Within Conservative Institutions 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 5

New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 5

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 5

Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) 6

CONSTITUTION AND STATUTES

U.S. Const. amend. I 1

U.S. Const. amend. XIV, § 1 1

N.J. State Ann. §§ 10:5-1 to –49 (West 1993) 1

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Page

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Page

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Page

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Page

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Kathy Rudy, *Sex and the Church: Gender, Homosexuality and the Transformation of Christian Ethics*..... 15

Saul M. Olyan, *And With a Male You Shall Not Lie the Lying Down of a Woman: On the Meaning and Significance of Leviticus 18:22 and 20:13, in Que[e]rying Religion: A Critical Anthology* (Gary David Comstock and Susan E. Henking eds., 1997) 10

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TABLE OF AUTHORITIES—Continued

Page

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No. 99-699

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF DEANS OF DIVINITY SCHOOLS AND RABBINICAL INSTITUTIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*[1]

Amici are deans of accredited seminaries, theological schools, and rabbinical institutions, the president of a school of religion and the vice president of a rabbinical school. *Amici* submit this brief to

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[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici curiae* and their counsel, made any monetary contribution to the preparation and submission of this brief.

address the critical, yet unfounded, assumption on which Petitioners' argument is built: that being a homosexual has been widely understood by the members and sponsors of Boy Scout troops to be inconsistent with the mission of moral education embraced by the Boy Scouts of America. There is no clear consensus among religious scholars or within religious organizations that a gay man or boy cannot be "morally straight" and "clean," and there is no proper basis to infer that these commitments contained in the Scout Oath and Law are generally understood by those who participate in the Boy Scouts to preclude membership to someone who is homosexual.

Amici are leaders of institutions that are engaged full-time in religious scholarship and theological education. These institutions train priests, ministers and rabbis who provide moral leadership to our country and who run many of the religious organizations that sponsor the Scouts' programs. *Amici* are familiar with the moral and religious issues surrounding homosexuality, and have well-considered insights into the diverse religious traditions of this country – a number of which do not exclude gays and lesbians from their understanding of morality, as Petitioners' presume. The *amici* are:[2]

Dr. Susan E. Davies, Academic Dean and Jonathan Fisher Professor of Christian Education at Bangor Theological Seminary in Bangor, Maine. Bangor Theological Seminary is an ecumenical

[2] *Amici* submit this brief in their individual capacities. Institutional affiliations of *amici* are provided for identification purposes only.

theological institution, affiliated with the United Church of Christ, which primarily serves Northern New England congregations.

Rabbi Kenneth E. Ehrlich, Dean of the Rabbinical School at the Cincinnati campus of the Hebrew Union College-Jewish Institute of Religion. The College-Institute educates Reform Jewish leadership for service in approximately nine hundred congregations in North America.

Dr. Heather Elkins, Associate Dean of the Drew University Theological School in Madison, New Jersey. Drew University Theological School is an ecumenical theological institution affiliated with the United Methodist Church.

Dr. Jack Forstman, Dean *Emeritus*, acting Dean, and Finney Professor of Theology *Emeritus* at the Vanderbilt University Divinity School. The Vanderbilt Divinity School is a non-denominational, ecumenical theological school.

Dr. William McKinney, President and Professor of American Religion at the Pacific School of Religion in Berkley, California, and an ordained minister of the United Church of Christ. The Pacific School of Religion is an inter-denominational seminary of the United Church of Christ.

Dr. Elisabeth Nordbeck, Academic Dean of the Faculty and Vice President of Academic Affairs of the Andover Newton Theological School in New Centre, Massachusetts. Andover Newton is an ecumenical theological institution affiliated with the United Church of Christ, which serves more than forty religious denominations.

Rabbi Aaron D. Panken, Dean of Hebrew Union College-Jewish Institute of Religion in New York, New

York. The College-Institute educates Reform Jewish leadership for service in approximately nine hundred congregations in North America.

Dr. Robert E. Reber, Dean of the Auburn Theological Seminary in New York, New York. Auburn Theological Seminary devotes its resources to research on theological education for religious leadership and multi-faith education for laity and clergy.

Dr. Reverend T. Richard Snyder, Academic Dean and Professor of Theology and Ethics at the New York Theological Seminary in New York, New York. The New York Theological Seminary is an inter-denominational institution committed to preparing men and women to minister to New York metropolitan-area congregations. Its students are drawn from more than forty-five different church bodies.

Dr. Jacob J. Staub is the Vice President for Academic Affairs at the Reconstructionist Rabbinical College, the center for Reconstructionist Judaism worldwide. Rabbi Staub is a scholar of Jewish thought and a leading spokesperson for the Reconstructionist movement.

Dr. Fredrica Harris Thompsett, former Dean and current Mary Wolfe Professor of Theology at the Episcopal Divinity School in Cambridge, Massachusetts. The Episcopal Divinity School is an ecumenical theological institution affiliated with the Episcopal Church in the United States.

Dr. Richard J. Wood, Dean of the Yale University School of Divinity, an ordained United Methodist minister and a recorded Quaker minister. Yale Divinity School is a non-denominational, ecumenical theological institution.

SUMMARY OF THE ARGUMENT

The Boy Scouts of America (the "Boy Scouts") argue that homosexuality is inconsistent with a shared goal that brought its members together – to promote the view that homosexual conduct is not moral conduct. The Boy Scouts infer this supposedly shared goal of its multi-cultural membership, and its widely-diverse sponsoring institutions, from the requirements of the Scout Oath and Law that a Boy Scout be "morally straight" and "clean." While all organizations have the right to define their own goals, the Boy Scouts present no adequate basis for their conclusion that those who join and support Boy Scout troops around the country accept the view that a homosexual cannot be "morally straight" and "clean."

There is no clear consensus among American scholars of religion, or among the many religious institutions represented by the Boy Scouts' membership, that gays are to be excluded from full and equal participation in moral communities. To the contrary, a number of theologians, religious ethicists, and biblical scholars from diverse religious traditions recognize homosexual status to be consistent with a pledge to remain "morally straight," and with a commitment to promote the moral education of young men. A state law requiring the Boy Scouts to accept homosexual members as part of an effort to eliminate pervasive, historic discrimination against one class of citizens does not undercut the collective message of "clean" living advanced by the Boy Scouts.

ARGUMENT

THERE IS NO AGREEMENT AMONG THE DIVERSE RELIGIOUS INSTITUTIONS THAT SPONSOR BOY SCOUT TROOPS AND WHOSE MEMBERS BECOME SCOUTS THAT A HOMOSEXUAL CANNOT BE "MORALLY STRAIGHT" AND "CLEAN"

This case once again calls upon the Court to address a conflict between a state's effort to eliminate discrimination against its citizens and the protected freedom of association. Here, the Boy Scouts claim that a state law requiring them to accept an open homosexual as a member violates their right to select those with whom they wish to join in a common endeavor. Petitioners' Brief ("Pet'rs' Br.") 30-39.

This Court has previously addressed this issue in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); and *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988) (the "*Roberts* trilogy"). Under these cases, to establish a First Amendment bar to the New Jersey anti-discrimination law, the Boy Scouts must demonstrate that their acceptance of an openly gay man would materially interfere with their ability to promote the central mission that brought them together in the first place. *See, e.g., Roberts*, 468 U.S. at 623.

The Boy Scouts claim that requiring them to reinstate Respondent James Dale, an openly gay man, would defeat the shared expressive purpose of its members to promote the view that "homosexual conduct is not morally straight." Pet'rs' Br. 39. We do not purport to tell the Boy Scouts what their collective view towards homosexuality should be; every

organization has the right to define its own goals and values. However, there is no adequate basis to conclude, as Petitioners do, that the members and sponsors of the Boy Scouts endorse an anti-gay message when they accept a pledge to be "morally straight" and "clean."

As described by Petitioners, the Boy Scouts' historical mission, in relevant part, has been a positive one – to educate young men to engage in proper moral behavior. Pet'rs' Br. 2,3. The Boy Scouts concede that the organization has never articulated any anti-gay message ratified by members or their sponsoring organizations, and has never disseminated any written statement to its members concerning the admission of openly gay men and boys.[3]

The Boy Scouts argue, however, that admitting a known homosexual would be contrary to the moral message set forth in the Boy Scout Oath and Law. Pet'rs' Br. 6. The Oath, in part, requires each scout to be "physically strong, mentally awake and morally straight;" the Scout Law states that a scout, among other things, will be "clean." JA 184. Petitioners' fundamental premise is that Boy Scout members, leaders, and sponsoring institutions understand that a gay scout cannot be a "morally straight" and "clean"

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[3] Pet'rs' Br. at 5,6. Petitioners point to certain *post hoc* memoranda and statements explaining certain administrative actions, which state that their organization does not permit admission of openly gay men and boys. Joint Appendix ("JA") 453-61. While we understand that Mr. Dale challenges the relevance of these internal statements, *amici* limit our discussion to the mistaken assumption in the Boy Scouts principal argument, that its members embrace an anti-homosexual message when they commit to be "morally straight" and "clean."

scout.[4] Yet, there is no basis for this assumption in the record, in the positions of religious institutions that support scouting, or in the extensive religious scholarship on the morality of homosexuality.

The diverse religions traditions of this country present no coherent moral message that excludes gays and lesbians from participating as full and equal members of those institutions. Indeed, the movement among a number of the nation's major religious institutions for many decades has been toward public recognition of gays and lesbians as full members of moral communities, and acceptance of gays and lesbians as religious leaders, elders and clergy. A growing body of scholarship in the areas of religious ethics, biblical studies, and theology asserts that gay and lesbian believers must be recognized as full and equal members in religious communities.[5]

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[4] Pet'rs' Br. at 5,6. The Boy Scouts are not the first group to attempt to rationalize historic discrimination by an appeal to "morality." The *Dred Scott* decision, holding that slaves could not be deemed citizens under the Constitution, relied on the fact that the Declaration of Independence and Constitution had both been written at a time when slavery was almost universally considered a moral practice. *See Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). The rightness of that peculiar institution, thought the Court, "was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion." *Id.* at 407. *See also* Mark D. Jordan, *The Invention of Sodomy in Christian Theology* 170 (1997): "This is not the first time that the body of believers has reached an impasse in moral reflection. Something very similar happened with the question of chattel slavery just over a century ago. . . "

[5] *See, e.g.*, John J. McNeill, *The Church and Homosexuals* (Beacon Press 3d ed, 1998); D.J. Atkinson, *Homosexuals in Christian Fellowship* (1979); *A Challenge to Love: Gay and Lesbian Catholics in The Church* (Robert Nugent ed., 1983); *Twice Blessed: On Being Lesbian, Gay, and Jewish*; (Christie Balka and Andy Rose eds., 1989); Eugene F. Rogers, Jr., *Sexuality and the Christian Body: Their Way into the Triune God*, (Gareth Jones and Lewis Ayres eds., 1999); Jordan, *supra* note 3.

Because there is no clear consensus among religious institutions or among religious scholars that a homosexual, by virtue of that status alone, may be considered "immoral," there is no meaningful basis for the Boy Scouts to claim that a pledge to be "morally straight" and "clean" demonstrates that its diverse members and sponsoring religious institutions share a collective goal of discriminating against gays and lesbians.

A. There Is No Consensus Among Religious Scholars That Homosexuality Is Immoral.

There is no consensus among American religious scholars and theologians that homosexuality is immoral.[6] As lesbians and gays have become more socially visible over the past half century, and as the physical and social sciences have advanced new understandings of the determinants of sexual orientation, cultural theorists and theologians have focused their attention on the nature of sexuality and on those parts of religious tradition that have condemned same-sex behavior.[7] The research of these scholars generally reflects three broad approaches to the issue: i) analyzing the specific language used in

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[6] *See, e.g., Homosexuality: Both Sides of the Debate*, (Jeffrey S. Siker ed., 1994); *The Sexuality Debate in North American Churches 1988-1995* (John Carey ed., 1995).

[7] *See, e.g.*, Robin Scroggs, *The New Testament and Homosexuality: Contextual Background for Contemporary Debate* (1983); *Biblical Ethics and Homosexuality: Listening to Scriptures* (Robert L. Brawley ed., Westminster John Know Press 1996).

biblical passages and the context for biblical references relating to same-sex behavior; ii) researching the history of church teachings and policies with respect to same-sex behavior, same-sex unions, and related issues; and iii) studying the process by which religious institutions and believers make moral and ethical decisions today. Each of these approaches has contributed new understandings to the issue of the morality of homosexuality.

1. Biblical Scholarship

A substantial body of scholarship surrounds the translation and interpretation of specific Old and New Testament passages addressing same-sex sexual behavior. Many scholars of these texts challenge the interpretations of biblical translations offered by those theologians who conclude that same-sex behavior is *per se* immoral. These biblical scholars challenge both the literal translation of the biblical texts and the interpretation of specific passages in historic and textual context.

Genesis 19:1-11 and Sodom Some biblical scholars and religious leaders point to the story in Genesis about the fall of Sodom as evidence of God's condemnation of homosexuality, because the men of Sodom are depicted raping male foreign guests.[8] "Sodomy," of course, has become widely used as a term for non-vaginal intercourse, generally, and specifically for sex between men.[9] But, recent biblical

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[8] The Bible, Book of Genesis 19:1-11 (Standard Revised Version). All citations to the Bible are to the Standard Revised Version.

[9] *See* Merriam-Webster's Collegiate Dictionary 111 (Frederick C. Mish ed., 10th ed. 1998); Jordan, *supra* note 3 at

scholars have convincingly refuted this interpretation. They have demonstrated that the "sin of Sodom" as described in Genesis was not, in fact, same-sex behavior, but instead involved such offenses as violent gang rape, inordinate prosperity, and in hospitality to the poor and needy.[10]

Leviticus 18:22 and 20:13 The Levitican declaration, "thou shall not lie with a male as with a woman," is similarly cited by some to be a blanket moral condemnation of same-sex intimacy. This passage, in context, identifies but one of the many activities proscribed for early Israelites as part of their "Purity Code."[11] This Code prohibits, among other acts, the eating of animals declared unclean (11:4-8); marriage of a chief priest to a woman widowed, divorced or defiled (21:14); ordination of maimed or deformed men (21:18-21); wearing clothes of mixed

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161; *Keeping Body and Soul Together, Report of Special Committee on Human Sexuality of the Presbyterian Church U.S.A.* 52 (1991).

[10] The Bible, Book of Ezekial 16:49-50. According to Jordan, "Sodomy," or the sin of the sodomites, was not homosexuality. Jordan, *supra* note 3 at 161. The "sin of sodom" was "the breach of ancient Hebrew hospitality norms and persistent violations of rudimentary social justice." Jordan, *supra* note 4 at 183-4. *See also* Keeping Body and Soul Together, *supra* note 8; Rabbi Bradley S. Artson, *Gay and Lesbian Jews: A Teshurah*, Jewish Spectator, Winter 1990, at 1-16; Rabbi Robert Gordis, *Homosexuality and Traditional Religion*, Judaism, 32, 4:405-09 (1983).

A similar interpretation is now given to the rape of Levite in Judges 19:22-26, *see Keeping Body and Soul Together, supra* note 8, at 52.

[11] *See* Saul M. Olyan, *And With a Male You Shall Not Lie the Lying Down of a Woman: On the Meaning and Significance of Leviticus 18:22 and 20:13, in Que[e]rying Religion: A Critical Anthology*, 398-414 (Gary David Comstock and Susan E. Henking eds., 1997); *Keeping Body and Soul Together, supra* note 8, at 52-3.

fibers (19:19); and eating shellfish. (11:9-12).[12] No other contemporaneous Israelite legal records or documentation prohibits same-sex sexual activity. [13]

Given the context of the sexual proscription in Leviticus and the lack of other similar statements on same-sex relations elsewhere in the Bible or in other contemporaneous religious texts, many scholars conclude that this passage does not reflect a moral condemnation of same sex intimacy, but reflects a civil code of conduct to which Christians and many Jews no longer adhere.[14] Moreover, Christian scholars have demonstrated that New Testament passages counsel that such codes must be subordinate to virtues of love and justice.[15]

Romans 1:23-27 Paul's Letter to the Romans is cited as a New Testament condemnation of same-sex behavior. Paul's letter, in one translation, states in reference to the Gentiles: "For this reason God gave them up to dishonorable passions. Their women exchanged natural relations for unnatural, and the men likewise gave up natural relations with women and were consumed with passion for one another, men

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[12] Olyan, *supra* note 10; *Keeping Body and Soul Together*, *supra* note 8, at 52-3.

[13] *Id.*

[14] "The [Levitican] taboos are part of an elaborate system of rituals and prohibitions that maintain and reinforce the socio-religious boundaries of the group and ensure that the group will continue to maintain its separate identity even under adverse conditions." Christine Davies, *Religious Boundaries and Sexual Morality*, in *Que[e]rying Religion: A Critical Anthology*, *supra* note 10, at 41; *Keeping Body and Soul Together*, *supra* note 8, at 52-3.

[15] *See, e.g.*, Book of Mark 7:1-23 and 5:21-43, Romans 14:13-14, , I Corinthians 8:1-11:1, Acts 8:26-40. *Keeping Body and Soul Together*, *supra* note 8 at 52.]

committing shameless acts with men and receiving in their own persons the due penalty for their error." The translating of this passage has been the subject of much debate, focussed on the true meaning of the original Greek text.[16] Recent scholarship indicates that this passage may not refer to same sex behavior generally, but to specific abusive practices of Greek and other Gentile men, most notably pederasty and prostitution of young boys.[17] Thus, some scholars assert that Paul's statements in Romans are not properly applied to the sexual conduct of consenting homosexual adults.[18]

I Corinthians 6:9-10 and I Timothy 1:10 These passages, which in different translations reference the sin of "sexual perverts" (I Corinthians 6:9) and "sodomites" (I Timothy 1:10), have also been cited as moral condemnation of consensual same-sex behavior. This interpretation, however, is criticized by recent scholars, based again in large measure on questions concerning the correct interpretation of the original Greek text. Scholars dispute translations of the Greek word "arsenokoitai," asserting that the term does not refer to modern forms of homosexuality.[19] Other scholars conclude that the passage condemns not same-sex intimacy, but a lifestyle of licentiousness

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[16] Dale B. Martin, *Arsenokoites and Malakos: Meanings and Consequences*, in *Biblical Ethics and Homosexuality: Listening to Scriptures*, *supra* note 6, at 11-123.

[17] Scroggs, *supra* note 6; William Countryman, *Dirt, Greed and Sex: Sexual Ethics in the New Testament and Their Implications for Today* (1988); *Keeping Body and Soul Together*, *supra* note 8; Eugene Rogers, *Sexuality and the Christian Body* 65 (1999).

[18] *Id.*

[19] Martin, *supra* note 15, at 11-123.

and lust, including fornication, idolatry, adultery and prostitution, whether heterosexual or homosexual.[20]

2. Religious History

Scholars of church history and theology have focused their attention on developing a fuller understanding of the historic treatment by churches and religious communities of those who practice same-sex intimacy or participate in same-sex relationships. While religious institutions have actively condemned same-sex behavior for major periods of Church history, historians have found this condemnation not to have been uniform. In some periods, important forms of acceptance of same-sex relationships appear.

The leading study of the history of Christianity and homosexuality is John Boswell's *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (1980). Boswell's survey of Christian teachings from the beginning of the church's existence to the Middle Ages undermines the common assumption that Christian theology has always opposed homosexuality.[21] As Boswell documents, early Christian views on the regulation of marriage and sexuality differed greatly from contemporary religious views.[22] Saint Paul, for example, did not demand that sexuality be limited to procreation, but only "disapproved of any form of sexuality which had as its end purely sexual pleasure," and "regarded licit

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[20] *See, e.g., Keeping Body and Soul Together, supra* note 8, at 52-3.

[21] *Id.* at 333.

[22] *Id.* at 26.

sexuality as that contained within a permanent and monogamous sexual relationship."[23] According to Boswell, there is no reason that same sex relations could not meet these moral criteria.[24]

Boswell also notes that the rise of urban cultures by the eleventh century led to the appearance of homosexual literature and a notable homosexual presence, yet governments did not criminalize homosexuality until the late thirteenth century.[25] It was not until the late nineteenth century that the term "homosexual" began to describe one's identity, and in the twentieth century gays became the victims of widespread and vehement intolerance.[26] Boswell thus cautions against projecting onto historical data ideas about homosexuality that may be skewed by current notions that are historically atypical.[27]

Boswell has also discovered early Christian liturgical texts that support forms of same-sex unions. Medieval texts contain evidence that early Christians granted liturgical blessing to certain same-sex unions, which Boswell finds inconsistent with any claim that all Christians viewed homosexuality as *per se*

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[23] *Id.* at 115.

[24] *Id.* at 116. As Boswell notes: "For Paul, Christian sexuality . . . was, rather, a question of good stewardship – of using sexuality in a way that was not obsessive, . . . and did not cause scandal, and did not distract Christians from the service of the Lord. . ." *Id.* at 115-16.

[25] *Id.* at 292-93; 333-34. Boswell notes that neither of the two most important twelfth – century English legal compilations even mentioned homosexuality.

[26] *See id.* at 23, 42 n.4.

[27] *Id.* at 24. *See generally* Martti Nissinen, *Homoeroticism in the Biblical World: A Historical Perspective* (Kirsi Stjerna, tran., 1998).

immoral.[28] Among the rituals he examined is a set of four early Christian ceremonies commemorating sacramental union: one for heterosexual betrothal, two for heterosexual marriage, and a comparable 'prayer' for the purpose of uniting two men.[29] The similarity in the wording of the rituals for heterosexual marriage and same-sex unions suggests parallel historical development in Christian theology.[30] These same-sex ceremonies – though their precise meaning and contours remain unclear – appear in liturgical manuscripts from throughout the medieval Christian world.[31]

3. Religious Ethicists

A substantial number of theologians and religious ethicists challenge the traditional ways in which ethical proscriptions concerning same-sex behavior have been derived. These contemporary scholars devote substantial attention to the processes through which moral and ethical norms are derived from biblical texts, natural law and religious traditions, and conclude that those texts and traditions–adequately understood and appropriately applied to the contemporary world–indicate that same-sex behavior can be viewed as moral in the very ways that other sexual behavior is evaluated.[32]

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[28] John Boswell, *Same-Sex Unions in Premodern Europe* (1994).

[29] *Id.* at 178-79.

[30] *Id.* at 179.

[31] *Id.* at 184-85.

[32] *See, e.g.*, John McNeill, *Taking a Chance on God: Liberating Theology for Gays, Lesbians, and Their Lovers, Families, and Friends* (1988); Rabbi Bradley S. Artson, *Gay and Lesbian Jews: A Teshurah, in Jewish Spectator,* Winter 1990; Letha Dawson

For example, these scholars apply a hermeneutical process to determine how biblical texts should be applied to the contemporary world.[33] The Bible contains passages on a number of issues (including slavery and the subordination of women) which require explanation and analysis in light of contemporary understandings of human identity and community.[34] Similarly, biblical teachings on a range of sexual issues (including marriage, divorce and related topics) are extremely complex.[35] Just as biblical teachings on this range of issues must be interpreted within the context of developing insights into the nature of human identity and sexuality.[36]

Theologians and religious ethicists pursuing this approach move away from modes of "proof-texting" and strict interpretation of biblical texts to call

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Scanzoni and Virginia Ramey Mollenkott, *Is the Homosexual My Neighbor?* (rev. ed. Harper San Francisco 1994); Thomas Thurston, *Homosexuality and Roman Catholic Ethics* (1994); Margaret A. Farley, *An Ethic of Same-Sex Relations, in Sexuality and the Sacred: Sources for Theological Reflection* (Nelson and Longfellow eds., 1994) at 54-67; Kathy Rudy, *Sex and the Church: Gender, Homosexuality and the Transformation of Christian Ethics* (1997).

[33] *See, e.g., Biblical Ethics and Homosexuality: Listening to Scripture, supra* note 6; George R. Edwards, *Gay/Lesbian Liberation: A Biblical Perspective* (1984); and Scroggs, *supra* note 6.

[34] Jordan, *supra* note 3, at 166-7; *See also, e.g., Biblical Ethics and Homosexuality: Listening to Scripture, supra* note 6; and Scroggs, *supra* note 6.

[35] Mary A. Tolbert, *Statement for Committee on Investigation, Northern California-Nevada Annual Conference, United Methodist Church,* February 2000, reprinted at http://www.psr.edulresorces/mto(bert1.htm).

[36] Jordan, *supra* note 3, at 166-7; *Keeping Body and Soul Together, supra* note 8; *See also, e.g., Biblical Ethics and Homosexuality: Listening to Scripture, supra* note 6; and Scroggs, *supra* note 6.

for a more reflective and self-aware process of moral decision-making. As one scholar has noted:

> "It is a curious but unmistakable phenomenon that Christian theologians treat so literally the limited references to homosexual practice in the Bible, while at the same time interpreting almost every other topic with such flexibility and non-literalness."[37]

These scholars also insist that religious traditions themselves be interrogated in this same fashion. They assert that the insights of human reason (including new forms of scientific knowledge), experience, and evolving social and historical contexts should be brought to bear in this process of ethical decision-making.[38] One of the principal methods of their analysis is the effort to derive comprehensive moral principles from the biblical text and religious traditions which are then applied to contemporary questions. With these basic principles in hand, religious institutions and believers can engage in the complex process of assessing the morality of contemporary sexual behavior.

Thus, for example, a number of theologians and religious ethicists focus specifically on the biblical themes of unity and equality before God as central to the biblical message.[39] In light of these themes,

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[37] *See, e.g.*, James B. Nelson, *Embodiment: An Approach to Sexuality and Christian Theology (1979)*; *Keeping Body and Soul Together*, *supra* note 8.

[38] *See Biblical Ethics and Homosexuality: Listening to Scripture supra* note 6; and Scroggs, *supra* note 6.

[39] *See, e.g.*, Nelson, *supra* note 36; Mary McClintock Fulkenson, *Gender — Being It or Doing It? The Church,*

ethicists argue for the full and equal membership of gay and lesbian believers in their religious communities. A number of Christian theologians stress the significance of Galatians 3:27-28 as pointing toward these principles: "For as many of you were baptized into Christ have put on Christ. There is neither Jew nor Greek, there is neither slave nor free, there is neither male or female; for you are all one in Christ Jesus."[40] Religious communities, these scholars argue, are called to fight against injustice, including all forms of prejudice against sexual minorities.[41]

Many scholars also argue that basic principles derived from the biblical text and religious traditions demonstrate that sexual and emotional wholeness is deeply connected to spiritual wholeness.[42] Homosexuals and heterosexuals equally share those needs.[43]

Other theologians and religious ethicists stress the theological values of human embodiment, touch and pleasure, and the spiritual power of friendship and erotic love to argue that lesbian and gay sexuality can be morally good.[44] In these perspectives, the morality and quality of same-sex relationships must

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Heterosexuality, and the Politics of Identity, Union Seminary Quarterly Review 47 (1993).

[40] Book of Galatians, 3:27-28.

[41] *See, e.g.*, Nelson, *supra* note 6; Fulkenson, *supra* note 38.

[42] Nelson, *supra* note 36.

[43] *Id.*

[44] *See, e.g.*, Nelson, *supra* note 36; Virginia Ramey Mollenkott, *Sensuous Spirituality: Out From Fundamentalism* (1992).

be judged on the same terms as heterosexual relationships.[45] In this approach, all sexual behavior, regardless of the gender of the parties, must be evaluated with regard to values of equality, fidelity, and mutual respect and responsibility.[46]

Contemporary theologians and ethicists argue that just as religious institutions provide support and guidance to their heterosexual members to help them conduct their intimate relationships in a moral fashion, so also these institutions must support their gay and lesbian members' efforts to establish strong, faithful intimate relationships.[47] With this support and guidance, same-sex relationships can lead to human flourishing in the same ways as heterosexual relationships.[48]

These few examples are intended only to demonstrate the quality and quantity of debate among religious scholars over the morality of same-sex intimacy. Nonetheless, decades of scholarship leave no doubt that homosexuality has not been viewed by all Christians and Jews as inconsistent with moral behavior. Certainly religious scholars do not share a common view that homosexuality *is* inconsistent with a moral life, as the Boy Scouts presume.

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[45] *See, e.g.*, Nelson, *supra* note 36; Carter Heyward, *Coming Out and Relational Empowerment, in No Easy Peace: Liberating Anglicanism — A Collection of Essays in Memory of William John Wolf* (Heyward and Phillips eds., 1992).

[46] *Id.*

[47] *See, e.g.*, Nelson, *supra* note 36; *Keeping Body and Soul Together*, *supra* note 8.

[48] *Id.*

B. A Number of Major American Religious Institutions Have Moved Toward Acceptance, Not Condemnation, of Homosexuals.

Over the last thirty years, many of the same religious institutions that support the Boy Scouts have internally debated the role of gay men and lesbians within their membership, issuing a variety of position statements on the topic. Although some conservative denominations have adhered to a blanket condemnation of homosexuality, the trend among a number prominent religious denominations has been toward acceptance of and support for gay and lesbian members and leaders in religious communities.

A number of institutions, including the United Church of Christ, the Unitarian Universalist Association, and Reformed and Reconstructionist Judaism, have moved toward full acceptance of gays and lesbians as members, lay leaders, and clergy. Still others, such as the Episcopal Church of the U.S.A., the United Methodist Church, and the Presbyterian Church of the U.S.A. have acknowledged the presence of gays and lesbians among their ranks and have set up committees to study issues of sexuality and religion. These committees have engendered great debate within their institutions about the treatment of gays and lesbians and issued vocal calls for an end to discrimination based on sexual orientation. These debates have even surfaced within very conservative religious institutions such as the Southern Baptist Convention.

1. Full Acceptance

Among the major Christian denominations in the United States, *The United Church of Christ* (the "UCC") was one of the earliest to promote acceptance

and tolerance toward gay men and lesbians. In 1972, the UCC became the first Christian denomination to ordain an openly gay person as a minister. In 1983, the UCC reaffirmed its acceptance of lesbians and gay men as clergy, when its delegates issued a statement that sexual orientation should not be grounds for refusing ordination of a minister. The UCC's General Synod, its highest decision-making body, has since reaffirmed that position.[49]

The *Unitarian Universalist Association* has also long supported an end to discrimination against gays and lesbians in the United States and promotes acceptance of homosexuals as full members and leaders within the church. In 1970, Unitarians called for "all people" to bring an end to discrimination on the basis of sexual orientation and asked all churches and fellowships to develop programs to promote that goal.[50] Unitarians have since reaffirmed that mission and called upon its ministerial division to work toward "settlement of qualified openly gay, lesbian and bisexual religious leaders."[51]

The governing body of *Reform Judaism* is also committed to ending discrimination on the basis of sexual orientation in both membership and leadership positions within that religious body. Indeed, in 1990, its governing board, the Union of American Hebrew

[49] General Synod of the United Church of Christ, *Resolution on Affirming Gay, Lesbian And Bisexual Persons and Their Ministries* (1991).

[50] General Assembly of the Unitarian Universalist Association, *Resolution on Discrimination Against Homosexuals and Bisexuals* (1970).

[51] General Assembly of the Unitarian Universalist Association, *Resolution on Ministerial Employment Opportunities* (1980).

Congregations, reaffirmed its public position that gays and lesbians may serve as rabbis.[52] In addition, the governing board of Reformed Judaism affirmed its approval of same sex-unions, as reflected in the 1996 statement by the Central Conference of American Rabbis.[53] The governing body of Reconstructionist Judaism maintains a similar position on acceptance of gays and lesbians as members and rabbis.[54]

2. Moving Toward Acceptance

For at least a quarter century, *The Protestant Episcopal Church in the U.S.A.* has opposed discrimination on the basis of sexual orientation and promoted equal treatment of gays and lesbians. In 1976, the Episcopal Church affirmed that "homosexual persons are children of God, who have a full and equal claim with all other persons upon the love, acceptance, and pastoral concern and care of the Church."[55] More recently, the Episcopal Church recommended that local bishops retain the discretion to conduct same-sex unions.[56]

The United Methodist Church has not approved the ordination of gays and lesbians as ministers, but it has called for an end to discrimination against gays

[52] Ad Hoc Conference on Homosexuality and the Rabbinate, *Report of Central Conference of American Rabbis* (1990).

[53] Central Conference of American Rabbis, *Resolution Adopted on Gay and Lesbian Marriage*, htt://www.ccarnet.org/cgi-bin/resodisp.pl?file=gl&year=1996

[54] *See* Rabbi Gail Diamond, *Reconstruction Values* (Jan. 2000) at http://www.jrf.org/agudasma/rabbi/Jan2000.htm

[55] General Convention of the Protestant Episcopal Church in the U.S.A., *Statement on Homosexuality* (1976).

[56] Julia Lieblich, *Episcopal Commission Agrees to Disagree on Gay Unions*, AP Wire Service, Feb. 14, 2000.

and lesbians. In the last decade, the Methodists announced their support for full civil rights for gays and lesbians and proclaimed that "homosexual persons no less than heterosexual persons are individuals of sacred worth."[57] Moreover, although not formally adopted by the Church, a 1991 report by a committee tasked with reviewing the Church's treatment of homosexuality reflects a movement within that church toward a more progressive viewpoint.[58]

The *Presbyterian Church of the U.S.A.* in 1988 convened a Committee on Human Sexuality to study, among other things, the causes of homosexuality, biblical teachings on homosexuality, and the recommended approach of the Presbyterian Church on issues of sexuality and religion.[59] This led to publication by that committee in 1991 of "Keeping Body and Soul Together," a detailed analysis of scriptural, scientific, and other evidence on

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[57] *The Book of Discipline of The United Methodist Church* – 1996, Section II para. 65(g).

[58] This four-year study concluded that present knowledge of homosexuality does not justify blanket condemnation of homosexual practice. At page 27, it notes that "some members of the Committee believe that the Creation accounts in Genesis express the will of God prescribing heterosexual marriage as the norm for all sexual relationships. Most members of the committee believe that the Genesis creation accounts are attempts to explain the way things were, not to prescribe what they should be, and that nothing is implied about the normative character of heterosexuality or about monogamy. . ." *Report of the Committee to Study Homosexuality to the General Council on Ministries of the United Methodist Church*, Aug. 24, 1991.

[59] Mary McClintock Fulkerson, *Church Documents on Human Sexuality and the Authority of Scripture, in Interpretation: A Journal of Bible and Theology* 49:1, 46-58 (Jan. 1995). *Keeping Body and Soul Together*, *supra* note 8.

homosexuality. The study recommends full acceptance of gays and lesbians.[60] Although not adopted by the General Assembly, that body did conclude that congregations should continue serious consideration of these issues and should reach their own conclusions on such sensitive issues.[61]

More recently, one regional governing body of the Presbyterian church held that lesbians and gays may continue to have same-sex unions and may continue to apply to be ministers.[62] Additionally, last year, a Presbyterian church tribunal ruled that a group of churches in New Jersey did not violate church laws by accepting a gay man as a candidate for ordination.[63]

3. Debates Within Conservative Institutions

Even among this nation's more conservative religious institutions, debate has emerged over the proper response to homosexuality. For example, even within the Southern Baptist Convention individual churches have moved in recent years to ordain openly-gay ministers and to bless same-sex unions, and these congregations have persisted in their progressive

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[60] *Keeping Body and Soul Together*, *supra* note 8.

[61] *The 203rd General Assembly (1991) Response to The Report of the Special Committee on Human Sexuality* (1991).

[62] *See, e.g.*, Jeffrey Gold, *Presbyterians Uphold Gay Man's Candidacy, Same-sex 'Holy Unions*, Associated Press, Nov. 23, 1999.

[63] *See, e.g., Presbyterian Decisions Back Gays; Gay Clergy and Same-Sex Marriage Cases, The Christian Century* 1218, Dec. 15,1999.

stand despite the vocal opposition and even expulsion from the convention[64]

The movement of these prominent, mainstream religious institutions toward acceptance of gays and lesbians as full members and as religious leaders belies any claim that this nation's religious traditions share a clear view that homosexuality is inconsistent with moral rectitude.

*****

As this discussion demonstrates, no clear consensus exists among biblical scholars, religious historians or theologians that homosexuality should be viewed as incompatible with a moral life. Similarly, no consensus exists among this nation's major religious institutions that homosexuality is inconsistent with moral behavior, or that homosexuals should not fully participate in the life of religious communities.

Given this reality, there is no proper basis for the Boy Scouts to presume that their members and sponsoring organizations implicitly agree that one cannot be gay and also be "morally straight." Every organization has the right to define its own values, and we do not mean to tell the Boy Scouts what their moral message should be. But, taking the pledge required for membership in the Boy Scouts does not itself imply acceptance of the anti-gay viewpoint suggested by Petitioners in this lawsuit.

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[64] *See* Pat Long, *Pullen Memorial Baptist Church: An Inside Look at a Journey of Affirmation, in Que[e]rying Religion: A Critical Anthology, supra* note 11.

CONCLUSION

The judgment of the New Jersey Supreme Court should be affirmed. The State of New Jersey has a legitimate interest in eliminating historic discrimination. Prohibiting discrimination against homosexuals does not undercut the Boy Scouts' stated mission of moral education, and is not inconsistent with their pledge to be "morally straight" and "clean."

Dated: March 28, 2000

New York, New York

Respectfully submitted,

Of Counsel:

David A. Schulz
Wesley R. Powell
Darren Rosenblum

CLIFFORD CHANCE
ROGERS & WELLS LLP
200 Park Avenue
New York, NY 10166
(212) 878-8000

Counsel to Amici Deans of Divinity Schools and Rabbinical Institutions

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

ON WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

Brief Of *Amici Curiae* The General Board Of Church And Society Of The United Methodist Church, The United Church Board For Homeland Ministries, The Religious Action Center Of Reform Judaism, The Diocesan Council Of The Episcopal Diocese Of Newark And The Unitarian Universalist Association In Support Of Respondent

MICHAEL D. SILVERMAN
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
Attorneys for Amici Curiae
590 Madison Avenue
New York, New York 10022-4616
(212) 872-1039

158770

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of the *Amici Curiae*	1
Summary of Argument	6
Argument	7
Petitioners' Claim To A First Amendment Right To Exclude Gay Boys And Men Fails Under This Court's Precedents Because The Members Of Scouting Do Not Share, And Did Not Come Together To Express, Any View About Homosexuality	7
A. The Views of *Amici Curiae* Religious Sponsors and Members of Scouting	12
1. The United Methodist Church	12
2. The United Church of Christ	14
3. Reform Judaism	18
4. The Protestant Episcopal Church in the U.S.A.	20
5. Unitarian Universalist Association .	22
B. Government Sponsors of Boy Scouts ...	24
Conclusion	26

TABLE OF CITED AUTHORITIES

Page

Cases:

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 10

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Roberts v. United States Jaycees, 468 U.S. 609 (1984) 8, 9, 10, 11

Romer v. Evans, 517 U.S. 620 (1996) 24

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First Amendment 1, 7, 8, 10, 11, 27

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Beliefs and Policies of the National School Boards Association, as amended April 12, 1999 26

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Page

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Cited Authorities

Page

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Cited Authorities

Page

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Statement of Rabbi David Sapperstein (August 5, 1999) 20

Statement of the General Board of Church and Society of The United Methodist Church, adopted October 10, 1999 13

The Book of Discipline of The United Methodist Church — 1996 .....2, 3, 12, 13

United Methodist News Service, *United Methodist Men to Support New Jersey Boy Scout Appeal*, September 20, 1999 4

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are some of Scouting's largest religious sponsors. Together with government entities that join us in the Boy Scouts of America ("BSA" or "Boy Scouts"), we sponsor nearly 60% of all boys in Scouting. It is *our* boys and young men that the BSA seeks to exclude from *our* Scout troops under cover of *our* First Amendment freedom of association. It is essential that we convey to this Court that our boys' participation in Scouting (whether they are gay or not) has no effect upon Boy Scout members' ability to express any of the views that brought us together in Scouting.

We have always recognized that we are partners in Scouting with a diverse group of religious organizations that agree to disagree about numerous issues, including recently the theological meaning that some Boy Scout members apply to the Scouting terms "morally straight" and "clean." For *amici*, these terms have nothing to do with sexual orientation. For some of our partners, that is not the case.[2] But despite these divergent views regarding sexual orientation, *amici* and our partners in Scouting have never lost sight of our fundamental purpose in this enterprise — promoting the development of boys in accordance with the Scout Oath and Law.

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1. The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than named *amici curiae* and their counsel, made any monetary contribution to the preparation and submission of this brief.

2. *See, e.g.*, Brief of National Catholic Committee on Scouting, *et al.* as *Amici Curiae* in Support of Petitioners, dated February 28, 2000 ("Committee Brief").

This important goal is also shared by the government entities that have always been our partner in the Boy Scouts. Government entities are deeply entwined in the affairs of the Boy Scouts. More boys participate in Scouting through government entities than through any religious organization. Like *amici*, these government entities participate in Scouting in order to promote boys' healthy development in accordance with the Scout Oath and Law, and not for any discriminatory purpose. Indeed, far from being a religious ministry with a particular view of morality, Scouting is a non-sectarian organization with room for the government and for a variety of moral viewpoints, no single one of which justifies excluding our boys or adult participants from Scouting.[3]

Amicus The General Board of Church and Society of The United Methodist Church (the "Methodist Board") is the public policy and social action agency of The United Methodist Church. The United Methodist Church is the *largest* single sponsor of Boy Scout troops in the country. It sponsors more than 12,000 Boy Scout troops consisting of more than 424,000 boys and men. Pursuant to *The United*

3. Consistent with what we have always understood, the BSA Declaration of Religious Principle explicitly states that Scouting is "identified with no particular faith, encourages no particular affiliation, nor assumes the function of religious bodies." A.880. In fact, religious organizations that sponsor troops (including *amici*) are directed by the Boy Scouts to refrain from imposing their religious beliefs on Scouts. In no case where a unit is connected with a church, synagogue or other religious organization may members of other faiths or denominations be required because of their membership in the unit to take part in or observe a religious ceremony unique to that church or organization. A.1176.

Numbers preceded by "A" refer to pages in the record before the New Jersey Supreme Court.

Methodist Church Book of Discipline — 1996, the primary responsibility of the Methodist Board is to seek the implementation of the Social Principles of The United Methodist Church that have been adopted by the General Conference of The United Methodist Church, the only entity within The United Methodist Church authorized to speak on behalf of the entire denomination, including its Scouting ministries. Through its Social Principles, The United Methodist Church has decreed — in irreconcilable opposition to the "moral beliefs" alleged to govern the Boy Scouts — that all persons, regardless of sexual orientation, are entitled to have their human and civil rights protected and that homosexual persons no less than heterosexual persons are individuals of sacred worth. Consistent with the Methodist Board's responsibility to implement these Social Principles, the General Board of Church and Society of The United Methodist Church rejects Petitioners' characterization of Boy Scout members' moral views.[4]

4. The General Commission on United Methodist Men (the "UMM"), which was formed in 1995, decades after The United Methodist Church became a supporter of Scouting, has filed a brief *amicus curiae* in support of Petitioners. It is important to note that under The United Methodist Church organizational policy, UMM may file such a brief, but it is nevertheless expected that UMM will uphold the Social Principles of The United Methodist Church. *Amicus curiae* The General Board of Church and Society of The United Methodist Church is authorized by The United Methodist Church to implement the Social Principles of The United Methodist Church (including those Social Principles condemning discrimination against gay boys and men) that have been adopted by the General Conference, and which thereby apply to, and represent the views of, the entirety of The United Methodist Church, including its Scouting ministries. As Rev. Faith Conklin, who is a board member of UMM, recognized upon voting against UMM filing

(Cont'd)

Amicus United Church Board for Homeland Ministries (the "Homeland Ministries") is the domestic mission arm of the United Church of Christ (the "United Church"), which has 1.4 million members in 6,000 congregations. United Church congregations sponsor 1,450 Boy Scout troops consisting of more than 54,000 boys and men. Homeland Ministries is the agency within the United Church responsible for the United Church's relationship with the Boy Scouts of America through its Office for Youth and Young Adult Ministries. Homeland Ministries, like the United Church's General Synod (its highest decision making body), is committed to the full inclusion of lesbian, gay, bisexual and transgender persons in the life and ministry of the church, including its Scouting ministries. There are more than 100 openly gay and lesbian clergy serving full time as pastors of United Church congregations. Consistent with the United

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(Cont'd)
an *amicus* brief on Petitioners' behalf, "[s]uch action [] conflicts and is inconsistent with [The United Methodist Church's] stated affirmation of the worth of every person and [The United Methodist Church's] commitment to reject justice denying policies of discrimination." United Methodist News Service, *United Methodist Men to Support New Jersey Boy Scout Appeal,* September 20, 1999.

Accordingly, the claim by Petitioners' *amici* that they represent the largest share of the boys in Scouting simply is incorrect. Committee Brief, at 1. Without the millions of boys who participate in Scouting either through government entities that do not discriminate on the basis of sexual orientation or through religious organizations such as *amici* that disagree with Petitioners' moral views, the voice of Petitioners' *amici* regarding the morality of gay boys (or the meaning of the Scouting terms "morally straight" and "clean") rightly is heard not as the dominant voice in Scouting, but rather as only one of the many diverse voices among Scouting's membership regarding this issue.

Church's policies opposing discrimination based on sexual orientation, the United Church Board for Homeland Ministries rejects Petitioners' characterization of the moral views that brought the United Church into Scouting.

Amicus Religious Action Center of Reform Judaism pursues social justice and religious liberty as the official representative of the Union of American Hebrew Congregations, the governing body of Reform Judaism, North America's largest Jewish body. Reform Judaism's 875 congregations (representing 1.5 million people in the United States and Canada) sponsor Boy Scout troops consisting of more than 2,000 boys and men. Reform Jews are aware of the costs to individuals, families and society of the oppression of those who differ from society's majority. For this reason — and in accordance with the teaching of Reform Judaism that all individuals are created *betselem elohim* (in the divine image) — Reform Judaism strongly condemns discrimination on the basis of sexual or affectional orientation and rejects the claimed "moral beliefs" ascribed to Scouting's members by Petitioners as antithetical to the true purposes of Scouting.

Amicus Diocesan Council of the Episcopal Diocese of Newark represents 130 congregations made up of 30,000 confirmed communicants and 275 clergy in seven counties in the State of New Jersey. Congregations represented by the Diocesan Council sponsor Boy Scout troops consisting of hundreds of boys and men. The Diocesan Council, in accordance with the teachings of the Episcopal Church in the United States of America, affirms the rights of lesbians and gay men to the equal protection of the laws and to live free from discrimination based upon affectional or sexual orientation. The Diocesan Council rejects Petitioners' characterization of Boy Scout members' moral views regarding gay boys and men.

Amicus Unitarian Universalist Association is a religious association of more than 1,000 congregations in the United States, Canada and elsewhere. Unitarian congregations sponsor Boy Scout troops consisting of more than 1,000 boys and men. Through its democratic processes, the Unitarian Universalist Association has adopted numerous resolutions affirming the rights of lesbians and gay men to live free from discrimination based on sexual orientation and affirming the goals of equality, dignity and respect for all people, regardless of affectional or sexual orientation. Consistent with these resolutions, the Unitarian Universalist Association rejects the claimed "moral beliefs" ascribed to Scouting's members by Petitioners.

SUMMARY OF ARGUMENT

Together with public schools and other government entities joining us in the Boy Scouts of America ("Boy Scouts" or "BSA"), the faith groups and religious organizations participating as *amici* represent more than 60% of all boys in Scouting. Because we have come together with others in the Boy Scouts for its true purposes — teaching *our* boys and young men to be trustworthy, loyal, kind, morally straight and clean — and *not* for discrimination, we affirm to this Court that we have no First Amendment problem in this case. Contrary to Petitioners' assertions, *amici curiae* and our boys and young men do not participate in the Boy Scouts for the purpose of expressing the view that gay boys and men are immoral. We believe that it is discrimination against gay people that is immoral, a belief that we teach our boys in Scouting and that BSA has never told us not to teach. Accordingly, James Dale's membership in the Boy Scouts will not impair our ability to express any of the views that, in fact, did bring us into Scouting, such as the inculcation in *all* of our boys and young men of

Scouting values that will " 'prepare them to make ethical choices over their lifetime in achieving their full potential.' " Pet. Mem. at 2, *citing* A.2238.[5]

ARGUMENT

PETITIONERS' CLAIM TO A FIRST AMENDMENT RIGHT TO EXCLUDE GAY BOYS AND MEN FAILS UNDER THIS COURT'S PRECEDENTS BECAUSE THE MEMBERS OF SCOUTING DO NOT SHARE, AND DID NOT COME TOGETHER TO EXPRESS, ANY VIEW ABOUT HOMOSEXUALITY

If it were true, BSA's assertion that it "has certain moral beliefs" arising out of its members' association in order "to promote the view that homosexuality is immoral" might establish its *members'* First Amendment right to exclude James Dale (and all other gay boys and men) from Scouting. Brief for Petitioners, at 20, 25. But BSA's assertion is false. As faith groups and religious organizations that have sponsored Scouting for decades, we state emphatically that we do not subscribe to such a view and that our expressive purposes in Scouting are not impaired by the participation of any of our boys, gay or straight, in Scouting. We believe that it is discrimination against gay people that is immoral, a belief that we teach our boys in Scouting and that BSA has never told us not to teach. In the end, BSA seeks to effectuate the personal biases of some under the guise of *our* First Amendment associational freedoms which are *not* implicated by the participation of gay boys and men in Scouting.

Amici faith groups and religious organizations are the Boy Scouts' chartered sponsors (or official agencies thereof).

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5. "Pet. Mem." refers to Boy Scouts of America and Monmouth Council, Boy Scouts of America's Petition for a Writ of *Certiorari*.

We speak both for our boys and for the adults among us who are the volunteer leaders who run our troops and support our involvement in Scouting.[6] While acutely aware of the critical importance of the First Amendment freedom of expressive association, we submit this brief to alert the Court to the *actual* views of BSA members regarding gay boys and men and anti-gay discrimination — views that differ fundamentally and irreconcilably with the views ascribed to Boy Scout sponsors and members in BSA's petition for a writ of *certiorari* and in its brief on the merits. While BSA hypothesizes that "[f]or most of Scouting's history, no one could have had any doubt about the organization's view on homosexuality," in fact it is the contrasting views of *amici* regarding our gay boys that always have been known to BSA. Brief for Petitioners, at 5. Before approving any sponsor of Boy Scout troops, BSA investigates "the general objectives, purpose, character, intent, and programs of the prospective chartered organization or community group and its compatibility with the aims and purposes of the Boy Scouts

6. Organizationally, the Boy Scouts grants unit charters to sponsors consisting of "organizations and groups of citizens" that establish and "maintain units . . . and . . . issue certificates of membership . . . to the officers and members thereof." *Dale v. Boy Scouts of America*, 160 N.J. 562, 572, 734 A.2d 1196, 1201 (1999). Unit charters allow the "organization to use the Scouting program *under its own leadership* to serve the youth and families for which it has concern, *to help it accomplish its own objectives*." *Id.* (emphasis supplied). We have always taught our boys that discrimination against gay people is immoral, and BSA has never interfered with our instruction of our boys in that regard. Moreover, as the Boy Scouts' chartered sponsors and members, it is our expressive association rights (and those of the youth and families for which we have concern) that are implicated here. The First Amendment right to associate belongs to an organization's members. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

of America." *Dale*, 160 N.J. 562, 572, 734 A.2d 1196, 1201 (1999). BSA has always known that neither we nor the public schools, fire departments, police departments and other public entities who join us, subscribe to, or participate in Scouting to promote, the view that gay boys and men are immoral or should be excluded from Scouting.

Amici faith groups and religious organizations *do* sponsor Scouting — and sponsor troops for our boys and young men to participate in Scouting — for Scouting's *true* purposes as set forth in the Scout Oath and Law. These include teaching *all* of our boys and young men important values that Scouting's members do share, such as trustworthiness, loyalty, kindness, respect for others, bravery and living one's life in a morally straight and clean manner. *Dale*, 160 N.J. at 574-75. In all of our decades of participation in Scouting, we have never seen, in any Scouting literature sent to us, any reference to the Boy Scouts' anti-gay policy (which applies to all of our boys, and not merely to our young men who, like James Dale, rise to a leadership position within Scouting). Nor have we been told by BSA to communicate any anti-gay view to our youth or to exclude any of our boys or adult volunteers. As we have learned of BSA's covert anti-gay policy (through media coverage of various litigations), we have spoken out in opposition to the exclusion of gay boys and men. We will continue to speak out for inclusion of all of our boys and men as we continue to come together with other members of the Boy Scouts to promote boys' development in accordance with the membership's shared belief in the Scout Oath and Law.

We are familiar with and support the *Roberts* trilogy framework for balancing an organization's legitimate interests in its membership policies with a State's compelling

interest in eradicating discrimination. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). The *Roberts* trilogy makes clear that an organization may exclude an individual without regard to an otherwise applicable anti-discrimination law *only* when that individual's presence as a member will interfere with the current members' ability to promote those views *that brought them together. Id.* In this case, while some BSA members may believe that gay boys and men are immoral, *amici curiae and the public entities involved in the Boy Scouts do not*, rendering untenable the Boy Scouts' assertions that we, Scouting's members, have come together to express a shared view of the morality of gay boys and men or that the inclusion of gay boys and men in the Boy Scouts will impair our ability to express those views that did, in fact, bring us all together.[7]

BSA and its *amici* argue in essence for an abandonment of the *Roberts* trilogy in favor of a theory of expressive association jurisprudence that would make the Boy Scouts' leadership the sole judge of whether the Boy Scouts is entitled to First Amendment protection. BSA argues that:

> even if it were true that Boy Scouts of America had never articulated moral disapproval of homosexuality until now, that would be

7. The Boy Scouts' suggestion that our views may be ignored because "it is not uncommon for members of expressive groups to disagree about some aspects of the group's beliefs" misses the point entirely. Pet. Mem., at 24-25. Under the *Roberts* framework, if some of the current members already subscribe to a particular point of view, then the admission of another individual who shares that view cannot be said to interfere with the membership's ability to promote the views that brought them together.

> completely irrelevant [because a] private organization has the right to decide for itself what it believes, *and to change those beliefs when it sees fit.*

Brief for Petitioners, at 27 (emphasis supplied). In other words, the Boy Scouts argue, an organization faced with a charge of discriminatory exclusion may without any substantiation that its members indeed associate in order to promote a view at odds with a view held by the individual (or group of individuals) sought to be excluded, suddenly claim that the organization now subscribes to a view incompatible with the claimant's admission and that the First Amendment thereby protects the organization's otherwise discriminatory exclusion. If adopted, the Boy Scouts' theory would render the *Roberts* framework and civil rights laws across the country a nullity.

Amici believe that the *Roberts* framework, which promotes civil rights enforcement within First Amendment boundaries that address viewpoint (and not mere identity), best balances the competing interests between individuals' First Amendment right to associate to promote shared views and a State's compelling interest in eradicating discrimination. Under the *Roberts* framework for examining the views of an organization's members, the Boy Scouts' First Amendment claim that it is entitled to discriminate against our gay boys must fail.

A. The Views of *Amici Curiae* Religious Sponsors and Members of Scouting

1. *The United Methodist Church*

The United Methodist Church (of which *amicus curiae* the General Board of Church and Society of The United Methodist Church is the official agency empowered to implement its Social Principles) is the *largest* single sponsor of the Boy Scouts nationally with more than 12,000 troops consisting of more than 424,000 boys and men. In fact, James Dale's Boy Scout troop — Troop 73 — was sponsored by The United Methodist Church and met in a hall provided by the Matawan First United Methodist Church. A.205. The Boy Scouts' rhetoric about protecting religious liberty is just that. It was the Boy Scouts' national leadership — in opposition to the religious doctrines of James Dale's Methodist troop sponsor — that expelled James Dale from membership in his United Methodist Church troop. The United Methodist Church has for decades supported the true purposes of Scouting, including teaching all boys and young men to be loyal, courageous, honest, reverent, morally straight and clean. The United Methodist Church does not participate in Scouting to promote the view that gay boys and men are immoral.

Moreover, the United Methodist Church strongly condemns discrimination against gay boys and men. *See generally* A.3965. The *Book of Discipline of The United Methodist Church — 1996* (the "*Book of Discipline*"), adopted by the General Conference of The United Methodist Church in 1996, states that "[w]e insist that all persons, regardless of age, gender, marital status, or sexual orientation, are entitled to have their human and civil rights

ensured." *Book of Discipline* Section II, ¶ 65(G) ("Human Sexuality"), at 89. The *Book of Discipline* also affirms that United Methodists "are committed to supporting [human] rights and [civil] liberties for homosexual persons." *Id.* Section III, ¶ 66(H) ("Equal Rights Regardless of Sexual Orientation"), at 94. It recognizes as well that claims of gay people to "equal protection before the law" present "a clear issue of simple justice." *Id.* As The United Methodist Church's policies demonstrate, the Boy Scouts' assertion that The United Methodist Church participates in Scouting to promote the view that homosexuality is immoral is false.

Accordingly, when it learned about the Boy Scouts' anti-gay litigation policy, The United Methodist Church's General Board of Church and Society, fulfilling its obligation to seek the implementation of the Social Principles of The United Methodist Church which unequivocally prohibit discrimination against gay boys and men, condemned the anti-gay policy and stated that:

> [T]he Boy Scouts of America's discrimination against gays . . . conflicts with [The United Methodist Church's] Social Principles. . . . The General Board of Church and Society affirms the decision of the New Jersey Supreme Court in the case *James Dale v. Boy Scouts of America* that ruled the Boy Scouts of America is discriminatory in its exclusion of gays. We . . . call upon the Boy Scouts of America to discontinue this exclusion of gays.

Statement of the General Board of Church and Society of The United Methodist Church, adopted October 10, 1999.

Tellingly, rather than seeking to exclude its largest sponsor from the Boy Scouts because of The United Methodist Church's condemnation of discrimination against homosexuals, the Boy Scouts responded to adoption of the Methodist Board's October 10, 1999 Statement affirming the New Jersey Supreme Court's decision in this case by stating that "[w]e hope that we could continue the relationship with [T]he United Methodist Church." Frank J. Murray, *Methodist Panel Chides Scouts On Gay Troops*, Washington Times, October 13, 1999, at A3. By contrast, James Dale, who had expressed no view, was summarily excluded from the Boy Scouts *not* because of any conflict between his views and the views of the Boy Scouts' existing members, but solely because Boy Scout officials fortuitously discovered that he is gay.

2. *The United Church of Christ*

The United Church of Christ, whose congregations sponsor more than 1,450 Boy Scout troops consisting of more than 54,000 boys and men (making it one of the Boy Scouts' 15 largest chartered organizations as of 1997), has a long history of participation in the Boy Scouts of America. We have always understood the true purposes of Scouting to be to teach our boys and young men to live obediently, bravely, kindly, reverently and in a morally straight and clean manner in accordance with the Scout Oath and Law. The assertion by BSA officials that United Church congregations and boys participate in Scouting to promote the view that gay boys and men are immoral is simply incorrect.

In fact, we have a long history of opposing discrimination based on sexual orientation. In 1977, for example, the biennial United Church General Synod (the United Church's highest decision making body):

> 1. Reaffirm[ed] the action of the Tenth General Synod in its pronouncement on Civil Liberties Without Discrimination Relating to Affectional or Sexual Preference [or Orientation];
>
> 2. Deplore[d] the use of scripture to generate hatred, and the violation of civil rights of gay and bisexual persons; and
>
> 3. Call[ed] upon individual [United Church] members, local churches, Associations, Conferences, and Instrumentalities to continue to work for the enactment of civil rights legislation at the federal, state, and local levels of government.

Eleventh General Synod of the United Church of Christ, Resolution Deploring the Violation of Civil Rights of Gay and Bisexual Persons (1977). A.3823. Indeed, the United Church was an early supporter of the rights of lesbians and gay men; in 1972, in fact, the United Church ordained its first openly gay minister. Deb Price, *Times Have Changed, But Not Fast Enough*, San Francisco Examiner, June 21, 1994, at B7. Since 1975, the United Church has reaffirmed its commitment to ensuring full civil rights for lesbians and gay men and has taken steps to "facilitate the ordination and placement of qualified lesbian, gay and bisexual candidates" for ministry in United Church congregations. General Synod of the United Church of Christ, Resolution on Affirming Gay, Lesbian and Bisexual Persons and Their Ministries (1991). A.3858.

As our policies make clear, Petitioners' assertion that we participate in Scouting to promote the view that homosexuality is immoral is false. In fact, as word spread

through the media of the Boy Scouts' litigation position regarding gay boys and men, we concluded that this shocking stance was incompatible with our own anti-discrimination policies. Accordingly, on February 8, 1993, Rev. Gordon J. Svoboda, II, *amicus curiae* United Church Board for Homeland Ministries' Secretary for Education in Human Identity and Youth and Young Adult Programs, wrote to the Boy Scouts, noting that:

> [n]o less than eleven votes in the national setting have been taken inviting study and action to overcome homophobia and the resultant prejudice against gay, lesbian, and bisexual persons. These votes, taken by the church's highest deliberative body, the General Synod, and its Executive Council, address our needs: to affirm the civil liberties of all persons without discrimination based on sexual orientation; to encourage the welcoming of gay, lesbian, and bisexual persons into membership and ordained ministry in the United Church of Christ; and, to protect the right to privacy of all people in consensual, adult relationships.

The letter implored "the Boy Scouts of America [to] stop its discriminatory practices of prohibiting openly gay, lesbian, and bisexual persons from holding leadership positions at all levels of the scouting organization."

Despite our expressed moral views, the Boy Scouts nevertheless sought the endorsement of the United Church in 1998 in order to recruit local United Church congregations as Boy Scouts sponsors. On September 18, 1998, Rev. Dr. Paul H. Sherry, then President of the United Church, wrote

to Jere B. Ratcliffe, Chief Scout Executive of the Boy Scouts and Thomas R. Deimler, then Director of Religious Relationships of the Boy Scouts, stating again that:

> The General Synod of the United Church of Christ has a twenty-nine year history of pronouncements, resolutions, and prophetic actions seeking affirmation and justice for gay, lesbian, and bisexual persons, both in the church and in the larger society. . . . *I ask you, again, to abandon policies and practices which, in our judgment, perpetuate homophobia, hate and hurt to others, and fail to support the most fundamental values of respect and compassion for others which Scouting seeks to encourage.* We are deeply concerned about the damage being done to gay youth who wish to participate in scouting and the destructive effects upon non-gay youth whose anti-gay prejudices may be reinforced by your policies.

(Emphasis supplied).

In response, Mr. Deimler of the Boy Scouts wrote to Rev. Dr. Sherry of the United Church on November 23, 1998 that "[o]ur goal will be to continue the national support of the Boy Scouts of America in serving youth of the United Church of Christ through Scouting." As with The United Methodist Church, it is apparent that while heterosexual members and sponsors may hold *any* view of homosexuality contrary to the claims of the Petition, gay boys and men are automatically excluded from membership solely because of who they are.

3. *Reform Judaism*

The Union of American Hebrew Congregations ("UAHC") (represented in this action by its social justice agency, *amicus curiae* Religious Action Center of Reform Judaism), the governing body of Reform Judaism, North America's largest Jewish body, sponsors BSA troops in order to teach our boys and young men to live in a trustworthy, loyal, kind, brave, reverent, morally straight and clean manner consistent with the Scout Oath and Law.[8] We do not participate in Scouting for our boys to learn that gay youth and men are immoral or should be excluded, beliefs we simply do not hold.

On the contrary, the UAHC "has consistently supported the civil rights and civil liberties of all persons" and has stated in particular "that homosexual persons are entitled to equal protection under the law. We oppose discrimination against homosexuals in areas of opportunity, including employment and housing. We call upon our society to see that such protection is provided in actuality." General Assembly of UAHC, Statement on Human Rights of Homosexuals (1977). A.3897.

Not only have we consistently opposed discrimination based upon affectional or sexual orientation, we have specifically welcomed lesbian and gay Jews as leaders of our congregations. The Central Conference of American Rabbis declared in 1990 that "[a]ll Jews are religiously equal regardless of sexual orientation." That being the case, the statement continued, "all rabbis, regardless of sexual

8. UAHC congregations sponsor Boy Scout troops consisting of at least 2,000 boys and men. Many more Reform Jews are affiliated with Scouting through non-UAHC organizations.

orientation, [should] be accorded the opportunity to fulfill the vocation which they have chosen." Central Conference of American Rabbis, Ad Hoc Committee on Homosexuality and the Rabbinate, Report (June 25, 1990). A.3902; *see also Gay Rabbis*, Time, July 9, 1999, at 62; Ari L. Goldman, *Reform Judaism Votes to Accept Active Homosexuals in Rabbinate*, N.Y. Times, June 26, 1990, at A1. The Boy Scouts' assertion that we participate in Scouting to promote Petitioners' asserted "moral beliefs" is incorrect. Brief for Petitioners, at 20, 25.

We further believe that discrimination against an individual because of his sexual orientation is no more morally acceptable because it is practiced by an organization which otherwise promotes laudatory values. We have specifically voiced our condemnation of BSA's anti-gay policy. On April 9, 1992, the Executive Board of the Central Conference of American Rabbis called upon Petitioners "to open [their] membership and leadership to all men and boys without regard to their sexual orientation." Executive Board of the Central Conference of American Rabbis, Resolution (April 9, 1992). A.3893; *see also* A.3886-A.3887; A.3894 (Executive Board of the National Federation of Temple Youth, the largest youth organization of Reform Judaism, Resolution (1992-'93), calling upon the Boy Scouts "to open its membership and leadership to all men . . . and boys without regard to their sexual orientation"). We have urged BSA officials to reverse this policy barring gay members, noting that our congregations sponsor Boy Scouts troops consistent with our support for human rights, including "full inclusion of lesbian and gay Jews in all aspects of synagogue life." *Jewish Groups Decry Gay Ban*, Washington Times, July 11, 1992, at B4.

In response to the New Jersey Supreme Court's decision in this case, *amicus curiae* Religious Action Center of Reform Judaism on August 5, 1999 stated:

> We applaud yesterday's decision by the New Jersey Supreme Court requiring the Boy Scouts of America to stop discriminating against homosexuals who wish to participate in scouting activities. . . . The Justices made clear that they find discrimination on the basis of sexual orientation repugnant. So do we. . . . Rank discrimination should have no place in an organization that aspires to inculcate fundamental American values in our nation's boys.

Statement of Rabbi David Sapperstein, Director of the Religious Action Center of Reform Judaism (August 5, 1999). BSA officials have not expelled us for stating our opposing views.

4. *The Protestant Episcopal Church in the U.S.A.*

The Diocesan Council of the Episcopal Diocese of Newark sponsors Boy Scout troops to teach our boys and young men values consistent with the true purposes of Scouting, such as loyalty, courage, kindness, cleanliness, obedience, reverence and moral straightness. We do not participate in Scouting to promote the view that homosexuality is immoral.

Such a view, in fact, contradicts the teachings of The Protestant Episcopal Church in the U.S.A. (the "Episcopal Church") which has a long history of opposition to

discrimination on the basis of affectional or sexual orientation.[9] In 1976, the Episcopal Church issued the following statement:

> Resolved, House of Bishops concurring, that it is the sense of this General Convention that homosexual persons are children of God, who have a full and equal claim with all other persons upon the love, acceptance, and pastoral concern and care of the Church.
>
> * * *
>
> [T]his General Convention expresses its conviction that homosexual persons are entitled to equal protection of the law with all other citizens, and calls upon our society to see such protection provided in actuality.

General Convention of the Protestant Episcopal Church in the U.S.A., Statement on Homosexuality (1976). A.3949. In 1982, the General Convention of the Episcopal Church reaffirmed its position that "homosexual persons are children of God and are entitled to full civil rights." General Convention of the Episcopal Church, Resolution on Civil Rights of Homosexuals (1982). A.3950.

Additionally, the Standing Commission on Human Affairs of the Episcopal Church has since recommended that the church allow gay and lesbian clergy at the discretion of local bishops. *See, e.g.*, Peter Steinfels, *Lesbian Ordained Episcopal Priest*, N.Y. Times, July 6, 1991, at A1. The Boy Scouts' assertion that we participate in Scouting to promote

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9. The Episcopal Church sponsors more than 1,400 BSA troops consisting of more than 50,000 boys and men.

Petitioners' incompatible view of gay youth and men is incorrect and ignores the beliefs and policies of the Episcopal Church.

Consistent with these beliefs and policies, we opposed this anti-gay policy upon learning of it and have called upon BSA officials "to admit to full membership otherwise qualified homosexual persons." Diocesan Council of the Episcopal Diocese of Newark, Resolution on the Diocese of Newark and the Boy Scouts of America (June 9, 1993). A.3958; *see also* A.3913. BSA officials have not expelled us for stating our opposing views.

5. *Unitarian Universalist Association*

Like other members of Scouting, congregations affiliated with the Unitarian Universalist Association ("UUA") sponsor Boy Scout troops for Scouting's true purposes — teaching our boys and young men, among other things, to live kindly, obediently, bravely and in a morally straight and clean manner. Unitarian Universalists do not participate in Scouting to promote the "morality" ascribed to us by Petitioners. Brief for Petitioners, at 20, 25.

In fact, Unitarians long ago recognized that "[h]omosexuality has been the target of severe discrimination by society" and "urge[d] all peoples immediately to bring an end to discrimination against homosexuals, homosexuality, bisexuals, and bisexuality." General Assembly of the Unitarian Universalist Association, Resolution on Discrimination Against Homosexuals and Bisexuals (1970). A.3807. Specifically, the Unitarian Universalist Association:

> call[ed] upon the UUA and its member churches, fellowships, and organizations immediately to end all discrimination against homosexuals in employment practices, expending special effort to assist homosexuals to find employment in our midst consistent with their abilities and desires; [and]
>
> urge[d] all churches and fellowships . . . to initiate meaningful programs . . . with the particular aim to end all discrimination against homosexuals and bisexuals.

Id.

Since that time, the UUA has continued to support the rights of lesbians and gay men through its Office of Lesbian, Bisexual and Gay Concerns. In particular, in 1980, the UUA called upon the Unitarian Universalist Ministers' Association and the UUA Department of Ministerial and Congregational Service "to lend full assistance in the settlement of qualified openly gay, lesbian and bisexual religious leaders." General Assembly of the Unitarian Universalist Association, Resolution on Ministerial Employment Opportunities (1980). A.3809. Moreover, in 1987, the UUA renewed its call for "organizations and society at large to end discrimination against gay and lesbian people" and again expressed its support "for the passage of laws prohibiting discrimination based on sexual orientation." General Assembly of the Unitarian Universalist Association, Resolution on Supporting Legal Equity for Gays and Lesbians (1987). A.3811. BSA officials' assertion that we participate in Scouting to promote the view that homosexuality is immoral is incorrect and ignores our beliefs and policies.

B. Government Sponsors of Boy Scouts

More than any single religious denomination, government entities (including public schools) constitute the largest sponsor of Boy Scout troops in the nation, sponsoring over 19,000 Boy Scout troops consisting of more than 1,000,000 boys and men. *Chartered Organizations: Top 30 For 1997 Ranked By Total Youth*, BSA Today, No. 5-886, February/March 1998 ("Chartered Organizations"); BSA 1990 Report to United States Congress. Government entities subject to Constitutional equal protection guarantees and state civil rights laws such as New Jersey's Law Against Discrimination do not (and may not) participate in the Boy Scouts to express the view that gay boys and men are immoral or that they should be subject to exclusion from the Boy Scouts. *See generally Romer v. Evans*, 517 U.S. 620 (1996). Like other members of the Boy Scouts, they participate in order to teach boys and young men the fundamental and inclusive values set forth in the Scout Oath and Law that bring Scouting's members together.

Government sponsors of the Boy Scouts include civilian branches of the U.S. Air Force, U.S. Army, U.S. Coast Guard, U.S. Coast Guard Auxiliary, U.S. Marine Corps and U.S. Navy. A.4455. NASA is a sponsor of the Boy Scouts, A.4456, as is the Department of Housing and Urban Development. *Chartered Organizations*. Local government entities, including fire and police departments, are also sponsors of Boy Scouts troops. *Id.*; *see generally* A.1592. The New Jersey Supreme Court found that

> in New Jersey, for example, public schools [which are barred by the Law Against Discrimination from discriminating against gay boys in the provision of public school services] and school-affiliated groups sponsor close to 500 scouting units, comprising approximately one-fifth of the chartering organizations in the State. Other government entities, such as law enforcement agencies, fire departments, city governments, and the [civilian] military, sponsor approximately 250 scouting units in New Jersey.

Dale, 160 N.J. at 573. The same is true nationally. A.4455; *Chartered Organizations*.

Public schools, in particular, are one of the largest sponsors of Boy Scout troops in the nation. *Chartered Organizations*. Public school boys have responded in droves to BSA's "[p]ersonal invitation to every boy in school to join Scouting," thereby fulfilling BSA's recruitment goal of "[e]very classroom[,] every boy." 1997 BSA Join Scouting Night Guidebook. Public schools participate in the Boy Scouts because they wish their students to learn the fundamental values set forth in the Scout Oath and Law, *not* because they wish to promote the view that gay boys and men are immoral.

In fact, consistent with applicable Constitutional equal protection guarantees and legal prohibitions on discrimination, public school boards and public school organizations nationwide prohibit discrimination against gay youth in school and school-sponsored activities such as the Boy Scouts. The National School Boards Association, for example, which serves as the national voice for 17,000 local school districts nationwide and which is a national leader in the formulation and implementation of federal and national educational policy, has stated unequivocally that its member

schools must "ensure that students are not subjected to discrimination on the basis of socioeconomic status, race, color, national origin, religion, gender, disability, or *sexual orientation*." Beliefs and Policies of the National School Boards Association, as amended April 12, 1999, Article II ("Responsibilities of Local School Boards"), Sec. 3.4 (emphasis supplied).[10]

Schools and other public entities are members of Scouting side by side with diverse religious groups who agree to disagree on many doctrines and moral views in order to collectively support the goals we do agree upon. Like *amici*, these public entities participate in Scouting for the reasons that Scouting's members have always come together — to teach youth (including gay boys and young men) the values and skills of citizenship, community service and self-respect embodied in the Scout Oath and Law.

CONCLUSION

The broad support among the Boy Scouts' religious and government sponsors and members for the equal legal rights and human dignity of gay boys and men belies Petitioners' contention that these diverse public and religious sponsors and members come together in Scouting for an expressive purpose that mandates exclusion of gay boys and men. Petitioners' characterization of "moral beliefs" that gay youth and adults cannot share in is a smokescreen for invidious discrimination against gay boys and men in violation of New Jersey law. BSA's policy excludes gay youth and men from Scouting without

10. A copy of this document is on file with counsel and available upon request. It is also available on the internet at the website of the National School Boards Association (http://www.nsba.org/about/beliefs.htm).

regard to their adherence to any set of "moral beliefs," while, by contrast, any heterosexual or sponsoring organization may participate in the Boy Scouts even if that individual or organization loudly opposes Petitioners' claimed "moral beliefs" and the policy regarding gay boys and men.

The New Jersey Supreme Court correctly recognized that Petitioners' summary exclusion of gay boys and men — and inconsistent tolerance of conflicting opinions regarding gay boys and men from heterosexuals — forecloses the possibility that BSA "seeks to exclude individuals who do not share the views that the clubs' members wish to promote." *New York State Club Ass'n*, 487 U.S. at 13. Instead, BSA is impermissibly using sexual orientation as a shorthand measure "in place of . . . legitimate criteria for determining membership." *Id.* We, the members and sponsors of Scouting, have no First Amendment problem with enforcement of the Law Against Discrimination. This case raises no First Amendment concerns and this Court should emphatically reject BSA's efforts to invoke *our* First Amendment rights to defend a discriminatory policy that we do not support or believe in, and that we do not participate in Scouting to advance.

Respectfully submitted,

MICHAEL D. SILVERMAN
Counsel of Record
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
Attorneys for Amici Curiae
590 Madison Avenue
New York, New York 10022-4616
(212) 872-1039

(54)

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF OF THE CITIES OF ATLANTA, CHICAGO, LOS ANGELES, NEW YORK, PORTLAND, SAN FRANCISCO AND TUCSON AS AMICI CURIAE IN SUPPORT OF RESPONDENT

PETER T. BARBUR
Counsel of Record
SARA M. DAREHSHORI
DAVID L. WELLER
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Amici Curiae The Cities of Atlanta, Chicago, Los Angeles, New York, Portland, San Francisco and Tucson

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(Additional Amici Curiae Counsel Continued on Inside Front Cover)

March 29, 2000

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SUSAN PEASE LANGFORD
City Attorney
on behalf of the CITY OF
ATLANTA, GEORGIA

MARA S. GEORGES
Corporation Counsel
LAWRENCE E. ROSENTHAL
Deputy Corporation
Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
on behalf of the CITY OF
CHICAGO, ILLINOIS

JAMES K. HAHN
City Attorney
DAVID I. SCHULMAN
Deputy City Attorney
CARMEL B. SELLA
Special Assistant City
Attorney
on behalf of the CITY OF
LOS ANGELES,
CALIFORNIA

MICHAEL D. HESS
Corporation Counsel
LEONARD J. KOERNER
Chief Assistant Corporation
Counsel
FLORENCE A. HUTNER
Assistant Corporation
Counsel
on behalf of the CITY OF
NEW YORK,
NEW YORK

JEFFREY L. ROGERS
City Attorney
MADELYN F. WESSEL
Chief Deputy City Attorney
on behalf of the CITY OF
PORTLAND, OREGON

LOUISE RENNE
City Attorney
MARIO KASHOU
Deputy City Attorney
on behalf of the CITY OF
SAN FRANCISCO,
CALIFORNIA

THOMAS J. BERNING
City Attorney
on behalf of the CITY OF
TUCSON, ARIZONA

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTERESTS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. APPLYING *HURLEY* AS URGED BY PETITIONERS WOULD CREATE AN ENORMOUS LOOPHOLE IN THE APPLICATION AND ENFORCEMENT OF CITY ANTI-DISCRIMINATION LAWS	5
A. Removing Courts' Ability To Examine The Claimed Expressive Purpose Of An Organization Would Defeat the Purpose Of Anti-Discrimination Laws	6
B. Permitting Groups To Discriminate On The Basis of Status Alone Is An Unwarranted Infringement On Cities' Abilities To Enforce Anti-Discrimination Laws	10
II. PETITIONERS' VOLUNTARY ENTANGLEMENT WITH CITIES BOTH UNDERMINES THEIR ASSERTION OF A COMMON ANTI-GAY EXPRESSIVE PURPOSE AND STRENGTHENS NEW JERSEY'S COMPELLING INTEREST	12
A. Cities' Participation In The Boy Scouts Undermines Petitioners' Assertion That The Boy Scouts Has A Common Anti-Gay Expressive Purpose	14

	Page
B. Boy Scouts' Entanglement With Cities Increases The Harmfulness Of Discrimination And Heightens Government Interest In Regulating Petitioners	16
C. Cities Have A Further Compelling Interest In Eradicating Invidious Discrimination Where The Failure To Do So Will Result In Denying An Important Opportunity To All Urban Youth	18
CONCLUSION	21

TABLE OF AUTHORITIES

Cases	Page(s)
Bloom v. City of Worcester, 293 N.E.2d 268 (S.Ct. Mass. 1973)	1
Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987)	3, 5, 17
Bracker v. Cohen, 204 A.D.2d 115, 612 N.Y.S.2d 113 (Supr. Ct. App. Div. 1994)	3
Brown v. Dade Christian Schools, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978)	7, 8
Chicago Real Estate Board v. City of Chicago, 224 N.E.2d 793 (1963)	
Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999)	*passim*
Elk's Lodge No. 719 and No. 2021 v. Department of Alcoholic Beverage Control, 905 P.2d 1189 (Utah 1995), *cert. denied*, 517 U.S. 1221 (1996)	4, 11
Fiedler v. Marumsco Christian School, 631 F.2d 1144 (4th Cir. 1980)	7, 8
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Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964)	17

	Page(s)
Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995)	*passim*
Hutchinson Human Relations Comm'n v. Midland Credit Management, Inc., 517 P.2d 158 (Kan. 1973)	1
New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988)	3, 6, 10
Roberts v. United States Jaycees, 468 U.S. 609 (1984)	*passim*
Runyon v. McRary, 427 U.S. 160 (1976)	16
Sims v. Besaw's Cafe, ---P.2d---, 165 Or. App. 180 (Or. Ct. App. 2000)	1, 3

Statutes

CAL. CIVIL CODE § 52(c) (West 1999)	3
775 Ill. COMP. STAT. ANN. 5/7-108(A) (West 1999)	3
ATLANTA, GA., CODE § 94-68(a)	2
BUFFALO, N.Y., CODE §§ 154-4 to 154-7	3
BOSTON, MASS., ORD. §12-9.7	2
CHICAGO, ILL., MUNIC. CODE § 2-160-020(i)	3
CHICAGO, ILL., MUNIC. CODE § 2-160-070	2, 3

	Page(s)
DENVER, COLO., REV. MUNIC. CODE § 28-96(a)	2
D.C. CODE § 1-2502	3
D.C. CODE § 1-2519(a)	2
LOS ANGELES, CAL., MUNIC. CODE §§ 45.95.00-45.95.04	2, 3
LOS ANGELES, CAL., MUNIC. CODE § 49.75[a][3]	18
LOS ANGELES, CAL., MUNIC. CODE §§ 45.80 *et seq.*	2
NEW ORLEANS, LA., CODE § 86-33(a)	2
N.Y.C. ADMIN. CODE § 8-107.4	2
PHILADELPHIA, PA., CODE § 9-1105(A)(1)(a)	2
PORTLAND, OR., CODE ch. 23.01	2
SAN FRANCISCO, CAL., POLICE CODE § 3305(a)(4)	2
SAN FRANCISCO, CAL., POLICE CODE § 3805	2
SAN FRANCISCO, CAL., POLICE CODE art. 33B	3
SEATTLE, WASH., MUNIC. CODE § 14.08.040	2
SEATTLE, WASH., MUNIC. CODE § 14.08.090	2
TUCSON, ARIZ., CODE § 17-12(a)	2

	Page(s)
Other Materials	
1990 Boy Scouts of America Ann. Rep.	12
1994 Boy Scouts of America Ann. Rep.	14
1996 Boy Scouts of America Ann. Rep.	13
Nanette Asimov, *Scouts Hold Fast To Homosexual Ban*, S. F. Chronicle, Sept. 18, 1991, at A15	19
Brief of *Amici Curiae* The General Board of Church and Society of the United Methodist Church *et al.* in Support of Respondent, Petition for a Writ of *Certiorari, Boy Scouts of America v. Dale* (U.S. 1999) (No. 99-699)	14
Bd. of Police Commissioners, Motion, May 12, 1998	15
Chartered Organizations: Top 30 for 1997 Ranked by Total Youth, BSA Today, No. 5-886, Feb./March 1998	12
Chicago Drops Ties to Boy Scout Program, Chronicle of Philanthropy, Feb. 26, 1998, at 47	19
Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws, 7 N.Y.U. Rev. L. & Soc. Change 215 (1978)	1
Note, *Constitutional Limits on Anti-Gay Rights Initiatives*, 106 Harv. L. Rev. 1905 (1993)	15

	Page(s)
Paul O'Donoghue, *LAPD Explorers*, City News Service, May 12, 1998	16
Police Drop Scout Post Over Policy on Gays, L.A. Times, Oct. 21, 1992, at A16	19
Larry A. Taylor, *How Your Tax Dollars Support the Boy Scouts of America*, The Humanist, Sept./Oct. 1995 at 6	13

STATEMENT OF INTERESTS

Pursuant to Supreme Court Rule 37.4, *amici curiae* — the cities of Atlanta, Chicago, Los Angeles, New York, Portland, San Francisco and Tucson — submit this brief in support of the affirmance of the opinion of the Supreme Court of New Jersey.

Cities are of necessity on the forefront of the battle against invidious discrimination of all sorts. "Problems arising from racial and other forms of discrimination are especially common in population centers; the cancer of injustice toward members of minority groups is peculiarly virulent on the local scene." *Hutchinson Human Relations Comm'n v. Midland Credit Management, Inc.*, 517 P.2d 158, 162 (Kan. 1973). Local initiative is necessary to solve these problems. Moreover, because the type and extent of discriminatory practices varies from community to community — depending upon, among other things, the composition of the population and the depth of local prejudice — familiarity with local conditions is imperative both for determining whether or not to enact civil rights legislation and for deciding what its contents should be. *Bloom v. City of Worcester*, 293 N.E.2d 268, 276 n.8 (Mass. 1973). "[D]iscrimination is essentially a people problem, and must eventually be dealt with and solved by the people in the localities where they live." *Hutchinson*, 517 P.2d at 162.

The development of our country's civil rights laws highlights the role of cities. Cities passed fair housing laws and public accommodation laws requiring equal access for racial minorities years before similar federal legislation was enacted.[1] More recently, cities have passed or amended ordinances to extend the prohibition against discrimination in public accommodations to include grounds not explicitly covered by state or federal law. These grounds include marital

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[1] *See Sims v. Besaw's Cafe*, ---P.2d---, 165 Or. App. 180, 200 n.24 (Or. Ct. App. 2000); *see also Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 240 (1978).

status,[2] sexual orientation,[3] place of residence,[4] HIV and AIDS,[5] political affiliation,[6] personal appearance[7] and familial status,[8] among others. The ability of cities to enact laws that are broader than state anti-discrimination legislation has been

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[2] *See, e.g.*, ATLANTA, GA., CODE § 94-68(a) (1995) (Tab A); BOSTON, MASS., CODE §12-9.7 (1985) (Tab B); CHICAGO, ILL., MUNIC. CODE § 2-160-070 (1990) (Tab D); DENVER, COLO., REV. MUNIC. CODE § 28-96(a) (1982) (Tab E); D.C. CODE § 1-2519(a) (1999) (Tab F); NEW ORLEANS, LA., CODE § 86-33(a) (1995) (Tab H); N.Y.C. ADMIN. CODE § 8-107.4 (1999) (Tab I); PHILADELPHIA, PA., CODE § 9-1105(A)(1)(a) (1999) (Tab J); PORTLAND, OR., CODE ch. 23.01 (1997) (Tab K); SAN FRANCISCO, CAL., POLICE CODE § 3305(a)(4) (1999) (Tab L); SEATTLE, WASH., MUNIC. CODE § 14.08.040(D) (Tab M); TUCSON, ARIZ., CODE § 17-12(a) (1987) (Tab N).

Citations to "Tab __" refer to the booklet of materials that *amici* cities have lodged with the Clerk of the Court.

[3] *See, e.g.*, ATLANTA, GA., CODE § 94-68(a) (Tab A); BOSTON, MASS., CODE §12-9.7 (Tab B); CHICAGO, ILL., MUNIC. CODE § 2-160-070 (Tab D); DENVER, COLO., REV. MUNIC. CODE § 28-96(a) (Tab E); D.C. CODE § 1-2519(a) (Tab F); LOS ANGELES, CAL., MUNIC. CODE § 45.95.02 (1999) (Tab G); NEW ORLEANS, LA., CODE § 86-33(a) (Tab H); N.Y.C. ADMIN. CODE § 8-107.4 (Tab I); PHILADELPHIA, PA., CODE § 9-1105(A)(1)(a) (Tab J); PORTLAND, OR., CODE ch. 23.01 (Tab K); SAN FRANCISCO, CAL., POLICE CODE § 3305(a) (Tab L); SEATTLE, WASH., MUNIC. CODE § 14.08.040(D) (Tab M); TUCSON, ARIZ., CODE § 17-12(a) (Tab N).

[4] *See, e.g.*, D.C. CODE § 1-2519(a) (Tab F).

[5] *See, e.g.*, LOS ANGELES, CAL., MUNIC. CODE §§ 45.80 *et seq.* (Tab G) and SAN FRANCISCO, CAL., POLICE CODE § 3805 (Tab L). *See also* N.Y.C. ADMIN. CODE § 8-107.4 (Tab I).

[6] *See, e.g.*, D.C. CODE § 1-2519(a) (Tab F); SEATTLE, WASH., MUNIC. CODE § 14.08.090 (Tab M).

[7] *See, e.g.*, D.C. CODE § 1-2519(a) (Tab F).

[8] BOSTON, MASS., CODE §12-9.7 (parental status) (Tab B); CHICAGO, ILL., MUNIC. CODE § 2-160-070 (parental status) (Tab D); D.C. CODE § 1-2519(a) (Tab F); PORTLAND, OR., CODE ch. 23.01 (Tab K); SEATTLE, WASH., MUNIC. CODE § 14.08.090 (parental status) (Tab M); TUCSON, ARIZ., CODE § 17-12(a) (Tab N).

recognized by state courts. *Sims v. Besaw's Cafe*, ---P.2d---, 165 Or. App. 180 (Or. Ct. App. 2000) (upholding city anti-discrimination law which includes sexual orientation although state anti-discrimination law does not include this ground and upholding enforceability of private rights created under city law in state circuit courts); *Bracker v. Cohen*, 204 A.D.2d 115, 115, 612 N.Y.S.2d 113, 113 (Supr. Ct. App. Div. 1994) (recognizing that New York State Human Rights Law was not intended to preempt the field of anti-discrimination legislation). At least one state legislature has expressly allowed municipalities to enact anti-discrimination measures broader than those adopted by the state. 775 ILL. COMP. STAT. ANN. 5/7-108(A) (West 1999). City attorneys are also called upon to enforce state non-discrimination laws. *See, e.g.*, CAL. CIVIL CODE § 52(c) (West 1999).

The Court's decisions in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987) and *New York State Club Association v. City of New York*, 487 U.S. 1 (1988), have provided an important framework for the cities' fight against discrimination. Following the Court's decisions in these cases, cities from coast to coast enacted or amended ordinances to cover discrimination by private organizations that act as public accommodations.[9] Indeed, numerous cities modeled their statutes on the ordinances upheld by the Court in *Roberts* and *New York State Club Association*.[10] Applying these decisions, lower courts have upheld important applications of city and state anti-

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[9] *See, e.g.*, CHICAGO, ILL., MUNIC. CODE §§ 2-160-020(i), 2-160-070(a) (Tab D).

[10] *See, e.g.*, BUFFALO, N.Y., CODE §§ 154-4–154-7 (1989) (Tab C); CHICAGO, ILL., MUNIC. CODE § 2-160-020(i) (addendum effective Dec. 21, 1988) (Tab D); D.C. CODE § 1-2502(24) (Tab F); LOS ANGELES, CAL., MUNIC. CODE §§ 45.95.00–45.95.04 (effective June 29, 1987) (Tab G); SAN FRANCISCO, CAL., POLICE CODE, art. 33B (effective November 17, 1987) (Tab L).

discrimination laws. *See, e.g., Fraternal Order of Eagles, Inc. v. Tucson*, 816 P.2d 255 (Ariz. Ct. App. 1991); *Elk's Lodge No. 719 and No. 2021 v. Department of Alcoholic Beverage Control*, 905 P.2d 1189 (Utah 1995), *cert. denied*, 517 U.S. 1221 (1996).

As discussed in greater detail below, the arguments advanced by petitioners in this case would, if accepted, seriously jeopardize the efforts of cities to combat discrimination. This alone provides the cities with a very keen interest in the outcome of this case. However, cities have a second vital interest in this case: several of the *amici* sponsor Boy Scout units or support them in other ways. This government entanglement provides the cities with a heightened interest in the application of their anti-discrimination laws to groups such as the Boy Scouts. It also provides important context for evaluation of the claims being advanced by petitioners in this case.

SUMMARY OF ARGUMENT

Petitioners argue that the Court should extend the holding in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), to this case and hold that prohibiting the Boy Scouts from excluding a homosexual member would abridge their First Amendment right to choose the content of their message and infringe upon their rights of association. Petitioners further argue that this Court is powerless to examine their claim — asserted for the purposes of litigation — that Boy Scouts of America has a shared anti-gay expressive purpose. If the Court accepts these arguments, the result would be the virtual disarmament of cities in the battle against discrimination. Organizations such as the Boy Scouts could effectively grant themselves an exemption from city and state anti-discrimination laws by merely asserting that enforcement of the laws would interfere with a claimed expressive purpose.

The ramifications of this case do not end there, however. Because of the longstanding and close ties between the Boy Scouts and the government, the discriminatory conduct of the Boy Scouts is, and will continue to be, perceived as endorsed by the government. The interconnection between the Boy Scouts and the government provides cities and states with a particularly compelling interest in eradicating such discrimination. Moreover, if city and state anti-discrimination laws cannot be enforced here, the cities that sponsor Boy Scouts will be put in the untenable position of either offering support to an organization that violates city anti-discrimination ordinances and policy or severing all financial and other ties to currently sponsored Boy Scout troops. A finding that petitioners are immune from city and state anti-discrimination laws could thus result in denying urban youth an important civic opportunity.

ARGUMENT

I. APPLYING *HURLEY* AS URGED BY PETITIONERS WOULD CREATE AN ENORMOUS LOOPHOLE IN THE APPLICATION AND ENFORCEMENT OF CITY ANTI-DISCRIMINATION LAWS.

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Court held that requiring the St. Patrick's Day parade organizers in Boston to allow gays and lesbians to march as a group with a banner in the parade infringed the First Amendment rights of the organizers. The decision is explicitly founded on the inherently expressive nature of parades in general and on the expressiveness of the particular group sought to be excluded. *Id.* at 568-70, 578-81. Mere participation in the parade by openly gay individuals was expressly not at issue. *Id.* at 572.

Petitioners now urge the Court to stretch the holding in *Hurley* and thereby effectively overrule *Roberts*, *Rotary Club*

and *New York State Club Association*. Petitioners argue for a standard that would allow any group to meet the expressive purpose requirement based upon an unsubstantiated assertion of an expressive purpose alone. Petitioners also argue that the *status* of a prospective member alone renders the prospective member's conduct sufficiently expressive to fall within *Hurley*. Each of these arguments would, if accepted, have dire consequences for cities' anti-discrimination efforts.

A. Removing Courts' Ability To Examine The Claimed Expressive Purpose Of An Organization Would Defeat The Purpose Of Anti-Discrimination Laws.

To attempt to fit themselves into the *Hurley* standard, petitioners allege they have an expressive purpose at odds with the admission of gay members. Petitioners argue that the Court should take this assertion at face value, claiming "it is not the role of government to decide what a private organization's message is." (Pet. Br. at 25)[11] At a minimum, petitioners contend that a reviewing court must give deference to an expressive organization's characterization of its own beliefs. (Pet. Br. at 26) Petitioners thus take issue with the New Jersey Supreme Court's finding that the Boy Scouts do not associate to preserve the view that homosexuality is immoral and in fact do not have a single view on this subject. *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1223-25 (N.J. 1999).

Accepting petitioners' arguments would undermine city and state anti-discrimination efforts to eliminate all forms of invidious discrimination, not only discrimination on the basis of sexual orientation. The law has long recognized that courts are empowered to identify pretextual justifications for discrimination. That principle applies fully to this case. The First Amendment is not offended when a court properly finds

[11] References to petitioners' brief are cited herein as "Pet. Br." followed by the page number.

that an organization's assertion that its expressive purposes would be undermined by application of anti-discrimination laws is merely pretextual.

A directly analogous situation arose in *Brown v. Dade Christian Schools*, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978). In *Brown*, a private sectarian school sought to exclude black children from the school on grounds that its members "sincerely held a religious belief that socialization of the races would lead to racial intermarriage, and that this belief, sanctioned by the Free Exercise Clause, should prevail against private interests created by Congress." *Id.* at 311. The trial judge examined the written literature of the school which was distributed to members of the church and the public and found that segregation was not mentioned and thus that discrimination was a matter of policy rather than exercise of religion. *Id.* at 312. In affirming the trial judge's decision, the Court of Appeals noted that the patrons of the schools were divided in their beliefs on the religious justification for segregation, and held that:

> "In such a situation the only practical course open to a Court is to examine the corporate beliefs of the institution involved, as adopted or promulgated or carried forward as an institutional concept. To do otherwise would allow the institution to pick and choose which of its members' potentially conflicting beliefs it wished to assert at any given time."

Id. at 313. Had the court in *Brown* been unable or unwilling to examine the basis for the school's purported religious beliefs about segregation to determine whether they were merely pretextual, the door would have been open for parochial schools to discriminate freely based upon unsupported assertions of religious convictions.

Similarly, in *Fiedler v. Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980), a parochial school established by a church expelled a student for interracial dating. In its Free

Exercise defense against the student's claims under the federal civil rights statutes, the school argued that interracial dating was in conflict with its fundamentalist Christian views. The Fourth Circuit found that the church's writings, constitution and by-laws did not address interracial dating. Nor was there a common understanding amongst the members of the church of its position opposing interracial dating on religious grounds. The Court of Appeals therefore found the school's Free Exercise defense unsupportable. *Id.* at 1152-54.

Here, as in *Brown* and *Fiedler*, the New Jersey Supreme Court was correct in examining the history and literature of the Boy Scouts to determine whether its asserted expressive purpose is sincere or just a pretext for illegal discrimination. Circumscribing the ability of courts to examine the bona fides of a group's claimed message would endow certain members or officers of organizations with the ability to justify virtually any form of discrimination. Indeed, any organization with by-laws containing a reference to a "moral code" or "belief in God" could claim an expressive purpose sufficient to exempt itself from anti-discrimination laws.

Although *Roberts* has been widely used to uphold application of cities' anti-discrimination statutes, that will necessarily cease to be true if petitioners' distorted characterization of *Hurley* is accepted. For example, in *Fraternal Order of Eagles, Inc. v. Tucson*, 816 P.2d 255 (Ariz. Ct. App. 1991), the City of Tucson challenged the Fraternal Order of Eagles' ("FOE"'s) policy of not admitting women to the organization based on its ordinance prohibiting discrimination in places of public accommodation. FOE is organized as a social club which raises money for charities. FOE requires that its members "must be over 21, believe in a supreme being, not be a member of the Communist party, and be of good moral character." *Fraternal Order of Eagles*, 816 P.2d at 256. In response to FOE's contention that admitting women would violate its members' rights to freedom of association, the court performed an analysis using the standard

set forth in *Roberts* and concluded that the Eagles' First Amendment rights would not be violated if they were compelled to admit women. *Id.* at 258-59. Specifically, the court found that the members' rights of intimate association were not constitutionally protected in these circumstances and that the slight infringement imposed upon the members' right of expressive association was justified by the city's compelling interest in eradicating sexual discrimination. *Id.*

However, if in the future the FOE decides to exclude homosexuals from membership, which is also a violation of Tuscon's anti-discrimination ordinance, *see* note 3 *supra*, FOE could — under petitioners' view — defend itself by claiming that having openly gay members would convey a message with regard to morality with which FOE does not wish to be associated. Even if nothing in FOE's materials refers to disapproval of homosexuality, and even if this disapproval is contrary to the understanding and beliefs of many members, FOE's position would be upheld under the test urged by petitioners. The prior decision, *Fraternal Order of Eagles*, would not be sustainable and FOE would be free to discriminate against women, gays and anyone else it wishes to exclude.

It is thus more than just a group's "multifarious voices" that justifies court scrutiny (Pet. Br. at 27); it is the need to determine whether beliefs claimed for purposes of litigation are merely a pretext for what is otherwise unlawful activity. If no, or only minimal, inquiry were allowed into an organization's expressive purposes, public accommodations could easily hide behind an opportunistic expression of belief in order to evade anti-discrimination laws.

B. Permitting Groups To Discriminate On The Basis Of Status Alone Is An Unwarranted Infringement On Cities' Abilities To Enforce Anti-Discrimination Laws.

The *Hurley* standard requires an expressive component on the part of an individual seeking to participate in an expressive activity. To meet this requirement, petitioners argue that compelling the Boy Scouts to have an openly gay member would in and of itself be forcing the Boy Scouts to convey a message with which they do not wish to be associated. (Pet. Br. at 23-24) Petitioners urge the Court to dispense with consideration of whether the group member affects "'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints",[12] and instead seek to have the Court make assumptions based on the status of the member alone. Notably, because the policy defended by the Boy Scouts excludes openly gay members as well as leaders, the petitioners seek to ascribe an expressive component to any form of participation by an openly gay individual.

The Supreme Court of New Jersey correctly rejected petitioners' argument. Following the precedent of this Court, the New Jersey Supreme Court declined to indulge in "sexual stereotyping" that amounts to "shorthand measures in place of what the city considers to be more legitimate criteria for determining membership." *Dale*, 734 A.2d at 1225 (quoting *New York State Club Ass'n*, 487 U.S. at 13). The New Jersey Supreme Court rightfully pointed out that "[t]he invocation of stereotypes to justify discrimination is all too familiar. Indeed, the story of discrimination is the story of stereotypes that limit the potential of men, women, and children who belong to excluded groups." *Id.* at 1226.

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[12] *New York State Club Ass'n*, 487 U.S. at 13 (quoting *Rotary Club*, 481 U.S. at 548).

Petitioners' First Amendment rights are fully protected by their ability to expel members who engage in conduct that undermines the Boy Scouts' objectives. Scouts who are disruptive, or otherwise unwilling to participate in Scouting activities and curriculum, remain subject to expulsion even under the judgment below. While the First Amendment protects petitioners' rights to decide for themselves what the Boy Scouts' message, objectives and curriculum should be, free from governmental interference, nothing in the judgment below infringes that right. The sexual orientation of a Scout, without more, simply does not undermine petitioners' control over organizational objectives and beliefs, just as the presence of members with varying backgrounds in any social or political organization does not undermine the ability of organizational leadership to control that organization's stated beliefs and objectives.

In *Elk's Lodge No. 719 and No. 2021 v. Department of Alcoholic Beverage Control*, 905 P.2d 1189 (Utah 1995), *cert. denied*, 517 U.S. 1221 (1996), the court used the *Roberts* analysis to uphold application of the State's requirement that a club or other establishment seeking a liquor license comply with the laws of Utah, including the law prohibiting discrimination on grounds of gender. However, the result may well have been different if petitioners' broad *Hurley* argument is accepted. The Utah court rejected the clubs' freedom of association claims and distinguished *Hurley* on grounds that it addressed only the right of a private group of parade organizers to control the message it sought to convey in the parade and did not address the organizers' rights to exclude individuals based on status alone. *Id.* at 1196. However, the standards proposed by petitioners would permit the argument that allowing women to be present at a club would in and of itself promote a message that conflicts with the club's moral standards. The club could assert that it has an expressive purpose of advocating that women stay at home or not drink.

Petitioners' attempt to infer a message from mere participation by members of a particular group is unsupported by the *Hurley* rationale from which they seek sustenance. A ruling in support of petitioners would gravely undermine anti-discrimination laws and serve only to promote harmful stereotyping.

II. PETITIONERS' VOLUNTARY ENTANGLEMENT WITH CITIES BOTH UNDERMINES THEIR ASSERTION OF A COMMON ANTI-GAY EXPRESSIVE PURPOSE AND STRENGTHENS NEW JERSEY'S COMPELLING INTEREST.

City governments, including fire departments, police departments and schools, are major sponsors of Boy Scout troops throughout the country. 1990 Boy Scouts of America Ann. Rep. 8 (Tab O);[13] *Chartered Organizations: Top 30 for 1997 Ranked by Total Youth*, BSA Today, No. 5-886, Feb./March 1998 (Tab R). As of December 31, 1990 — soon after the time petitioners expelled respondent — fire departments sponsored troops with 55,175 youth and law enforcement agencies sponsored troops with 42,924 youth. 1990 Boy Scouts of America Ann. Rep. 8 (Tab O). Public schools, which are the largest type of chartered organization by number of youth participating, sponsored troops with 1,096,425 youth in 1990. *Id.* In New Jersey, law enforcement agencies, fire departments, city governments and the military sponsor approximately 250 scouting units. *Dale*, 734 A.2d at 1201. Public schools and school-affiliated groups in that state sponsor nearly 500 units, comprising approximately 20 percent of chartered organizations statewide. *Id.*

[13] Citations to "Tab __" refer to the booklet of materials that *amici* cities have lodged with the Clerk of the Court.

Amicus curiae City of Los Angeles, through its police and fire departments, sponsors Explorer programs,[14] and Boy Scout groups regularly use city facilities. In fact, each of the Los Angeles Police Department's 18 area stations sponsors Explorer programs. *Amicus curiae* New York City and certain of its agencies provide assistance and funding for Boy Scout posts and activities. Approximately 75 police precinct houses — more than 90 percent of all the precincts in New York City — support Explorer posts. 1996 Boy Scouts of America Ann. Rep. 5 (Tab Q). Through the New York Police Department, "the law enforcement Exploring program . . . reaches into every community in New York City". *Id.* Fire department precincts sponsor Explorer programs in The Bronx and Brooklyn, and other Boy Scout groups regularly meet at New York City public schools. In Newark, 19 of the city's 40 public schools host Cub Scout packs and Boy Scout troops. *Id.* at 10. *Amicus curiae* City of Tucson provides direct financial assistance to the Boy Scouts and its police department participates in Boy Scout programs.

Explorers, wearing Explorer uniforms, perform volunteer service at these government posts, "assum[ing] . . . adultlike roles, identif[ying] with adult careers, and participat[ing] in community and citizenship responsibilities." JA412.[15] *See also* Larry A. Taylor, *How Your Tax Dollars Support the Boy Scouts of America*, The Humanist, Sept./Oct. 1995, at 6, 6 (Tab S) (describing Explorers giving public tours of city police department). In Los Angeles, Explorers can be seen assisting in traffic control. In New York, Explorers secure crime scenes for city police officers and "gain appreciation for front-line police work by doing it themselves". 1996 Boy Scouts of America Ann. Rep. 5 (Tab Q). In Hartford, Connecticut,

[14] Explorers is a Boy Scout membership program for young men and women between the ages of 14 and 20.

[15] Citations to "JA" refer to the Joint Appendix submitted by petitioners and respondent.

Explorers periodically accompany police officers on city patrols, assisting motorists at traffic accidents and helping control crowds. 1994 Boy Scouts of America Ann. Rep. 7 (Tab P). They also help enforce the traffic laws. *Id.*

Municipal sponsorship is the result of a conscious decision by the Boy Scouts to solicit municipalities as their partners in Scouting. The Boy Scouts' choice to affiliate itself with the government is relevant to this case for three reasons. First, it undermines petitioners' position that the Boy Scouts has a common, shared anti-gay expressive purpose. The voluntary and intentional decision of petitioners to associate themselves with municipalities that are dedicated to anti-discrimination wholly discredits petitioners' claim that requiring them to obey applicable anti-discrimination laws would undermine the Boy Scouts' organizational purpose. Second, government entanglement magnifies the harm caused by petitioners' invidious discrimination and accordingly provides New Jersey with a compelling interest in enforcing its Law Against Discrimination. Third, if government is not permitted to enforce anti-discrimination laws against petitioners, cities ultimately will be unable to sponsor petitioners' activities, thereby depriving urban youth of an important civic opportunity. Preserving the participation of urban youth further supports government's compelling interest in this case.

A. Cities' Participation In The Boy Scouts Undermines Petitioners' Assertion That The Boy Scouts Has A Common Anti-Gay Expressive Purpose.

Cities are major participants in the Boy Scouts. Cities do not participate in the Boy Scouts for the purpose of expressing the view that homosexuality is immoral. Like state governments, many religious organizations and other civic organizations, as well as many individual adult Scout leaders, cities do not share the expressive purpose articulated by the petitioners for the purpose of this litigation. *See, e.g.*, Brief of

Amici Curiae The General Board of Church and Society of The United Methodist Church *et al.* in Support of Respondent, Petition for a Writ of *Certiorari*, *Boy Scouts of America v. Dale* (U.S. 1999) (No. 99-699); Affidavits (JA655, JA673-JA674, JA626-JA627). The prominent involvement of these organizations and individuals belies the petitioners' factual contention — rejected by the New Jersey Supreme Court — that an expressive purpose of the Boy Scouts is to affirm heterosexuality as moral and homosexuality as immoral.

In fact, *amici* cities — and many other cities around the country — condemn discrimination based on a number of characteristics, including sexual orientation. Cities' views on these issues are clear and manifest. For instance, many of the *amici* cities have adopted laws explicitly prohibiting discrimination in public accommodations based on sexual orientation. *See* note 3 *supra*. Nationwide, 119 cities and counties have adopted laws or policies that provide varying degrees of protection against discrimination on the basis of sexual orientation. *See* Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 Harv. L. Rev. 1905, 1908 n.24 (1993).

Moreover, petitioners are aware of the views of some of their unit charterers and yet have continued to accept their active participation and sponsorship.[16] For instance, in 1998, the Los Angeles Board of Police Commissioners unanimously adopted a motion that the Los Angeles Police Department's Explorers' program "has not discriminated and will not discriminate against gays and lesbians or members of other protected classes as Explorers and Explorer Advisors." Bd. of Police Commissioners, Motion, May 12, 1998 (Tab T).

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16 "When deciding whether to grant an individual unit charter, BSA investigates 'the general objectives, purpose, character, intent, and programs of the prospective chartered organization or community group and its compatibility with the aims and purposes of the Boy Scouts of America.'" *Dale*, 734 A.2d at 1201.

Although the decision by the L.A.P.D. was well publicized, the Boy Scouts did not revoke the L.A.P.D. Explorers' program charter and has continued to renew it. *See* Paul O'Donoghue, *LAPD Explorers*, City News Service, May 12, 1998 (Tab U) (""What's interesting here is that the [commission] is telling the Boy Scouts that it will not be a party to discrimination. The question is what the response of the Boy Scouts will be"".).

Similarly, in New Jersey, where many public entities sponsor Boy Scout units, the lower court found no evidence of charter applicants having been rejected because of their expressed views on any subject. *Dale*, 734 A.2d. at 1202 n.2. Indeed, the charters of troops that have adopted resolutions expressly condemning the Boy Scouts' anti-gay policy have not been revoked. *See, e.g.*, JA628, JA630 (Santa Clara troop that passed resolution condemning Boy Scouts' anti-gay policy was renewed); JA640-JA644 (Baden-Powell Council passing resolution objecting to the Boy Scouts' anti-gay policy). In contrast, the petitioners expelled James Dale, who expressed no view on homosexuality within the context of the Boy Scouts prior to his expulsion.

B. Boy Scouts' Entanglement With Cities Increases The Harmfulness of Discrimination And Heightens Government Interest In Regulating Petitioners.

Discrimination "denies society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625. Invidious, status-based discrimination in accommodations offered to the public is abhorrent even without the imprint of government approval or sponsorship. *See Runyon v. McRary*, 427 U.S. 160 (1976) (small private schools denying admission to children solely on basis of race). Discrimination based on status deprives the individual of his or her "individual dignity" and "stigmatiz[es]" that individual. *Roberts*, 468 U.S. at 625. Discrimination is "humiliation, frustration, and embarrassment that a person must surely feel

when he is told that he is unacceptable as a member of the public" because of such characteristics as race or color. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16).

The stigmatizing injury is more pernicious, and the costs to society are greater, where the discriminating organization enjoys government endorsement. Discrimination that carries the imprint of government support sends a message to an individual that he or she is an unequal member of society and a second-class citizen. It represents an especially hurtful affront to individual dignity.

Similarly, the barriers erected by status-based discrimination to political and social integration and economic advancement are enlarged by the perception of government sponsorship. Petitioners' discrimination does not simply involve a large private club shutting its doors to a segment of citizens possessing a certain, shared characteristic, as was the case in *Roberts* and *Rotary Club*. Here, one of the nation's premier civic youth organizations, one that enjoys the active and direct support of local governments, is acting in defiance of valid, local civil rights laws. Denying gays leadership positions and excluding gay youth from participating in such an organization forecloses significant civic opportunities from citizens on an invidious basis and denies society the benefits of their participation.

The added injury and costs of discrimination that result from perceived government endorsement heightens the already compelling interest of cities (and the State of New Jersey) to enforce their anti-discrimination laws against petitioners. The New Jersey Supreme Court held that, as a matter of New Jersey law, the Boy Scouts qualify as a "place of public accommodation" within the New Jersey Law Against Discrimination. In evaluating whether such enforcement unjustifiably infringes the First Amendment rights of the Boy

Scouts, the Court must evaluate the nature of the government interest at issue. *See Rotary Club*, 481 U.S. at 549. This is essentially a balancing-of-interests test, *see Roberts*, 468 U.S. at 626-29, and the scales should reflect the seriousness of the harm. Where the private actor not only operates a public accommodation, but also acts with the imprimatur of government endorsement, the government has an especially compelling interest in ensuring non-discriminatory access and preventing the harm that flows from invidious discrimination.

Having actively sought and obtained government sponsorship such that it is a quasi-public organization, the Boy Scouts should not be permitted to exempt itself from the anti-discrimination laws enacted by the same governmental entities. Government has a compelling interest to prevent discriminatory conduct that enjoys the imprimatur of government endorsement.

C. Cities Have A Further Compelling Interest In Eradicating Invidious Discrimination Where The Failure To Do So Will Result In Denying An Important Opportunity To All Urban Youth.

Petitioners' voluntary entanglement with cities and other governmental entities provides the *amici* cities with a further compelling interest here — an interest in preserving an important opportunity for thousands of urban youth. As noted above, many cities are not permitted by law to support organizations that follow discriminatory policies in violation of applicable anti-discrimination statutes. *See, e.g.,* LOS ANGELES, CAL., MUNIC. CODE § 49.75[a][3] (1999) (Tab G) ("It shall be . . . unlawful . . . to deny any individual the full and equal enjoyment of . . . any . . . program . . . wholly or partially funded or otherwise supported by the City of Los Angeles, on the . . . basis of such individual's sexual orientation."); *see also Dale*, 734 A.2d at 1212 n.7 ("New Jersey governmental entities are, of course, bound by the LAD. Their sponsorship of, or conferring of special benefits on, an

organization that practices discrimination would be prohibited.").

Thus, to the extent that cities are prevented from enforcing their anti-discrimination laws by an unduly constricted interpretation of what the First Amendment permits them to do to fight identity-based discrimination, they may be forced to sever all ties to the Boy Scouts and require the disbanding of the hundreds of city-sponsored Boy Scout troops in which thousands of urban children currently participate. Such a result would not only contravene the Boy Scouts' own policy,[17] but could have potentially devastating consequences in urban areas where participation in the Boy Scouts is a particularly important civic opportunity.

In response to the current litigation strategy of the Boy Scouts' corporate headquarters, some cities have already severed their ties with the Boy Scouts. *Amicus curiae* Chicago no longer sponsors Boy Scout units. *Chicago Drops Ties to Boy Scout Program*, Chronicle of Philanthropy, Feb. 26, 1998, at 47 (Tab V). The police department of San Diego discontinued its charter, ending a program that had been a part of the department for more than 25 years. *Police Drop Scout Post Over Policy on Gays*, L.A. Times, Oct. 21, 1992, at A16 (Tab W). The public schools of *amicus curiae* San Francisco have eliminated their Scouting programs. Nanette Asimov, *Scouts Hold Fast to Homosexual Ban*, S.F. Chronicle, Sept. 18, 1991, at A15 (Tab X). Other *amici*, like Portland and Los Angeles (through its police department), sponsor troops but on the understanding that the troops will not discriminate on the basis of sexual orientation.

If petitioners' arguments here are accepted — and the Boys Scouts are permitted to create for themselves an exemption

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[17] *See* JA64 ("The national objective, as well as for regions, areas, councils, and districts is to see that all eligible youth have the opportunity to affiliate with the Boy Scouts of America and receive the finest possible quality program under the best leadership available.").

from city and state anti-discrimination laws — the situation will only become worse. Additional city-sponsored troops will be required to close their doors and turn away prospective members.

The Boy Scouts is perhaps *the* premier civic youth organization in the United States; more than 82 million American boys have participated since 1910, and many girls participate through the Explorer program. JA107. Like its counterpart the Girl Scouts, which does *not* discriminate on the basis of sexual orientation, the Boy Scouts is a proven training program for good citizenship and instills values that local governments also wish to foster. It is for this reason that cities have actively participated in Scouting and that cities have a compelling interest in continuing to do so in the future. That compelling interest extends to preventing discriminatory practices that would make future participation impossible.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of New Jersey should be affirmed.

March 29, 2000

Respectfully submitted,

PETER T. BARBUR
Counsel of Record
SARA M. DAREHSHORI
DAVID L. WELLER
CRAVATH, SWAINE & MOORE
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorneys for Amici Curiae The Cities of Atlanta, Chicago, Los Angeles, New York, Portland, San Francisco and Tucson

SUSAN PEASE LANGFORD
City Attorney
on behalf of the CITY OF ATLANTA, GEORGIA

MARA S. GEORGES
Corporation Counsel
LAWRENCE E. ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
on behalf of the CITY OF CHICAGO, ILLINOIS

JAMES K. HAHN
City Attorney
DAVID I. SCHULMAN
Deputy City Attorney
CARMEL B. SELLA
Special Assistant City Attorney
on behalf of the CITY OF LOS ANGELES, CALIFORNIA

MICHAEL D. HESS
Corporation Counsel
LEONARD J. KOERNER
Chief Assistant Corporation Counsel
FLORENCE A. HUTNER
Assistant Corporation Counsel
on behalf of the CITY OF NEW YORK, NEW YORK

JEFFREY L. ROGERS
City Attorney
MADELYN F. WESSEL
Chief Deputy City Attorney
on behalf of the CITY OF PORTLAND, OREGON

LOUISE RENNE
City Attorney
MARIO KASHOU
Deputy City Attorney
on behalf of the CITY OF SAN FRANCISCO, CALIFORNIA

THOMAS J. BERNING
City Attorney
on behalf of the CITY OF TUCSON, ARIZONA

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

—v.—

JAMES DALE,

Respondent.

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ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF NEW JERSEY

BRIEF OF THE STATE OF NEW YORK, ET AL., AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ELIOT SPITZER
Attorney General of the
State of New York
Preeta D. Bansal
Solicitor General
Counsel of Record
Adam L. Aronson
Assistant Solicitor General
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8016

Attorneys for the State of New York

(Counsel continued on inside cover)

BEST AVAILABLE COPY

HON. BILL LOCKYER
Attorney General of California
1300 I Street, Suite 1730
Sacramento, California 95814

HON. EARL I. ANZAI
Attorney General of Hawaii
426 Queen Street
Honolulu, Hawaii 96813

HON. J. JOSEPH CURRAN, JR.
Attorney General of Maryland
200 St. Paul Place
Baltimore, Maryland 21202

HON. THOMAS F. REILLY
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

HON. PHILIP T. MCLAUGHLIN
Attorney General of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

HON. W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard, Suite 112
Oklahoma City, Oklahoma 73105

HON. HARDY MYERS
Attorney General of Oregon
1162 Court Street NE
Salem, Oregon 97310

HON. WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05609

HON. CHRISTINE O. GREGOIRE
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, Washington 98504

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. APPLICATION OF STATE LAW DOES NOT VIOLATE BSA'S FIRST AMENDMENT RIGHTS 4

A. BSA's Discrimination Is Not Protected By The First Amendment 5

B. States Should Retain Their Sovereignty To Determine The Scope Of Their Compelling Anti-Discrimination Interests 8

II. THE STATES HAVE COMPELLING INTERESTS IN PROHIBITING ILLEGAL DISCRIMINATION BY ORGANIZATIONS DEEPLY ENTWINED WITH GOVERNMENT 12

A. An Organization With Extensive Government Entanglements Is Not Entitled To Special First Amendment Protection 14

B. The Application Of State Anti-Discrimination Laws Should Not Be Limited To Commercial Organizations 18

III. *HURLEY* DOES NOT UNDERMINE THE APPLICATION OF STATE ANTI-DISCRIMINATION LAW TO OPEN MEMBERSHIP ORGANIZATIONS 21

A. As A Pure Expression Case, *Hurley* Has No Bearing On This Case 21

B. This Court's Separate Pure Expression and Free Association Doctrines Should Not Be Merged 24

IV. UNDER PRINCIPLES OF STARE DECISIS, THIS COURT'S PRECEDENT SHOULD NOT BE OVERRULED 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES PAGE

Baehr v. Miike, 1999 Haw. LEXIS 391 (Case No. 20371) (Ha. 1999) 9

Barnes v. Glen Theater, Inc., 501 U.S. 560 (1991) 11-12

Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990) 9

Bob Jones University v. United States, 461 U.S. 574 (1983) 4, 16

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Braunfeld v. Brown, 366 U.S. 599 (1961) 11

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 10

Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination, 402 Mass. 716, 524 N.E.2d 1364 (1988) 19

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) 28

Cox v. New Hampshire,
312 U.S. 569 (1941) 11

Crawford v. Board of Ed. of Los Angeles,
458 U.S. 527 (1982) 11

Curran v. Mount Diablo Council of the Boy Scouts of America,
17 Cal. 4th 670, 952 P.2d 218 (1998) 13

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160 N.J. 562, 734 A.2d 1196 (1999) ..... *passim*

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276 Utah Adv. Rep. 8, 905 P.2d 1189 (1995),
cert. denied, 517 U.S. 1221 (1996) 26

Frank v. Ivy Club,
120 N.J. 73, 576 A.2d 241 (1990) 19

Frontiero v. Richardson,
411 U.S. 677 (1973) 25

Gilmore v. City of Montgomery,
417 U.S. 556 (1974) 16, 24-25

Heckler v. Mathews,
465 U.S. 728 (1984) 25

High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1990) 9

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.,
515 U.S. 557 (1995) 3, 21, 22, 23, 25, 27

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40 Cal.3d 72, 707 P.2d 212 (1985) 19

Louisiana Debating and Literary Ass'n v. City of New Orleans, 42 F.3d 1483 (5th Cir. 1995) . 26

McCloud v. Testa,
97 F.3d 1536 (6th Cir. 1996) 26

Mississippi University for Women v. Hogan,
458 U.S. 718 (1982) 25

Mitchell v. United States,
119 S. Ct. 1307 (1999) 28

National Org. for Women v. Little League Baseball, Inc.,
127 N.J. Super. 522, 318 A.2d 33 (App. Div.),
aff'd, 67 N.J. 320, 338 A.2d 198 (1974) 20

New York State Club Ass'n v. New York City,
487 U.S. 1 (1988] 5, 10, 22

Norwood v. Harrison,
413 U.S. 455 (1973) 23

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) ... 26, 27

Prince v. Massachusetts,
321 U.S. 158 (1944) 11

Roberts v. United States Jaycees,
468 U.S. 609 (1984) ..... *passim*

Romer v. Evans,
517 U.S. 620 (1996) 9

Runyon v. McCrary,
427 U.S. 160 (1976) 4, 8, 18-19, 23, 28

State v. Burning Tree Club, Inc.,
315 Md. 254, 554 A.2d 366,
cert. denied, 493 U.S. 816 (1989) 26

U.S. Power Squadrons v.
State Human Rights Appeal Board,
59 N.Y.2d 401, 452 N.E.2d 1199 (1983) 19-20

United States v. O'Brien,
391 U.S. 367 (1968). 12

STATUTES

Ala. Code § 32-6-511 15

Ark. Code Ann. § 26-52-401 15
Ark. Code Ann. § 26-52-1004 15

Cal. Educ. Code § 38134 15
Cal. Educ. Code § 82542 15
Cal. Rev. & Tax Code § 6361 15

Fla. Stat. Ann. § 320.08058 15

Ind. Code Ann. § 6-1.1-10-25 15
Ind. Code Ann. § 9-18-37-5 15

Kan. Stat. Ann. § 19-2696 15

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La. Rev. Stat. Ann., tit. 48, § 999 15

Md. Code Ann. Tax-Prop. § 7-233 15

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Ohio Rev. Code Ann. § 4501.71 15

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submitted to the United States
House of Representatives 14

Http://www.bsa.scouting.org 17

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Support the Boy Scouts of America,
55 The Humanist No. 5 (Sept-Oct 1995) 14

The State of New York, joined by the states of California, Hawaii, Maryland, Massachusetts, New Hampshire, Oklahoma, Oregon, Vermont and Washington, respectfully submits this brief in support of respondent James Dale. *Amici* states urge affirmance of the New Jersey Supreme Court's unanimous judgment that application of the New Jersey Law Against Discrimination does not violate petitioner Boy Scouts of America's First Amendment free association rights.

INTEREST OF AMICI CURIAE

Equality of opportunity for all people to participate, benefit and contribute as full members of society, regardless of race, gender, religion or other applicable criteria, is a value of utmost importance to *amici* states. State anti-discrimination laws promote this vital state interest, thereby protecting not only citizens' privileges and rights, but the foundation of a free democratic society, its institutions, and the peace, safety and general welfare of the states and their inhabitants. *Amici* remain firmly committed to ending invidious discrimination by requiring full compliance with their state anti-discrimination laws. Reversal of the decision below would severely hamper the states in the attainment of such goals by carving out a broad, unprecedented exemption to generally applicable anti-discrimination laws with respect to all invidious distinctions sought to be eradicated by the people of a state.

Because petitioner actively promotes and publicly touts its close ties with both state and local government agencies throughout the country, moreover, the states' interest in this case is deeper than in any of this Court's

prior free association membership cases. Allowing petitioner to invoke an unprecedented and overbroad "First Amendment exemption" would make state and local governments unwilling accomplices in discrimination prohibited by their own laws. The fundamental legal and constitutional issues would be identical if petitioner were expelling its members on the basis of race, religion, national origin, or various other invidiously discriminatory grounds prohibited by all *amici* states' laws. The decision that the Court renders in this case, therefore, will determine whether states retain their sovereignty to pass, implement and enforce laws that they determine are necessary to protect their citizens' equality of opportunity and personal dignity.

SUMMARY OF ARGUMENT

Under this Court's free association precedent involving membership organizations, BSA's discrimination cannot be immune from state anti-discrimination law because it does not promote BSA's true expressive purposes or any views that "brought [BSA's members] together." Petitioner argues that the courts should not analyze an organization's expressive purposes but rather must blindly accept its bald statement of its expressive purposes in litigation, no matter how contrary to the record. In addition to finding no support in the case law, petitioner's argument would eviscerate state anti-discrimination law by providing a license for otherwise illegal discrimination.

Even if BSA's discrimination did further an expressive purpose of the organization, New Jersey's compelling interests in eliminating discrimination substantially outweigh the incidental abridgement of

BSA's free association rights. Under settled principles of state sovereignty, a state may determine that its compelling interests in fighting discrimination extend beyond what is required by the Federal Constitution, as long as the state law is not aimed at the suppression of ideas, and requires no more than is necessary for furtherance of the state's compelling interests. New Jersey's anti-discrimination law satisfies both requirements.

BSA's deep entwinement with state and local government agencies strengthens the states' compelling interests in this case, and weakens BSA's claim to a special exemption from state anti-discrimination laws. State statutes extend special access, tax exemptions and other benefits to BSA. The organization trumpets its ties to government in its recruiting efforts. Even if this Court were to adopt a free association analysis that, contrary to its precedent, examines only the nature of the organization, therefore, BSA's unusual and extensive ties to government make a special exemption from that government's law more inappropriate in this case than in any of this Court's prior membership cases.

Petitioner erroneously contends that under *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995), an organization's specific expressive purposes are not "legally relevant" in determining whether its discrimination is protected by the First Amendment. *Hurley* involved direct infringement on pure expression, not the free association interest of a membership organization. This Court's free association membership cases have consistently required the balancing of three factors that are generally not present in pure expression cases: the burden on an organization's particular expressive purposes, the equal

access rights of individuals, and the state's compelling interests in eliminating discrimination. Petitioner would have this Court ignore all of these factors and abandon its free association jurisprudence.

This case provides no basis for departing from this Court's settled free association precedent. For decades, that precedent has been embraced and easily applied by both state and federal lower courts. The states have relied on it in the drafting, implementation and enforcement of their anti-discrimination laws. Individuals have relied on it to protect their equal opportunity and personal dignity. Organizations' memberships have relied on it to protect their First Amendment free association rights. No contrary law has evolved, nor has discrimination been eliminated so as to warrant any change in this Court's free association jurisprudence.

ARGUMENT

I. APPLICATION OF STATE LAW DOES NOT VIOLATE BSA'S FIRST AMENDMENT RIGHTS

Under this Court's free association precedent involving membership organizations (the "membership precedent"),[1] a private organization with expressive purposes may not discriminate in violation of state or

[1]Petitioner refers to three of the membership cases as "the *Roberts* trilogy." As discussed below, numerous other decisions by this Court, including *Bob Jones University v. United States*, 461 U.S. 574 (1983), and *Runyon v. McCrary*, 427 U.S. 160 (1976), also provide guidance on resolving the tension between the First Amendment and invidious discrimination by private organizations. *Amici* states refer to these cases collectively as the Court's "membership precedent."

federal law, unless it can "show that it is organized for *specific expressive purposes* and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership." *New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988) (emphasis added); *see also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987) (although Rotary Clubs engage in activities protected by First Amendment, admitting women would not interfere with organization's specific expressive purposes); *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984) (compelling Jaycees to accept women as members did not infringe expressive association rights even though "a 'not insubstantial part' of the Jaycees' activities constitutes protected expression"). Application of anti-discrimination law interferes with an "expressive purpose" only if it "impair[s] the ability of the original *members* to express only those views that *brought them together*." *Roberts*, 468 U.S. at 623 (emphasis added).

In this case, the application of New Jersey's anti-discrimination law does not interfere with any of BSA's expressive purposes. Even if it did, BSA's First Amendment challenge would fail, because compelling state interests in eliminating discrimination substantially outweigh any incidental abridgement of BSA's expressive purposes.

A. BSA's Discrimination Is Not Protected By The First Amendment

Given BSA's policy statements inconsistent with discrimination, concessions that such discrimination is morally offensive to a substantial portion of its

membership, and entanglement with government that opposes its discrimination,[2] petitioner's litigation contention that discrimination is necessary to one of its expressive purposes lacks credibility. As in *Roberts*, Dale's membership in BSA "requires no change in the [organization's] creed of promoting the interests of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." 468 U.S. at 627. Thus, as in *Roberts*, petitioner's attempt to use the First Amendment to justify its discrimination should be rejected.

While acknowledging that "it does not have an 'anti-gay' policy," Pet. Br. at 6, petitioner contends that the courts must accept its litigation-based "interpretation" of the words "clean" and "morally straight" to require exclusion of gay people, because "*[t]he very argument that the government may impose its own interpretation on an organization's moral message raises First Amendment concerns of the highest order.*" Pet. Br. at 25-26 (emphasis in original).

The essence of petitioner's argument is that a

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[2] *See Dale v. Boy Scouts of America*, 160 N.J. 562, 609, 734 A.2d 1196 (1999) (BSA has long maintained an expressly inclusive policy, stating that "any boy" is welcome); *id.* at 612, 615 ("Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality"); Petitioner's Brief ("Pet. Br.") at 26 n. 7 & Petitioner's Reply on Petition for Certiorari ("Reply Pet. Cert.") at 8 & n.6 (conceding that substantial number of members and troop sponsors view petitioner's *discrimination*, not homosexuality, as immoral and contrary to religious teachings). That petitioner has not expelled the tens of thousands of BSA members who belong to faiths that oppose its discrimination further demonstrates that its position in this litigation does not promote an expressive purpose, but is a pretext for invidious discrimination.

party's litigation stance as to its expressive purposes, even if otherwise unsupported by the record, is entitled to unconditional judicial deference. Yet courts can and do make factual determinations that are contrary to a party's claims. Indeed, petitioner's insistence that this Court has always blindly "accepted . . . groups' characterizations of their views" in litigation is erroneous. *See* Reply Pet. Cert. at 2. In *Rotary Club*, for example, Rotary International's Constitution *expressly* excluded women as members. 481 U.S. at 541. Similarly, the General Secretary of Rotary International "testified that the exclusion of women results in an 'aspect of fellowship . . . that is enjoyed by the present male membership,'" and that the policy was necessary to "operate effectively in foreign countries with varied cultures and social mores." *Id.* Yet this Court concluded that "the evidence fail[ed] to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes." *Id.* at 548; *see also Roberts*, 468 U.S. at 627-28 (rejecting Jaycees' express all-male policy and assertion that admitting women would interfere with Jaycees' public positions on political issues).

Moreover, petitioner's argument that the courts must blindly accept an organization's litigation stance as to its expressive purposes would eviscerate all states' anti-discrimination laws. Under petitioner's theory, *any* organization engaging in invidious discrimination could simply assert in litigation (as petitioner has) that its stated purposes, on their face irrelevant to illegal discrimination, implicitly require it. If "morally straight" and "clean" suffice to immunize otherwise illegal discrimination, so must every description of positive character traits, such as "ethical," "proper," "worthy" and

"respectable." Nor could there be any limit as to the kinds of discrimination that would become permissible under this framework. An organization's "interpretation" of "worthy" to exclude people of certain races, religions or national origins would not be subject to judicial assessment. Both state and federal anti-discrimination law would become widely unenforceable, thereby undoing decades of this Court's membership precedent. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 175-76 (1976) (rejecting racially discriminatory private schools' free association challenge to enforcement of federal civil rights statute).[3]

B. States Should Retain Their Sovereignty To Determine The Scope Of Their Compelling Anti-Discrimination Interests

Even if application of New Jersey's law does abridge BSA's free association rights, the compelling state interests served by a law such as New Jersey's

[3]Petitioner also argues that New Jersey law infringes its right of intimate association. Pet. Br. at 39-44. The intimate relationships to which this Court has accorded such protection -- marriage, begetting and bearing children, child rearing and education, and cohabitation with relatives -- provide no support for petitioner's intimate association claim. *See Rotary*, 481 U.S. at 545. Further, each of the factors that this Court considers in determining whether an association is "sufficiently personal or private to warrant constitutional protection," *id.* at 546, weighs against petitioner's claimed right: BSA is large, nonselective, has an inclusive rather than exclusive purpose, and invites nonmembers to attend meetings. *See* 160 N.J. at 608-09. Petitioner's intimate association claim is further contradicted by its extensive ties with government agencies across the country, which sponsor and "own" tens of thousands of petitioner's troops and units, as well as by its affiliations with the federal government. *See infra*, Point II.A.

justify its application. Several *amici* submitting briefs in support of petitioner have argued that New Jersey cannot have compelling interests in eliminating sexual orientation discrimination because it is not entitled to heightened scrutiny under the Federal Constitution. *See* Brief of American Center for Law and Justice et al. at 21-23; Brief of the Public Advocate of the United States et al. at 23. Whether or not sexual orientation is a classification that should be entitled to heightened scrutiny,[4] petitioner's *amici* miss the point. Under settled principles of state sovereignty, states may have compelling interests in providing greater protection for their citizens than the Federal Constitution requires.

[4]Contrary to arguments by petitioner's *amici*, the question remains unsettled for purposes of federal law. In *Romer v. Evans*, 517 U.S. 620, 632 (1996), it was not necessary for this Court to decide whether sexual orientation discrimination should be entitled to heightened scrutiny because Colorado's Amendment 2 failed rational basis scrutiny. Even courts that have declined to apply heightened scrutiny have recognized that gay people "have suffered a history of discrimination." *See, e.g., High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 465 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *cf. Romer*, 517 U.S. at 627 (But for this Court's application of the Equal Protection Clause to strike down Amendment 2, Colorado's voters would have "withdraw[n] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination.") Moreover, the Hawaii Supreme Court recently suggested that sexual orientation may be entitled to strict scrutiny under that State's Constitution. *See Baehr v. Miike*, 1999 Haw. LEXIS 391, at *5 n.1 (Case No. 20371) (Ha. 1999). In any event, *amici* states need not take a position on the constitutional suspect class status of gay people because, as discussed below, the Federal Constitution does not establish an upper limit on state compelling interests.

In consistently holding that anti-discrimination laws serve "compelling state interests of the highest order" in "eliminating discrimination and assuring [the states'] citizens equal access," this Court has made clear that states may define the scope of their "compelling interests," as long as they do so through neutral laws of general applicability, "unrelated to the suppression of ideas," and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of those interests. *See, e.g., New York State Club*, 487 U.S. at 13 (upholding law that "prevents an association from using race, sex *and other specified characteristics* as shorthand measures in place of *what the city considers* to be more legitimate criteria for determining membership") (emphasis added); *Rotary*, 481 U.S. at 549 (public accommodations laws, which protect classes beyond those protected by Federal constitutional heightened scrutiny, "plainly serv[e] compelling state interests of the highest order").

In *Roberts*, this Court noted that "many states . . . ha[ve] progressively broadened the scope of [their] public accommodations law[s] in the years since [they were] first enacted, both with respect to the number and type of covered facilities *and with respect to the groups against whom discrimination is forbidden.*" 468 U.S. at 624 (emphasis added). Indeed, the state law upheld in *Roberts* included disability, which is not entitled to heightened scrutiny under the Federal Constitution. *See* 468 U.S. at 615; *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440-41 (1985) (classifications based on physical and mental disability not entitled to heightened constitutional scrutiny). This Court nonetheless held that Minnesota's law promoted the state's "compelling interests" in eliminating

discrimination.

This Court's analysis of "compelling state interests" in the membership cases is consistent with its longstanding precedent as well as with principles of state sovereignty. In defining the scope of their anti-discrimination laws, and of their "compelling interests," the states may go beyond what is required by federal or constitutional law. *See Crawford v. Board of Ed. of Los Angeles*, 458 U.S. 527, 542 (1982) (states may go beyond the requirements of the Federal Constitution in their anti-discrimination laws). Indeed, this Court has specifically held that state interests not identified in the Federal Constitution may nevertheless be sufficiently important to outweigh incidental infringements on First Amendment rights. *See Braunfeld v. Brown*, 366 U.S. 599, 602-03 (1961) (plurality opinion), and 366 U.S. at 461-62 (cross-referenced concurring opinion) (Pennsylvania's interests in improving health, safety, morals and general well-being of citizens justify Sunday closing laws despite indirect burden on exercise of religion); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (state statute prohibiting sale of literature by minors, designed to reach crippling effects of child employment, upheld despite infringement on Jehovah's Witnesses free exercise of religion); *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("Where a [state] restriction . . . is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection").

While this Court has consistently held that state anti-discrimination laws promote "compelling state interests," in this case, at most an "important or

substantial" state interest is necessary to outweigh any "incidental abridgement" of BSA's free association rights (which, as discussed above, were not abridged at all). *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 567, 582, 588-90 (1991) (plurality, concurring and dissenting opinions, with eight members of the Court agreeing upon proper standard); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).[5] The New Jersey Supreme Court's holding that the State's compelling interests in eliminating discrimination outweigh the incidental abridgement of petitioner's associational rights, if any, is therefore firmly rooted in this Court's precedent.

II. THE STATES HAVE COMPELLING INTERESTS IN PROHIBITING ILLEGAL DISCRIMINATION BY ORGANIZATIONS DEEPLY ENTWINED WITH GOVERNMENT

The states' sovereignty in determining the scope of their compelling interests in eliminating illegal discrimination must extend at least as far as an organization such as BSA, which actively promotes and touts its extensive government entanglements, including sponsorships (i.e., ownership) of troops by government agencies and a vast array of government-provided

[5]Under Justice Scalia's concurring opinion in *Barnes*, the application of New Jersey's anti-discrimination law in this case should not be subject to any heightened First Amendment scrutiny because it is a "general law regulating conduct," in this case discrimination, "and not specifically directed at expression." 501 U.S. at 572 ; *see also Roberts*, 468 U.S. at 628 (indicating that a "legitimate state interest" might have sufficed to uphold Minnesota's law).

benefits and privileges.[6] Ignoring its deep entwinement with government, however, petitioner relies in part on Justice O'Connor's concurring opinion in *Roberts* to contend that, as a non-commercial, nonprofit membership organization, it is entitled to a special exemption from the application of state anti-discrimination laws. *See* Pet. Br. at 34-35. Of all organizations, BSA's strong ties to government make it one of the least deserving of any such special exemption.

Indeed, while Justice O'Connor's *Roberts* analysis examines the nature of the organization, rather than its specific expressive purposes, to determine whether it is entitled to First Amendment protection, *see* 468 U.S. at 633 (O'Connor, J., concurring in the judgment), she expressly noted that she was proposing a different analysis from the one adopted by the Court, *see id.* at 632. Even under a logical extension of the analysis in that opinion, petitioner should not be entitled to evade state anti-discrimination law.

[6]*Amici* states do not contend that all state anti-discrimination laws must be applicable to BSA, but that states should retain sovereignty to determine whether their laws do extend so far. Thus, the California Supreme Court's decision in *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P.2d 218 (1998), holding that BSA is not a "business establishment" subject to California's Unruh Civil Rights Act, does not represent a conflict with the New Jersey Supreme Court's decision in this case, but an example of the different reach of different states' anti-discrimination laws that contain very different language.

A. An Organization With Extensive Government Entanglements Is Not Entitled To Special First Amendment Protection

BSA's extensive government affiliations distinguish it from the vast majority of organizations. As of 1993, over 22,000 Scouting units nationwide, approximately one in six, and over 7,000 of the highly prestigious "Explorer Units," approximately one in three, were sponsored by state and local government agencies. *See* Larry A. Taylor, *How Your Tax Dollars Support the Boy Scouts of America*, 55 The Humanist No. 5 at 3-4 (Sept-Oct 1995).[7] Each sponsor actually "owns" its local troop. *Id.* at 1. BSA describes the relationship as similar to "franchising": "local ownership while still using the corporation name and resources." *Id.* at 2 (citing BSA literature).

State laws throughout the country, moreover, confer special benefits on BSA, including numerous tax exemptions, free use of and special access to state property, and use of school facilities, among many other

[7]Because government-sponsored units tend to be substantially larger than those sponsored by other institutions, these "unit-based" statistics understate government involvement in BSA. In 1990, the year that BSA expelled Dale, for example, public schools alone sponsored more than 25 percent of the youth members nationwide, more than any other single institution, and more than three times as many as the second largest sponsor, the Mormon Church. *See* 1990 Boy Scouts of America Annual Report, submitted to the United States House of Representatives, at 8, 16.

privileges.[8] State statutes also authorize direct financial support to BSA funded through, for example, specialty license plate programs.[9] The New Jersey Supreme Court's opinion detailed other links that BSA has to not only state and local governments, but the federal government as well, including the military. *See* 160 N.J. at 591-94.

"An association must choose its market." *Roberts*, 468 U.S. at 636 (O'Connor, J., concurring in the judgment). Petitioner has chosen to actively promote close affiliations with and sponsorships from government agencies, and proudly "markets" those unique

[8]*See, e.g.*, Ark. Code Ann. §§ 26-52-401, 26-52-1004 (exemption from tax on sale and rental of all tangible personal property and services); Cal. Educ. Code §§ 38134, 82542 (use of facilities and grounds of elementary and secondary schools and community colleges); Cal. Rev. & Tax Code § 6361 (exemption from retailer tax for sale of food, beverage and other products); Ind. Code Ann. § 6-1.1-10-25 (exemption from property tax); Kan. Stat. Ann. § 19-2696 (special agreements for use of public lands); Md. Code Ann. Tax-Prop. § 7-233 (exemption from property tax); La. Rev. Stat. Ann., tit. 48, §§ 971, 999 (free passage over toll bridges and ferries); Mich. Comp. Laws § 211.7q (exemption from property tax); N.J.S.A. 23:2-3 (authorizes Division of Fish, Game and Wildlife to "stock with fish any body of water in this state that is under the control of and for the use of . . . Boy Scouts"); N.J.S.A. 39:3-27 (exemption from motor vehicle registration fees); Okla. Stat. Ann., tit. 63, § 4106, tit. 68, § 1356 (exemptions from sales and excise taxes); Tex. Parks & Wild. Code Ann. § 68.082 (special permission to possess and shoot firearms on state lands); Va. Code Ann. §§ 58.1-3609, 58.1-3614 (exemption from property tax); Wis. Stat. Ann. § 70.11 (exemption from property tax).

[9]*See, e.g.*, Ala. Code § 32-6-511; Fla. Stat. Ann. § 320.08058; Ind. Code Ann. § 9-18-37-5; Ohio Rev. Code Ann. §§ 4501.41, 4501.71; V.I. Code Ann. tit. 17, § 362.

advantages in recruiting and public relations materials. *See* 160 N.J. at 592-94. An organization so entangled with government should not be entitled to a First Amendment exemption from that government's generally applicable anti-discrimination laws, even if the organization is not a "state actor," and even if its discrimination arises out of "sincerely held beliefs." *Cf. Bob Jones University v. United States*, 461 U.S. 574, 602-04 (1983) (upholding, against First Amendment free exercise challenge, revocation of tax-exempt status to a religious school "that engage[d] in racial discrimination on the basis of sincerely held religious beliefs")[10]; *Gilmore v. City of Montgomery*, 417 U.S. 556, 573 (1974) (discrimination is prohibited if there is "significant state involvement in the private discrimination alleged"). To hold otherwise would put state and local governments in the untenable position of condoning and facilitating the violation of their own laws and "compelling interests." Thus, if this Court were to follow the approach in Justice O'Connor's *Roberts* concurrence, examining the nature of the organization rather than its specific expressive purposes, the judgment of the court below should still be affirmed.

Respondent should also prevail under Justice O'Connor's approach because BSA does not exist primarily for "expressive" purposes. *See* 468 U.S. at 638. The Jaycees, for example, did engage in "protected expressive activities," but because it was "first and foremost" a nonexpressive organization, Justice O'Connor concluded that its First Amendment challenge should be rejected. *Id.* at 639.

Like the Jaycees, BSA "is not a political party, or even primarily a political pressure group." *Id.* Petitioner's Internet web site describes the organization's "purpose" as "provid[ing] an educational program for boys and young adults to build character, to train in the responsibilities of participating citizenship, and to develop personal fitness." Http://www.bsa.scouting.org; *see also* 160 N.J. 593-94 (discussing petitioner's "educational and recreational nature," and its special access to military facilities for Scouting shows, meetings and training activities).

Like the Jaycees and the Rotary Club, BSA does have some expressive characteristics, but its activity is not "predominantly" protected expression. *See* 468 U.S. at 636. Because BSA "first and foremost" provides boys with unique opportunities for practical learning, physical fitness, and personal development, it is a nonexpressive organization, and its First Amendment challenge should be rejected under the analysis in Justice O'Connor's *Roberts* opinion. *See id.* at 639. At a minimum, considering both its extensive government entanglements and its predominant nonexpressive purposes, BSA should not be entitled to a special exemption from the application of state anti-discrimination laws.

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[10]Although *Bob Jones* did not result in the mandatory termination of a racially exclusionary policy (indeed, no party was seeking such relief), it demonstrates that even an institution with genuine expressive purposes justifying its discrimination may not engage in that discrimination if, like BSA, it receives government benefits.

B. The Application Of State Anti-Discrimination Laws Should Not Be Limited To Commercial Organizations

Petitioner reads Justice O'Connor's concurring opinion in *Roberts* to suggest that only "commercial" organizations should be subject to the full enforcement of anti-discrimination laws. *See* Pet. Br. at 34-35. Justice O'Connor did rely on the commercial aspects of the Jaycees to find that application of Minnesota's anti-discrimination laws to the association should not violate the First Amendment. 468 U.S. at 639. The opinion did not conclude, however, that commercial organizations *alone* should be subject to the full enforcement of anti-discrimination laws. Petitioner's misreading of Justice O'Connor's opinion, moreover, contradicts this Court's settled precedent without promoting any genuine First Amendment purpose, and would defeat the fundamental purposes of state anti-discrimination law: protection of "equal access" and "personal dignity." *Id.* at 625.

This Court has expressly upheld the application of state and federal anti-discrimination law over First Amendment challenges by non-commercial membership organizations that hold themselves out to broad sectors of the public. *See Rotary*, 481 U.S. at 539 (nonprofit corporation dedicated to "provid[ing] humanitarian service, encourag[ing] high ethical standards in all vocations, and help[ing to] build goodwill and peace in the world"); *Roberts*, 468 U.S. at 612-13 (nonprofit membership corporation that promoted "a spirit of genuine Americanism and civic interest, . . . personal development and achievement and an avenue for intelligent participation by young men in the affairs of their community, state and nation"); *Runyon v. McCrary*,

427 U.S. 160, 164 (1976) ("nonprofit association composed of six state private school associations, . . . represent[ing] 395 private schools.").

BSA bears striking resemblances to the institutions that this Court found unprotected by the First Amendment in *Rotary*, *Roberts*, and *Runyon*: BSA is a nonprofit membership organization seeking "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in Scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred virtues." *See* 160 N.J. at 573. BSA substantially differs from the organizations in this Court's membership precedent only in that BSA has extensive state and local government entanglements -- ties that further undermine BSA's claim to First Amendment protection. To find special First Amendment protection for all non-commercial organizations, therefore, would depart from decades of this Court's precedent.

It would also overrule decades of state high court decisions applying state anti-discrimination laws to non-commercial organizations. *See, e.g., Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990) (Princeton's all-male eating clubs subject to New Jersey's anti-discrimination law); *Concord Rod & Gun Club, Inc. v. Mass. Comm'n Against Discrimination*, 402 Mass. 716, 524 N.E.2d 1364 (1988) (nonprofit rod and gun club subject to Massachusetts' anti-discrimination law); *Isbister v. Boys' Club of Santa Cruz, Inc.*, 40 Cal.3d 72, 707 P.2d 212 (1985) (private charitable boys' club that operates community recreational facility subject to California's anti-discrimination law); *U.S. Power Squadrons v. State Human Rights Appeal Board*, 59 N.Y.2d 401, 452 N.E.2d 1199 (1983) (nonprofit corporation whose purposes

include promotion of safety and skill in boating subject to New York's anti-discrimination law); *National Org. for Women v. Little League Baseball, Inc.*, 127 N.J. Super. 522, 318 A.2d 33 (App. Div.) (baseball league dedicated to "shap[ing] tomorrow's leaders" subject to New Jersey's anti-discrimination law), *aff'd*, 67 N.J. 320, 338 A.2d 198 (1974).

Furthermore, because many non-commercial organizations, especially private nonprofit organizations, provide access to public accommodations or services that are otherwise unavailable in a given community -- BSA being a prime example of such an organization -- according them special First Amendment protection would be even more harmful than according such protection to strictly commercial organizations. The services of commercial organizations are often available from competitors; moreover, in today's society, the profit motive may discourage some corporations from engaging in invidious discrimination, at least in selling their products or services to the public. The accommodations or services of non-commercial organizations, in contrast, tend to be far less fungible, and the general absence of a profit motive renders the need for legal protection all the more compelling.

Finally, no First Amendment expressive interest would be promoted by according special protection to non-commercial organizations that discriminate on grounds that are unrelated to any of their expressive purposes. In contrast to a "commercial" test, the criteria in this Court's membership precedent are precisely tailored to determine whether admission of unwelcome members would interfere with organizations' expressive purposes.

III. *HURLEY* DOES NOT UNDERMINE THE APPLICATION OF STATE ANTI-DISCRIMINATION LAW TO OPEN MEMBERSHIP ORGANIZATIONS

According to petitioner, it is not "legally relevant" whether compliance with state anti-discrimination law would interfere with any of the organization's "specific expressive purpose[s]," because an organization can "decide what not to say." *See* Pet. Br. at 22-23, 26-27 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)). Petitioner fails to acknowledge that the pending case involves a membership organization, not pure expression, and is therefore governed by this Court's membership precedent. *Hurley* is relevant to this case only by way of contrast and in its *affirmation* of this Court's membership precedent.

A. As A Pure Expression Case, *Hurley* Has No Bearing On This Case

Petitioner's reading of *Hurley* as a sweeping limitation on the enforceability of state anti-discrimination laws as applied to membership organizations flatly contradicts not only this Court's membership precedent but *Hurley* itself. The Court's unanimous opinion specifically noted that state anti-discrimination laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, *and they do not, as a general matter, violate the First or Fourteenth Amendments.*" 515 U.S. at 572 (emphasis added). Illustrating constitutionally permissible applications of state anti-discrimination laws, this Court

then cited, among other precedent, two of its membership cases: *New York State Club Ass'n* and *Roberts*. *See Hurley*, 515 U.S. at 572.

Central to the holding in *Hurley* was that it involved a "parade," which does not simply involve expressive elements but is in fact "a form of expression." 515 U.S. 568 (citing cases). Further, the participation of the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) as a unit in the parade "was equally expressive." *Id.* at 570. Because both the parade and GLIB's participation in it were pure forms of expression, "the state courts' application of the [anti-discrimination] statute had the effect of declaring the sponsors' speech itself to be the public accommodation." *Id.* at 573.

BSA is not a "form of expression." It is a membership organization with extensive government affiliations. Moreover, unlike the state court in *Hurley*, the court below in this case did not declare BSA's *speech* to be the public accommodation. Rather, it correctly held that BSA as a *membership organization* is a public accommodation because of its active solicitation and open membership policies, its extensive uses of other public accommodations, and its "close relationships with federal and state governmental bodies." 160 N.J. at 591.

Even as a pure expression case, *Hurley* was "peculiar," because the state court had found discrimination even though "no individual member of GLIB claims to have been excluded from parading." 515 U.S. at 572. The parade sponsors only sought to prevent interference with their own pure expression. *Id.* In the pending case, in contrast, petitioner expelled Dale solely on the basis of his status as a gay person. *See* 160 N.J. at 578-79, 617. This Court has specifically refused to extend constitutional protection to such status-based

discrimination, even in cases involving private organizations with *express* discrimination policies (which petitioner in this case lacked before litigation). *See, e.g., Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 539, 541, 549 & n. 8 (1987) (rejecting free association challenge where organization's Constitution expressly limited membership to men, and organization claimed policy was necessary to its effectiveness); *Roberts v. United States Jaycees*, 468 U.S. 609, 627-28 (1984) (rejecting free association challenge where organization's policy expressly limited membership to men, and organization claimed that admission of women would "change [its] message"); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (rejecting free association challenge by private schools with racial discrimination policies because "'the Constitution . . . places no value on discrimination'") (quoting *Norwood v. Harrison*, 413 U.S. 455, 469 (1973)).

Although petitioner attempts to concoct similarity between this case and *Hurley* by arguing that it expelled Dale on the basis of his articulated views and not on the basis of his status, *see* Pet. Br. at 29, the New Jersey Appellate and Supreme Courts' conclusion to the contrary is well supported by the record. BSA's letter explaining the reason for Dale's expulsion stated that "the standards for leadership established by the Boy Scouts of America . . . specifically forbid membership to homosexuals." 169 N.J. at 579. Petitioner's express litigation-based policy, moreover, is to exclude not only those who declare support for gay rights, but "known or avowed homosexual persons," regardless of their stated views. *See* Pet. Br. at 27 (quoting BSA's National Director). Petitioner's repeated citations in its brief to newspaper articles reporting respondent's comments

made *after* the initiation of this litigation shed no light on petitioner's reasons for expelling respondent long before, nor do they demonstrate that Dale would have made comments regarding homosexuality in the context of a Scout meeting. To the contrary, in the newspaper article that was the basis for Dale's expulsion, he "does not identify himself as a Boy Scout leader or member, nor does he express an opinion about any of Boy Scouts' policies, or suggest that Boy Scouts should allow him openly to advocate acceptance of homosexuality. Indeed, Dale has stated that he accepts and endorses Boy Scouts' moral principles." 160 N.J. at 616.

B. This Court's Separate Pure Expression and Free Association Doctrines Should Not Be Merged

Both logic and sound policy considerations support the differences between this Court's pure expression and free association jurisprudence. Aside from the minimal restrictions necessary to maintain the public order (such as time, place and manner), government restrictions on pure expression generally do not promote a countervailing expansion of individual rights. Rigorous judicial protection of pure expression therefore promotes First Amendment freedoms without substantially infringing on the rights of others.

Unlike government restrictions on pure expression, anti-discrimination laws promote equal access, equal opportunity and personal dignity. *See Roberts*, 468 U.S. at 625. "[T]he very exercise of the freedom to associate by some may serve to infringe that freedom for others." *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974) (holding, *inter alia*, that exclusion of

African Americans from recreational facilities was correctly enjoined). Indeed, this Court has consistently recognized that society as a whole benefits from wide participation in its political, economic, civic and cultural life. *See, e.g., Roberts*, 468 U.S. at 625; *Heckler v. Mathews*, 465 U.S. 728, 744-45 (1984); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-26 (1982); *Frontiero v. Richardson*, 411 U.S. 677, 684-87 (1973) (plurality opinion). The analysis that this Court has adopted in its membership cases, therefore, properly balances the burden (if any) on the organization's expressive purposes, the rights of those whom the organization wishes to exclude, and the interests of government and society as a whole.

IV. UNDER PRINCIPLES OF STARE DECISIS, THIS COURT'S PRECEDENT SHOULD NOT BE OVERRULED

Many of the arguments that petitioner has presented to this Court -- including the arguments that the pure expression standards set forth in *Hurley* should apply to free association cases, and that all non-commercial organizations should have automatic special protection against enforcement of state anti-discrimination laws -- amount to a request that this Court overrule its membership precedent. *Amici* states believe that this Court's membership cases were correctly decided based on sound constitutional principles and a proper balancing of compelling state interests and organizations' asserted First Amendment rights. The membership cases are consistent, well-reasoned, and easily applied by lower courts. Under principles of stare decisis, the basis for applying the same analysis to this

case is therefore even stronger than when those cases were decided.

"[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (Justices O'Connor, Kennedy and Souter, writing for the Court). In *Casey*, the Court identified four factors to weigh the respective costs of reaffirming and overruling a case. *See id.* These factors weigh strongly in favor of reaffirming this Court's membership precedent.

First, the membership cases "ha[ve] in no sense proven 'unworkable.'" *See Casey*, 505 U.S. at 855. The specific standards set out in those cases for balancing an organization's First Amendment interests against the states' interests in eliminating discrimination give appropriate deference to both and have been consistently and easily applied by lower courts. *See, e.g., McCloud v. Testa*, 97 F.3d 1536 (6th Cir. 1996); *Louisiana Debating and Literary Ass'n v. City of New Orleans*, 42 F.3d 1483 (5th Cir. 1995); *Elks Lodges 719 & 2021 v. Dep't of Alcohol Beverage Control*, 276 Utah Adv. Rep. 8, 905 P.2d 1189 (1995), *cert. denied*, 517 U.S. 1221 (1996); *State v. Burning Tree Club, Inc.*, 315 Md. 254, 554 A.2d 366, *cert. denied*, 493 U.S. 816 (1989).

Second, this Court's membership cases are "subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Casey*, 505 U.S. at 854-55. Based on these decisions, both federal and state courts, as cited above, have rendered numerous decisions affecting the respective equal opportunity and

free association rights of citizens and organizations. *Amici* states have relied on this Court's decisions in drafting, amending and enforcing their anti-discrimination laws. As in *Casey*, "for two decades of economic and social developments," organizations' memberships and individuals' lives have been affected by the Court's membership precedent. *Id.* at 856. The ability of those who are targeted by discrimination "to participate equally in the economic and social life of the Nation has been facilitated by their ability" to have equal access to public accommodations and services. *Id.* at 856. Likewise, the First Amendment free association rights of organizations have been protected. *See, e.g., Invisible Empire of the Knights of the Ku Klux Klan v. Mayor*, 700 F. Supp. 281, 289 (D. Md. 1988) (holding that KKK's racist membership policy promotes its expressive purposes).

Third, "[n]o evolution of legal principle has left . . . the doctrinal footings [of the membership precedent] weaker than they were [when decided]. No development of constitutional law since the case[s] w[ere] decided has implicitly or explicitly left [the membership precedent] behind as a mere survivor of obsolete constitutional thinking." *Casey*, 505 U.S. at 857. *Amici* states are aware of no precedent by this Court or any other that implicitly or explicitly conflicts with this Court's membership precedent. Although petitioner invokes *Hurley*, that case creates no conflict when properly viewed as part of pure expression jurisprudence.

Finally, "facts have [not] so changed, or come to be seen so differently, as to have robbed [the membership cases] of significant application or justification." *Casey*, 505 U.S. at 855. While society has progressed toward greater equality in the past several decades, invidious

discrimination has not been eliminated.

The "widespread acceptance in the legal culture" of this Court's decisions in the membership cases provides "adequate reason not to overrule" them. *See Mitchell v. United States*, 119 S. Ct. 1307, 1316 (1999) (Scalia, J., dissenting) (case involving constitutional issues). "[A] concurring opinion in [a] case," moreover, should not "take precedence over an opinion joined in its entirety by five Members of the Court." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part).[11] The membership cases are "now an important part of the fabric of our law." *See Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring in majority opinion based on stare decisis principles). To overrule them would shred the fabric of more than two decades of this Court's membership precedent, undermine the enforceability of anti-discrimination law throughout the states as well as on the federal level, and upset the delicate balance that has been achieved in promoting individual rights while preserving harmony in society at large.

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[11]In this case, the stare decisis principles weigh even more heavily against overruling precedent: in all three of the membership cases that petitioner refers to as "the *Roberts* trilogy," the judgments were unanimous, and no more than two of the participating Justices departed from any portion of the majority's analyses.

CONCLUSION

For the foregoing reasons, *amici* states respectfully urge the Court to affirm the decision below.

Dated: March 28, 2000

Respectfully submitted,

ELIOT SPITZER
Attorney General of the
State of New York
PREETA D. BANSAL
Solicitor General
Counsel of Record
ADAM L. ARONSON
Assistant Solicitor General
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8016

GRANTED

No. 99-699

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

—v.—

JAMES DALE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE AMERICAN COUNSELING ASSOCIATION, AND THE AMERICAN ORTHO-PSYCHIATRIC ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Of Counsel:

WILLIAM S. SINGER
SINGER & FEDUN
2230 Route 206
P.O. Box 134
Belle Mead, New Jersey 08502
(908) 359-7873

MARVIN E. FRANKEL
Counsel of Record
JEFFREY S. TRACHTMAN
KERRI ANN LAW
KRAMER LEVIN NAFTALIS & FRANKEL LLP
919 Third Avenue
New York, New York 10022
(212) 715-9100

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42 pp

TABLE OF CONTENTS

PAGE

Table of Authorities iv

Interests of Amici Curiae 1

Summary of the Argument 2

Argument 3

Point I BSA MAY NOT RELY ON OUTMODED ASSUMPTIONS AND STEREOTYPES ABOUT GAY PEOPLE TO OBTAIN A FIRST AMENDMENT EXEMPTION FROM NEW JERSEY'S LAW AGAINST DISCRIMINATION 3

A. BSA Members Do Not Associate to Express Any Views on Homosexuality or Sexuality Generally 4

1. The New Jersey Supreme Court Correctly Identified BSA's Actual Expressive Purposes in Considering Its First Amendment Claim 4

2. BSA May Not Invoke Outmoded Societal Attitudes About Homosexuality to Create An Actual Expressive Purpose Regarding Sexual Orientation 6

PAGE

B. BSA Cannot Rely on Stereotypes to Assume that a Gay Scout Leader Would Do or Say Anything to Frustrate Its Actual Expressive Purposes 11

1. An Organization Subject to Public Accommodation Laws May Not Rely On Unsupported Stereotypes to Ascertain the Views, Character, or Conduct of a Potential Member 11

2. BSA May Not Rely on Unsupported Stereotypes About Gay People to Claim that Dale Will Undermine its Members' Actual Expressive Purposes 13

Point II NEW JERSEY'S COMPELLING INTEREST IN ERADICATING DISCRIMINATION OUTWEIGHS ANY MARGINAL IMPACT ON BSA'S FIRST AMENDMENT RIGHTS 21

A. All Three Branches of Government in New Jersey Recognize the State's Compelling Interest in Eradicating Sexual Orientation Discrimination 21

PAGE

B. Social Science Data Proves that Discrimination on the Basis of Sexual Orientation Causes Both Physical and Psychological Harms 23

C. The Application of the LAD to Eradicate Sexual Orientation Discrimination Helps Remedy the Harms Suffered by Gay People 29

CONCLUSION 30

TABLE OF AUTHORITIES

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PAGE

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PAGE

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INTERESTS OF AMICI CURIAE

Amici are national organizations devoted to promoting physical and mental health and supporting scientifically reliable research on health issues. They have each adopted positions advocating an end to discrimination based on sexual orientation as beneficial to the public health and welfare. *Amici* believe they can help inform the Court's consideration of the social science and policy issues implicated by this case.

The American Public Health Association ("APHA") is devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is the world's largest health organization, with over 50,000 affiliated members from all disciplines and specialties in public health. The National Association of Social Workers ("NASW") is the world's largest membership organization of professional social workers, with over 155,000 members. NASW works to enhance the professional growth and development of its members, create and maintain professional standards, and advance sound social policies. The American Counseling Association ("ACA") is a not-for-profit professional and educational organization dedicated to the growth and enhancement of the counseling profession. Founded in 1952, ACA is the world's largest association exclusively representing professional counselors. The American Orthopsychiatric Association, founded in 1924, provides a common ground for collaborative study, research, and knowledge exchange among individuals from a variety of disciplines engaged in preventive, treatment, and advocacy approaches to mental health.[1]

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[1] All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by a party and that no outside person or entity made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This case invokes this Court's longstanding directive that outmoded assumptions and stereotypes about a person's status have no place in assessing the First Amendment interests of an organization seeking an exemption from state antidiscrimination laws. Although James Dale served most of his life as an exemplary member and adult leader of the Boy Scouts of America ("BSA" or the "Boy Scouts"), BSA summarily expelled him when it learned, through outside sources, that he was gay. This action violated New Jersey's Law Against Discrimination ("LAD") unless that law's application directly burdens an actual expressive purpose of Boy Scouts' members.

The record supports the New Jersey Supreme Court's conclusion that BSA does not have an expressive purpose concerning homosexuality that might justify a First Amendment exemption from the LAD. BSA's membership programs and materials do not expressly address homosexuality. BSA nevertheless argues that Dale's mere presence burdens its expression because its general statements on "morality" are understood by its members to convey the view that homosexuality is "immoral." But there is no longer any broad consensus on this issue among BSA members or in society at large. In New Jersey, the notion that gay people, as such, should be excluded as "immoral" has been soundly repudiated. BSA's general teachings on morality thus cannot be seen today as conveying to BSA members any clear message about homosexuality.

The purposes that actually do bring together scouting's members concern citizenship, recreation, and character. BSA cannot assume that Dale or other gay scouts or leaders will interfere with its expression on *these* matters simply because they are gay. A person's sexual orientation tells nothing about his views, character, or conduct. Therefore, any claim that Dale's membership undermines these *actual* purposes of scouting is based on stereotypes, something forbidden by this Court's expressive association cases.

Decades of mainstream social science also unequivocally refute the stereotypes that the courts below recognized are implicit in BSA's First Amendment claim.

Even if the LAD's application worked some slight infringement on BSA's right of expressive association, this Court has recognized that such infringement may be justified to serve a compelling state interest in combating discrimination. 63a.[2] That interest – recognized by all three branches of New Jersey's government – is more than abstract policy: a large body of social science data, relied upon by many courts, demonstrates that the victims of sexual orientation discrimination suffer severe physical and psychological harms. Social science also confirms that anti-discrimination laws like the LAD are powerful remedies for the social ills caused by discrimination against gay people and other minorities. New Jersey's compelling interest decisively outweighs any marginal impact that the LAD may have on BSA's expressive association interests.

ARGUMENT

POINT I

BSA MAY NOT RELY ON OUTMODED ASSUMPTIONS AND STEREOTYPES ABOUT GAY PEOPLE TO OBTAIN A FIRST AMENDMENT EXEMPTION FROM NEW JERSEY'S LAW AGAINST DISCRIMINATION

When BSA argues that James Dale's presence among a million adult members of scouting would "contradict the stated mission and message of the organization," *Dale Pet. for Cert.* at 19 (No. 99-699), it means one of two things: either (i) that BSA members join to express an actual viewpoint on sexual orientation that would be undermined by Dale's mere presence, or (ii) that Dale's gay identity alone is an accurate predictor of how he will act and what views he will

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[2] Cited numbers followed by "a" refer to pages in the appendix submitted by BSA with its Petition for Writ of Certiorari. Numbers preceded by "JA" refer to pages in the Joint Appendix.

express within scouting. The New Jersey Supreme Court properly held that the former premise is factually groundless and the latter is a legally impermissible application of false stereotypes.

A. BSA Members Do Not Associate to Express Any Views on Homosexuality or Sexuality Generally

BSA argues that the mere presence of a known gay person in its ranks will undermine its core principles. But scouting's programs focus on citizenship, outdoor recreation, and development of character, not sexuality. BSA nevertheless insists that its general statements about "morality" are recognized by its members as expressing the allegedly self-evident fact that gay people are inherently immoral. This position is no longer tenable, if it ever was, given the evolution of public attitudes toward gay people both nationally and in New Jersey.

1. *The New Jersey Supreme Court Correctly Identified BSA's Actual Expressive Purposes in Considering Its First Amendment Claim*

To claim a First Amendment exemption from an applicable antidiscrimination statute, an organization must first establish that the statute's application will impede its members' shared goals. *See Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984) (no basis in record for concluding that "admission of women as full voting members will impede the organization's ability to engage in [its] protected activities or to disseminate its preferred views"); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548 (1987) ("*Rotary Club*") (prohibiting Rotary Clubs from excluding women did not require them to "abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace").

The right of expressive association does not protect an organization's ability to discriminate in furtherance of every view that any of its members or leaders happen to espouse, but "only those views *that brought them together*." *Roberts*, 468

U.S. at 623 (emphasis added). BSA is not entitled to a special exemption from the LAD unless it can establish that the law's application will directly impede an actual purpose or message that brings its members together.

Relying on BSA's own membership materials, 2a n.1, the New Jersey Supreme Court found that BSA "seeks 'to promote ... patriotism, courage, self-reliance, and kindred virtues,'" 5a, "'instill values in young people and ... prepare them to make ethical choices over their lifetime in achieving their full potential,'" 5a, and "foster 'strength, confidence, and good judgment' by providing boys with a 'world full of exciting adventures' and the opportunity 'to go places and do things,'" 53a. To effectuate these purposes, "BSA trains and educates boys in camping and other outdoor activities, democracy, civics, respect for the family, personal strength and development, self-sufficiency and sexual responsibility." 136a. BSA recognizes that "the skills it teaches its members are needed 'in all economic, cultural, and ethnic groups'" and therefore strives for a "diverse and 'representative' membership." 59a.[3]

The New Jersey Supreme Court identified the general inculcation of moral values as one of BSA's members' varied expressive purposes. 53a. But BSA defines morality as turning on individual conscience and a scout's personal "religious beliefs" – not specific positions on particular social issues. 55a. This definition necessarily precludes any "specific expressive purpose" with respect to sexual orientation, since the actual participants in scouting – including its sponsoring organizations – have widely varying personal

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[3] The acceptance of gay people in its ranks would thus actually enhance one of BSA's professed core values. *Compare* 59a ("The exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership.") *with Rotary Club*, 481 U.S. at 548-49 ("[B]y opening membership to leading business and professional women in the community, Rotary Clubs are likely to obtain a more representative cross section of community leaders with a broadened capacity for service.")

and religious views regarding the morality of homosexuality.[4] The recruiting and informational materials available to current and prospective members nowhere recite that members share the view that homosexuality is immoral. Indeed, hundreds of scouts, including Dale, stated in affidavits that they were unaware of any Boy Scout position on the morality of homosexuality. 91a.

The absence of any express "message" about homosexuality is not surprising, because sex and sexual orientation are simply not scouting issues. Scoutmasters are instructed to refer questions on sex to parents or clergy. 9a. To the limited extent "sexual responsibility" is part of the curriculum, the focus is on discouraging premarital sex generally, not expressing approval or disapproval for anyone's orientation. 9a.[5]

In short, the New Jersey Supreme Court correctly found that "Boy Scouts' members do not associate for the purpose of disseminating the belief that homosexuality is immoral." 52a. Thus, no expressive purpose of the members is burdened by applying the LAD to BSA.

2. *BSA May Not Invoke Outmoded Societal Attitudes About Homosexuality to Create An Actual Expressive Purpose Regarding Sexual Orientation*

Admitting that its members do not associate to reject homosexuality expressly, BSA argues that they infer such a purpose from its general statements on morality. BSA claims that for many years after its 1910 founding there existed a broad societal consensus that homosexuality was inherently immoral. BSA Br. at 5. Based on these historical attitudes, BSA maintains that its expressive purposes

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4 BSA repeatedly renews the charters of sponsoring organizations that adhere to the view that homosexuality is not immoral. 55a-56a.

5 There is no indication that BSA expels as "immoral" or incapable of serving as positive role models heterosexual leaders who do not conceal their premarital relationships.

regarding homosexuality are reflected in its requirements that members be "clean" and keep themselves "morally straight."

These attributes "do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral." 55a. And BSA defines "clean" and "morally straight" in broad terms that belie any claim of a specific coded reference to homosexuality. The term "clean" encompasses cleanliness of body and mind, including the rejection of "'swear words, profanity, dirty stories,'" as well as "'racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations.'" 55a. The term "morally straight" means "'[t]o be a person of strong character, guid[ing] your life with honesty, purity, and justice'" and "'[r]espect[ing] and defend[ing] the rights of all people.'" 54a. It cannot be said credibly that these concepts — either on their face or as defined by BSA — convey anything whatsoever about sexuality.

BSA argues that these terms — and its more general statements about "morality" — are nevertheless understood to convey a core message on sexual orientation. But this incorrectly presumes that early 20th Century mores survive relatively unchanged today. To the contrary, public attitudes towards homosexuality have become quite diverse and, particularly in New Jersey, the majority view increasingly opposes excluding gay people from civic life based upon mere identity. Accordingly, BSA may not assume that its general "morality" message is understood by its members to refer to sexual orientation.

Americans today increasingly favor the notion of equality for gay men and lesbians. *See, e.g.*, Alan S. Yang, *From Wrongs to Rights, Public Opinion on Gay and Lesbian Americans Moves Toward Equality* (NGLTF Policy Inst. 1998). For example, there has been a remarkable change in the proportion of Americans who believe that gay people should be eligible to serve as school teachers, a position that, like a scout leader, involves inculcating moral values in youth. A Gallup poll

trend shows that support for hiring gay people as elementary school teachers doubled from 27% in 1977 to 55% in 1996. *Id.* at 10. Similarly, support for hiring gay people as high school teachers rose from 47% in 1989 to 60% in 1996. *Id.* (citing *Gallup* polls). Several recent polls show that a majority of Americans consider homosexuality an "acceptable" alternative lifestyle. *Gallup Poll* conducted Feb. 8, 1999 (50% of respondents "feel that homosexuality should be considered an acceptable alternative lifestyle); *Time/CNN Poll* conducted Oct. 15, 1998 (52% of respondents feel that "different kinds of lifestyles ... such as homosexual relationships" are "acceptable for others, not self," and another 12% feel that they are "acceptable for others and self"). A recent Newsweek poll found that less than half of the general public surveyed, 46%, say they personally believe homosexuality is a sin, a decrease from 54% two years ago. John Leland, *Shades of Gay*, Newsweek, Mar. 20, 2000, at 49.[6]

Recognizing these trends, judges have come to accept less frequently the notion of "immorality" as a basis for treatment of gay people under the law. Editors, *Developments in the Law: Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1514 (1989).[7] Numerous social, political, and religious

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[6] Although homosexual conduct is not at issue in this case, 98a (trial court's failure to differentiate between Dale's status and conduct was "manifestly in error"), *Amicus* Claremont Institute argues, without any cited support, that homosexual conduct is viewed as "*malum in se.*" Brief of Amicus Curiae the Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioners ("Claremont Br.") at 25. Public attitudes toward homosexual conduct do not support this argument; while a small majority continues to disapprove of homosexual conduct, this view is far from universal, and the disapproval rate has dropped significantly in recent years. Yang, *supra*, at 2.

[7] This trend echoes the repudiation of judicial reliance on archaic stereotypes about the inherent personal moral worth of African Americans. In another time, this Court rationalized the subjugation of black Americans as "property," in part because they were historically viewed as immoral. *Dred Scott v. Sandford*, 60 U.S. 393, 409 (1857) (observ-

(footnote continued)

institutions have similarly rethought their positions on the inherent immorality of gay people. Even the Roman Catholic Church, a major scouting sponsor that adheres to an extremely conservative view of sexual morality, does not view a gay person as inherently immoral:

> [T]he Church teaches that homogenital behavior is objectively immoral, while making the important distinction between this behavior and a homosexual orientation, which is not immoral in itself. It is also important to recognize that neither a homosexual orientation, nor a heterosexual one, leads inevitably to sexual activity. One's total personhood is not reducible to sexual orientation or behavior.

National Conference of Catholic Bishops (United States Catholic Conference), *Always Our Children: A Pastoral Message to Parents of Homosexual Children and Suggestions for Pastoral Ministers* (A Statement of the Bishops' Committee on Marriage and Family 1997).

Consistent with these national trends, the evolution of public mores in New Jersey undercuts the argument that scouting's members view homosexuality as per se immoral. The people of New Jersey, through their elected representatives, have repudiated that perspective by enacting protections against sexual orientation discrimination in the LAD. 62a (addition of sexual orientation to LAD "was an implicit recognition that discrimination based on 'archaic'

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ing that from founding of Republic, blacks were "looked upon as so far below [whites] in the scale of created beings, that intermarriages between white persons and negroes or mulattos were regarded as unnatural and immoral . . . [and] this stigma, of the deepest degradation, was fixed upon the whole race"). Of course, the *Dred Scott* decision was long ago discredited. While public views on homosexuality have not yet evolved to the same extent as those on race, neither do they remain so monolithic that BSA can assume that its views on "morality" are understood by its members to invoke a shared "stigma" fixed on all gay people.

and 'stereotypical notions' about homosexuals that bears no relationship to reality cannot be countenanced"). Accordingly, BSA may no longer rely on any presumed social consensus to infer its members' expressive purposes, 100a:

> It is not tenable to conclude that because at one time "traditional moral values" were based on unsupportable stereotypes about homosexuals, those values have survived and endured unchanged in contemporary times. It is similarly untenable to conclude, in the absence of a clear, particular, and consistent message to the contrary, that Boy Scouts ... remains entrenched in the social mores that existed at the time of its inception.

In short, an organization as broadly inclusive as BSA, one that otherwise preaches tolerance and respect for diversity, cannot today claim an actual expressive purpose on sexual orientation issues without making that message more explicit to its members in its program and materials. While it has been litigating this issue since the 1980s, BSA has not revised its program materials to include the view that homosexuality is inherently immoral or any related message (leaving aside self-serving policy statements not actually disseminated to members). 54a n.12. This silence confirms that rejecting homosexuality is not an actual purpose of scouting, and that permitting Dale to remain in scouting would not change the speech of its members.[8]

[8] BSA suggests (Br. at 3) that its total silence on sexual orientation merely reflects that it teaches morality through positive example rather than negative admonition. But BSA's materials are replete with "don'ts" regarding pre-marital sex, 9a, offensive language, 55a, ridiculing the disabled, 55a, and a host of other things.

B. BSA Cannot Rely on Stereotypes to Assume that a Gay Scout Leader Would Do or Say Anything to Frustrate Its Actual Expressive Purposes

If, as demonstrated above, inherent moral disapproval of gay people is not an actual expressive purpose of scouting, then Dale's exclusion can be justified only by BSA's assumption that, because he is gay, he will say or do something to undermine the purposes for which its members actually do associate. But without knowing anything about Dale's actual views, character, or conduct, BSA can so assume only by resorting to stereotypes about gay people that mainstream social science has long rejected. Knowing that a young man is gay does not indicate whether he makes a good boy scout. It says nothing, for example, about whether he is trustworthy, honest, patriotic, or courageous — or even whether he likes camping.[9] Dale himself illustrated this point, excelling as a scout notwithstanding his sexual orientation. BSA's contrary assumption flows from illogical shorthand inferences based on status rather than views, character, or conduct. That reliance is impermissible as a matter of law and wrong as a matter of social science.

1. *An Organization Subject to Public Accommodation Laws May Not Rely On Unsupported Stereotypes to Ascertain the Views, Character, or Conduct of a Potential Member*

In assessing whether a particular applicant will significantly affect an organization's expressive purposes, thus potentially exempting it from an otherwise applicable public accommodation law, this Court has emphatically rejected reliance on stereotypes, which do not accurately predict a

[9] The Claremont Institute maintains that BSA "is *not* claiming that homosexual adult leaders are less likely than heterosexual adult leaders to be trustworthy, or brave, or loyal, and thus less able to serve as role models for those aspects of the Scout Law." Claremont Br. at 11 (emphasis in original). But that eliminates the only purported ground for excluding Dale that relates to the BSA's actual expressive purposes.

person's actual views, character, or conduct. *See Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984). ("[W]e decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech."); *see also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (rejecting facial challenge to anti-discrimination law that "merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership").

Following this Court's lead, other courts have frequently rebuffed claims that the views, character, or conduct of a lesbian or gay man is ascertainable from his or her homosexual identity. *See, e.g., Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1289 (D. Utah 1998) (rejecting reliance on negative community reaction to coach's sexual orientation as rational basis for termination because it was "based on nothing more than unsupported assumptions, outdated stereotypes, and animosity" rather than coaching ability); *Doe v. British Univ. N.A. Club*, 788 F. Supp. 1286, 1292 (D. Conn. 1992) (rejecting argument that child molestation is "foreseeable consequence of . . . sexual orientation," finding no evidentiary basis to conclude that "homosexuals are predisposed towards molesting or sexually assaulting minor males"); *People v. Garcia*, 92 Cal. Rptr. 2d 339, 344 (Cal. Ct. App. 2000) (prohibiting exclusion of jurors based on "stereotypes" and "group bias" about gay people because their "common perspective" of historical persecution would not lead to "identity of opinion").

Refusal to credit stereotypes does not mean that organizations subject to public accommodation laws lose the right to apply bona fide membership criteria. Groups whose members actually come together because of identity (e.g., KKK; B'nai B'rith) may exclude on that ground; the Boy Scouts is not required to admit girls. Nor does the LAD

mandate that scoutmaster positions "must be open to all members of the general public," BSA Br. at 43, any more than it requires a country club to hire a lifeguard who cannot swim. BSA can select (or expel) scouts and leaders based on their individual character, skills, experience, or conduct – but not on illegitimate shorthand inferences derived from mere identity, as was done here.

2. *BSA May Not Rely on Unsupported Stereotypes About Gay People to Claim that Dale Will Undermine its Members' Actual Expressive Purposes*

In the absence of "a unified Boy Scout position" expressed by its members on the inherent morality of gay people, such as might arguably justify a status-based exclusion, the New Jersey Supreme Court was satisfied that Dale's exclusion was "based on little more than prejudice" by BSA officals. 59a. In other words, "morality" was merely a proxy for negative assumptions based on Dale's gay identity. Echoing the observation in *Roberts* that discrimination based on "archaic and overbroad assumptions" regarding a person's status "deprives persons of their individual dignity," 468 U.S. at 625, the court noted that "[t]he invocation of stereotypes to justify discrimination is all too familiar. Indeed, the story of discrimination is the story of stereotypes that limit the potential of men, women, and children who belong to excluded groups." 59a-60a. The *Dale* court further noted that this Court "has not hesitated to uphold the enforcement of a state's anti-discrimination statute against an expressive association claim based on assumptions in respect of status that are not a part of the group members' shared expressive purpose." 56a (citing *Roberts*, 468 U.S. at 628, *New York State Club Ass'n*, 487 U.S. at 13).

The New Jersey Supreme Court found that BSA's expulsion of Dale was based solely on assumptions regarding his gay status, and not on any actual evidence that his views, character, or conduct conflicted with those shared by BSA's

members. 56a. Belying the accuracy of those stereotypes, through word and deed Dale "accept[ed] and endorse[d] Boy Scouts' moral principles." 57a. Thus, BSA violated the LAD when it terminated Dale based on stereotypical assumptions about the relative views, character, and conduct of homosexuals and heterosexuals, just as the Jaycees violated Minnesota's antidiscrimination law when it excluded women based on "unsupported generalizations about the relative interests and perspectives of men and women." *Roberts*, 468 U.S. at 628. That Dale was an exemplary participant in scouting for twelve years, earning over twenty-five merit badges and the rank of Eagle Scout, as well as serving as a scout patrol leader, assistant patrol leader, and assistant scoutmaster, 11a, reinforces that conclusion. *Cf. id.* at 627 (because Jaycees already invite women to share group's philosophy and participate in training and community activities, any claim that admitting women as full members will impede organization's ability to disseminate its views is "attenuated at best").

In *Roberts*, this Court noted that the generalizations about women relied upon by the Jaycees "may or may not have a statistical basis in fact with respect to particular positions adopted by the Jaycees," but that, "[i]n the absence of a showing far more substantial than that attempted by the Jaycees," the Court "decline[d] to indulge in [] sexual stereotyping." *Id.* at 628. Here, similarly, BSA has not substantiated its stereotypical thinking – there is no proof that a gay scout leader will in fact undermine the actual shared purposes of instilling in boys the qualities of patriotism, courage, self-reliance, honesty, and civic virtue. Indeed, social science emphatically debunks the stereotypes about gay people underlying any assumed tension between homosexuality and the basic tenets of Scout law.

While BSA has generally avoided explicitly invoking stereotypes to justify Dale's expulsion, several have been implicit in its arguments and were elucidated and endorsed by the trial court. One "particularly pernicious stereotype"

about gay people that is "implicit in Boy Scouts' arguments" is that "gay scout leaders will somehow cause physical or emotional injury to Scouts." 97a. BSA again invokes this stereotype, however obliquely, when it suggests that Dale's participation is inappropriate because scouting involves "hiking and camp-outs far from the public gaze," BSA Br. at 40, and a great deal of intimacy among members, *id.* at 41 ("When an 11 year-old boy away from home for the first time becomes afraid at night, skins his knee, or forgets his sleeping bag, he looks to his Scoutmaster for support.").

Many of the *amicus* briefs submitted in support of BSA are far less subtle. These briefs – particularly those of the Family Research Council ("FRC"), the Public Advocate of the United States ("Public Advocate"), and the Family Defense Council ("FDC") – overtly invoke stereotypes of gay people as promiscuous pedophiles bent on recruiting young scouts to homosexuality. These groups represent, by and large, not mainstream social scientists but right-wing religious activists.[10] Because they are driven by moral conviction and ideology rather than the spirit of neutral scientific inquiry, they cite sources that are equally biased – often little more than junk science[11] – and therefore

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[10] FRC and FDC are fringe organizations that have strongly held anti-gay beliefs. FRC "believes that homosexuality is unhealthy, immoral and destructive to individuals, families and societies. . . . [and] opposes any attempt to equate homosexuality with civil rights or to compare it to benign characteristics such as skin color or place of origin." <http://www.frc.org/issues/homosexualmain.html>. Similarly, FDC's chairman has stated that "homosexuality is an abomination according to the Torah," <http://web1.in4web.com/tushiyah/fdcv99hikind.htm>, and has protested the inclusion of gay concentration camp victims in the New York City holocaust memorial. Debra Nussbaum Cohen, *Boycott of Holocaust museum threatened for gay inclusion*, Jewish Telegraphic Agency, 1997 WL 11659558 (Apr. 12, 1997).

[11] This Court should hesitate to rely on materials that would not pass muster under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (footnote continued)

entitled to little weight.[12]

(*Daubert* applies to all expert testimony). *Daubert* requires courts to consider certain non-exclusive factors in weighing the scientific legitimacy of expert evidence: (1) whether the methodology employed has gained general acceptance in the relevant scientific community, (2) whether it has been peer reviewed, (3) whether it can (and has been) tested, and (4) whether there is a "known or potential rate of error."

[12] For example, FRC (Br. at 24-25) relies on the work of Paul Cameron, which has been discredited in both the public health community and the courts. *See* Amicus Brief of the American Psychological Association in Support of Dale ("APA Br."), at 11 n.40; *see also* <http: // psychology.ucdavis.edu/rainbow/html/facts_cameron.html> (noting six serious errors in Cameron's sampling techniques, survey methodolgy, and interpretation of results, any one of which makes his results flawed). FRC also relies heavily on The Gay Report, a journalistic book, which uses questionable survey methods. APA Br. at 11 n.40. Similarly, Public Advocate relies on the author G. Gallup – not to be confused with the polling organization – whose work is based on Cameron's flawed research and other unpublished, non-peer reviewed data. *See* Gordon G. Gallup, Jr., *Attitudes Towards Homosexuals and Evolutionary Theory: The Role of Evidence*, 17 Ethology & Sociobiology 281, 282 (1996).

Both Public Advocate (Br. at 24) and FRC (Br. at 23) also rely heavily on material published by NARTH, an organization that advocates reparative therapy, a psychotherapy aimed at eliminating homosexual desires that has been rejected by all major health and mental health professions. *See American Counseling Ass'n Governing Council* (Apr. 1999) (adopting position opposing promotion of reparative therapy as "cure" for homosexuality); *Policy Statement: Lesbian, Gay, and Bisexual Issues*, approved by Nat'l Ass'n of Social Workers Delegate Assembly (Aug. 1996), *printed in Social Work Speaks* (4th ed. 1997) (same); *Psychiatrists Reject Gay "Conversion,"* Wash. Post Nat'l, 1998 WL 22540805 (Dec. 13, 1998) (American Psychiatric Association joins American Psychological Association in rejecting conversion therapy as "likely to cause 'depression, anxiety and self-destructive feelings' in patients").

Perhaps most regrettable is FRC's quotation of a NARTH-affiliated psychiatrist for the astonishing allegation that a "'substantial, influential and growing segment of the homosexual community'" endorses pedophilia. FRC Br. at 25 (quoting Jeffrey Satinover, *Homosexuality and the Politics of Truth* 63 (1996)). The excesses to which certain of BSA's supporters go to defame gay people as a group reflects on both their credibility and the compelling need for legislation like the LAD to protect minorities from irrational hatred.

For example, the centerpiece of Public Advocate's argument that gay men tend towards pedophilia (Br. 24) is a study by Judith Reisman, "a key figure of the Christian American Right."[13] Judith A. Reisman, *Partner Solicitation Language As A Reflection of Male Sexual Orientation* (NARTH Collected Papers 1995). The study purports to demonstrate that gay men are pedophiles by comparing (a) the number of classified "personal" ads seeking teenage partners placed by heterosexuals in the *Washingtonian*, a mainstream news magazine, with (b) the number of such ads in *The Advocate*, at the time of the study a sexually oriented gay publication. Aside from the absurdity of drawing broad conclusions from data so limited and subject to innumerable confounding variables, the study was not peer reviewed, and its inclusion in the ideologically driven NARTH publication makes it highly suspect.

Mainstream social science rejects the stereotypes on which BSA and its supporters rely. For example, as Justice Handler observed, "[t]he myth that a homosexual male is more likely than a heterosexual male to molest children has been demolished." 97a. *See, e.g.*, Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 Pediatrics 41 (1994); Gregory M. Herek, *Stigma, Prejudice and Violence Against Lesbians and Gay Men*, in *Homosexuality: Research Implications for Public Policy* 70-71 (John C. Gonsiorek & James D. Weinrich eds. 1991) (hereinafter "Herek, *Stigma*") (citing studies); Kurt Freund et al., *Heterosexuality, Homosexuality, and Erotic Age Preference*, 26 J. Sexual Research 107, 115 (1989); Groh, et al., *The Child Molester: Clinical Observations*, 1 J. Soc. Work & Human Sexuality 129-

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[13] Features, *The Independent-London*, 1998 WL 16744044 (Aug. 10, 1998). Dr. Reisman is not a neutral social scientist. She has described homosexuality as one of "the social pathologies affecting us today" along with "sadomasochism, rape, child molestation" and other ills constituting a "destructive, downward spiral." *See* Interview, *Fight the Kinsey Fraud*, The New American, Vol. 15, No. 11, May 24, 1999, <http:// www.thenewamerican.com/tna/1999/05-24-99/vo15no11_ kinsey.htm.>

44 (1982); A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 Archives Sexual Behav. 175, 180-81 (1978). These studies definitively refute any positive association between homosexuality and pedophilia or child molestation.[14]

As explained in greater detail in the APA's *amicus* brief (at 4-7), social science also has refuted the assumption that a scout is somehow likely to become gay through exposure to gay scouts or scout leaders. *See* Alan P. Bell, et al., *Sexual*

[14] The claim of FRC (Br. at 22-25) and Public Advocate (Br. at 24-26) that gay people are more likely to be pedophiles is based on mischaracterizations of published studies and is not otherwise grounded in legitimate science. *See* APA Br. at 11 nn.39-40. Besides relying on the flawed research of Reisman, Cameron, and *The Gay Report*, *see* 16-17 & n.12, *supra*, Public Advocate misrepresents *Human Sexual Inadequacy* by William H. Masters and Virginia E. Johnson as establishing that homosexuality is caused by adult recruitment of teenagers. The cited passage purports to show no such thing. It is merely a discussion about early homosexual experiences of a subgroup of heterosexual males experiencing secondary impotence.

Similarly, FRC mischaracterizes a study of child molesters by W. L. Marshall as establishing that "30 percent of those studied admitted to having engaged in homosexual acts as adults, and 91 percent of the molesters of non-familial boys admitted to no lifetime sexual contact other than homosexual." FRC Br. at 25. In reality, of 34 men studied who molested nonfamilial boys, "2 engaged in frequent homosexual behavior with adults," a figure of 6% not 30% as FRC represents. Additionally, there is no support for FRC's statement that 91% of the molesters were homosexual; the cited figure refers to the percentage of molesters who did not also molest girls. W.L. Marshall, et. al., *Early Onset and Deviant Sexuality in Child Molesters*, 6 J. Interpersonal Violence 323, 326 (1991). FRC apparently infers that any same-sex molestation necessarily involves a homosexual molester. However, attraction to children is entirely distinct from adult sexual orientation. *See* APA Br. at 10.

Indeed, BSA itself draws a distinction between pedophilia and homosexuality. National BSA Spokesman Blake Lewis has stated that "some people assume that we do not allow homosexuals because of concerns for child abuse. They're two totally separate issues." BSA's youth protection guidelines, distributed to its leaders, concede that it is a myth that "children are at greater risk of sexual victimization from gay adults than from straight adults." JA 538.

Preference: Its Development in Men and Women 186-87 (1981); Richard R. Troiden, *The Formation of Homosexual Identities*, 17 J. Homosexuality 43, 43-73 (1989) (reviewing research literature). One's sexual orientation typically emerges by early adolescence; may indeed be determined before that by genetic and/or early developmental factors; and once established is highly resistant to change. *See* Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psych. 221 (1994); Douglas C. Haldeman, *Sexual Orientation Conversation Therapy for Gay Men and Lesbians: A Scientific Examination* in *Homosexuality: Research Implications for Public Policy* 149-60 (John C. Gonsiorek & James D. Weinrich eds. 1991). The fear that exposure to an otherwise qualified and appropriate gay scout leader will lead "impressionable" scouts to become gay (Public Advocate Br. at 26) is an expression of the most uninformed prejudice.

Studies have also shown that the children of homosexual parents (who obviously exert a greater developmental influence than a scout leader) are as psychologically well-adjusted as the children of heterosexual parents. Raymond W. Chan et al., *Psychological Adjustment among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 Child Dev. 443 (1998) (children of lesbian mothers show positive psychological development); Charlotte J. Patterson, *Children of the Lesbian Baby-Boom, Behavioral Adjustment, Self-Concepts, and Sex Role Identity* in *Lesbian and Gay Psychology* (Greene & Herek eds. 1994) (young children of gay and heterosexual families had similar social and psychological development).

Another common false assumption about gay people is that they are more "sexual" than heterosexuals. Indeed, there is frequently an "almost obsessive focus on homosexual activity," *Bowers v. Hardwick*, 478 U.S. 186, 200 (1986) (Blackmun, J., dissenting), to the exclusion of all other aspects of a gay person's life. Thus, the trial court below focused relentlessly on the "fact," extracted, without elabo-

ration, as the sole inquiry of counsel at oral argument, that Dale was "sexually active" – even though this issue played no role in Dale's expulsion. *See, e.g.*, 160a, 195a.[15]

Public Advocate's assertion (Br. at 25-26) that gay people as a group are more promiscuous than heterosexuals is unsupported by sound social science. The only study cited, Alan P. Bell & Martin S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* (1978), is based on interviews during the 1970's with gay men recruited at San Francisco bathhouses and gay bars and through other methods likely to introduce sampling bias. *Id.* at 30. Such obviously outdated and skewed data hardly speaks to the lifestyles of most gay people in 2000, much less is it a basis for judging James Dale. Moreover, sex is equally important in homosexual and heterosexual relationships. *See, e.g.*, Lawrence A. Kurdek & Patrick Schmitt, *Relationship Quality of Partners in Heterosexual Married, Heterosexual Cohabiting, and Gay and Lesbian Relationships*, 51 J. Personality & Soc. Psych. 711-20 (1986) (finding no discernible differences between married heterosexual and gay and lesbian couples). A singular focus on a gay person's sexuality fails to consider the many aspects of that person's life that do not involve sex, "making for a highly constricted image of the persons involved." *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 35 (D.C. 1987) (quoting W. Paul, *Social Issues and Homosexual Behavior: A Taxonomy of Categories and Themes in Anti-Gay Argument*, in *Homosexuality: Social, Psychological and Biological Issues* 29, 46-52 (W. Paul & J. Weinrich eds. 1982)).

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[15] FDC similarly dwells on a particular sexual practice engaged in by both homosexual and heterosexual couples (Br. at 8), and even attempts to raise the spectre of HIV infection in an obvious attempt to use fear to justify Dale's expulsion (Br. at 9). But the National Institute of Allergy and Infectious Diseases states that more than 80% of all adult HIV infections worldwide have resulted from *heterosexual* intercourse. <http://www.niaid.nih. gov/factsheets/aidstat.htm>.

Social science data convincingly establishes that BSA's implicit reliance on stereotypes about gay people to predict that Dale's conduct or speech would undermine its members' *actual* expressive purposes is not just wrong as a matter of law, but also fundamentally flawed as a matter of fact.

POINT II

NEW JERSEY'S COMPELLING INTEREST IN ERADICATING DISCRIMINATION OUTWEIGHS ANY MARGINAL IMPACT ON BSA'S FIRST AMENDMENT RIGHTS

In 1991, when New Jersey added sexual orientation to the LAD's list of prohibited grounds for discrimination, it recognized what social science and court cases have repeatedly shown – that discrimination against gay people inflicts serious harm on both society and the individual. All three branches of New Jersey's government have emphatically declared that ending this discrimination is a compelling interest. The New Jersey Supreme Court, therefore, correctly concluded that even if Dale's membership works a slight infringement on BSA's members' First Amendment rights, that "infringement is justified because it serves . . . [New Jersey's] compelling interest in eliminating discrimination' based on sexual orientation." 64a (quoting *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987)).

A. All Three Branches of Government in New Jersey Recognize the State's Compelling Interest in Eradicating Sexual Orientation Discrimination

Both this Court and the New Jersey Supreme Court have recognized that states have a compelling interest in eliminating discrimination. *See Rotary Club*, 481 U.S. at 549; *David v. Vesta Co.*, 212 A.2d 345, 359 (N.J. 1965). Both courts have also held that state anti-discrimination laws may outweigh First Amendment interests in the public accommodation setting because "acts of invidious discrimination in the distribution of publicly available goods, services, and

other advantages cause unique evils that government has a compelling interest to prevent – wholly apart from the point of view such conduct may transmit." *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984); *see* 63a.

New Jersey's Legislature, recognizing the compelling interest in eradicating discrimination, many years ago enacted the LAD to address discrimination in public accommodations, employment, and other settings. The Legislature specifically found that the State had an important interest in eradicating the harms of discrimination, including "economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm." N.J. Stat. Ann. § 10:5-3 (West 1983). New Jersey courts have consistently recognized the LAD as a powerful, positive force in the life of the state, "a shining beacon of reason and hope to those who have suffered the painful sting of prejudice." *Poff v. Caro*, 549 A.2d 900, 905 (N.J. Super. Ct. Law Div. 1987).

In 1991, the Legislature added "sexual orientation" to the prohibited grounds of discrimination covered by the LAD. In so doing, it recognized that sexual orientation discrimination is harmful and undermines New Jersey public policy, and that the state has a compelling interest in eliminating it.

Like the Legislature, New Jersey courts historically have recognized the arbitrariness of discriminating against individuals based solely on their sexual orientation. *See, e.g., One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control*, 235 A.2d 12, 18 (N.J. 1967) (rejecting argument that permitting "apparent homosexuals" to congregate at bar threatens public welfare); *Poff*, 549 A.2d at 905 ("[R]efus[al] to extend ... [LAD's] protection to homosexuals because they may be more susceptible to a dread disease would mark a return to a past of judging individuals on the basis of ignorance and prejudice.").[16]

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[16] New Jersey's judiciary has also sought to ensure equal treatment of gay people in its courts. In 1993, New Jersey's Code of Judicial Con-

(footnote continued)

Citing this history, the *Dale* court underscored that New Jersey has an "unquestionably" compelling interest in eliminating discrimination based on sexual orientation. 62a. Governor Christine Todd Whitman, in the tradition of previous New Jersey governors,[17] "applauded" the *Dale* court's repudiation of sexual orientation discrimination, noting that "[i]f the troop leader is a good leader, there's no reason to worry about his sexual preferences." Robert Hanley, *New Jersey Court Rules Boy Scouts Ban on Gays Illegal*, San Diego Union Tribune, August 5, 1999, at A-1.

The people of New Jersey have recognized the harm caused to gay people by discrimination of the type inflicted by BSA on Dale. All three branches of government in New Jersey have recognized the compelling interest in eradicating that discrimination. Nothing in the Constitution of the United States precludes or should be deemed to override this democratic judgment.

B. Social Science Data Proves that Discrimination on the Basis of Sexual Orientation Causes Both Physical and Psychological Harms

Social scientists and the courts have long recognized that prejudice causes harm to both individuals and society. In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court, relying on psychological and sociological studies, observed

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duct was amended to admonish judges not to discriminate on the basis of sexual orientation. *See* New Jersey Code of Judicial Conduct Canon 3A(4)(1993) ("A judge should be impartial, and should not discriminate because of ... sexual orientation."). In 1998, the New Jersey Supreme Court established the Task Force on Gay and Lesbian Issues to investigate the extent of sexual orientation bias in the judiciary. Elizabeth Amon, *Panel to Begin Fact-Finding on Sexual Orientation Bias*, N.J.L.J., Mar. 23, 1998, at 6.

[17] The year the Legislature added sexual orientation to the LAD, Governor Jim Florio signed an executive order prohibiting sexual orientation discrimination by state government. *See* State of New Jersey Exec. Order No. 39 (Aug. 16, 1991).

that such harm occurs and that government can and should act to remedy it. Since *Brown*, this Court, Congress, and the executive branch have all recognized and acted repeatedly to rectify the harms and injustices of racial and other discrimination. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 592-95 (1983). Moreover, this Court has recognized that such discrimination injures not only the stereotyped individual, but society as a whole:

> [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of [classes of people] forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Roberts, 468 U.S. at 625 (citations omitted). The New Jersey Supreme Court has likewise recognized these varied harms of discrimination. *David*, 212 A.2d at 359 ("[P]revention of unlawful discrimination vindicates not only the rights of individuals but also the vital interests of the State.").

The social science on which courts have relied consistently shows that discrimination injures the targets of prejudice both physically and psychologically. *See generally* Gordon Allport, *The Nature of Prejudice* (1954) (hereinafter, "Allport, *Prejudice*"); Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963); Edward E. Jones et al., *Social Stigma: The Psychology of Marked Relationships* (1984). Expressions of bias against gay people have historically been particularly intense. Gay people "have been the object of some of the deepest prejudice and hatred in American society." Gary B. Melton, *Public Policy and Private Prejudice*, 44 Am. Psychologist 933, 934 (1989). That most children internalize "acceptable" sex and gender roles from an early age further ingrains the prejudice against lesbians and gay men. *See, e.g.*, Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. &

Sexuality 133, 345 (1991) (hereinafter "Herek, *Myths*"); Commonwealth of Mass., *The Governor's Commission on Gay and Lesbian Youth, Education Report: Making Schools Safe for Gay and Lesbian Youth*, at 9 (Feb. 25, 1993) (97% of students in Massachusetts high schools reported hearing homophobic remarks at school).

Harassment and outright physical violence are the most visible and immediately harmful effects of anti-gay discrimination. In repeated surveys, an average of 44% of gay people reported that they have been subjected to threats of violence, and 80% reported verbal abuse, simply because they were perceived as gay. Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview* in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19, 20 (Gregory M. Herek and Kevin T. Berrill eds. 1992); *see also* Gregory M. Herek et al., *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay and Bisexual Adults*, J. Consulting and Clinical Psych. 1 (1999) (hereinafter "Herek, *Psychological Sequelae*") (study of 2259 lesbians, gay men, and bisexuals found approximately one-fifth of females and one-quarter of males experienced bias-related criminal victimization).[18]

The phenomenon of "gay bashing," in which people known or perceived to be gay are subjected to brutal, sometimes fatal, beatings, has been well documented. Brian Magruder et al., *The Relationship Between AIDS-Related Infor-*

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[18] Crime statistics confirm this picture. *See* FBI Uniform Crime Reporting Program, *Hate Crime Statistics 1997* (listing 1,375 offenses committed against gay, lesbian, and bisexual people in the United States, including three murders, five rapes, and 550 assaults); Nat'l Coalition of AntiViolence Programs, *Report: Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998*, at 10-15 (Apr. 6, 1999) (anti-gay violence resulting in murder skyrocketed by 136%, serious assaults were up 12%, inpatient hospitalizations rose by 108%). Many gay and lesbian crime victims are further victimized when they report the crime to the police. *Id.* at 21-24 (20% of people reporting anti-gay incidents were verbally and/or physically abused by police).

mation Sources and Homophobic Attitudes: A Comparison of Two Models, 25 J. Homosexuality 47, 48 (1993); Carol Ness, *Gay Bashing Reportedly More Violent in Bay Area*, San Francisco Examiner, Mar. 12, 1996, at A3. Growing awareness of violence against gay people has spurred passage of civil rights legislation in many jurisdictions. *See In re Joshua H.*, 17 Cal. Rptr. 2d 291 (Cal. Ct. App. 1993); *People v. Grupe*, 532 N.Y.S.2d 815, 819 (N.Y. Crim. Ct. 1988).

Three recent high profile incidents have graphically illustrated the most heinous form of gay-bashing: torture and murder because of sexual orientation. In October 1998, Matthew Shepard, a University of Wyoming freshman, died after he was tied to a post, beaten, burned, and left bleeding and unconscious in near freezing temperatures, because he was gay. *See* Howard Chua-Eoan, *That's Not a Scarecrow: A Brutal Assault in Wyoming and a Rise in Gay Bashing Fuel the Debate Over Sexual Orientation*, Time, Oct. 19, 1998, at 72. In March 1999, Billy Jack Gaither was stuffed into the trunk of a car, driven fifteen miles to an isolated area, and beaten to death with an ax handle, because he was gay. Sylvester Monroe, *A Burning in Alabama, The Savage Murder of a Gay Man Stuns a State Where Hate Crimes Do Not Protect Homosexuals*, Time, Mar. 15, 1999, at 47. Finally, in July 1999, Private First Class Barry Winchell was beaten to death by a fellow soldier after he "repeatedly experienced taunting with antigay slurs and ... superiors did not intervene." Steven Lee Meyers, *Army to Expand Inquiry in Death of Gay*, N.Y. Times, Jan. 10, 2000, § A, at 13.

Overt physical victimization often has an equally severe psychological impact. Herek, *Stigma*, at 74. The harmful effects of prejudice generally include "considerable distress, including feelings of personal loss, rejection, humiliation, and depression; agitation, restlessness, and sleep disturbances; somatic symptoms such as headaches and diarrhea; and deterioration in personal relationships." Herek, *Myths*, at 147; *see also* Linda D. Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J.

Interpersonal Violence 366 (1990); Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. Health & Soc. Behav. 38 (1995). Being the target of discrimination also leads to a sense that life is unfair and unjust, a persistent sense of vulnerability, and the feeling of being punished for being gay. Herek, *Stigma*, at 60, 74; *see also* Herek, *Psychological Sequelae*, at 1 (recent hate crime victims displayed significantly more symptoms of depression, anger, anxiety, and post-traumatic stress).[19]

Self-identified gay and lesbian young people, who often struggle with acceptance of their sexual orientation without any social support structure, also attempt suicide at a disturbing rate.[20] Curtis D. Proctor & Victor K. Groze, *Risk Factors for Suicide Among Gay, Lesbian and Bisexual Youths*, 39 Social Work 504-13 (Sept. 1994) (of 276 self-identified as gay, lesbian, or bisexual, 40.3% had attempted suicide); Joyce Hunter, *Violence Against Lesbian and Gay Male Youths*, 5 J. Interpersonal Violence 295-300 (Sept. 1990) (in study of 500 youths seeking services at community based agency targeting lesbian and gay male teenagers, 40% had experienced violent physical attacks, 46% of which were gay-related, and 41% of girls and 34% of boys reporting violent assaults had tried to kill themselves); Paul Gibson, *Gay Male and Lesbian Youth Suicide* in *Report of the Secretary's Task Force on Youth Suicide, Volume 3: Prevention and Interventions* (U.S. Dep't of Health & Human Servs. 1989) (gay youth are two to three

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[19] Anti-gay bias may also have negative consequences for heterosexual people. Herek, *Stigma*, at 60, 75 ("Because of the stigma attached to homosexuality, many heterosexuals restrict their own behavior in order to avoid being labeled gay .... Antigay prejudice also interferes with same-sex friendships. Males with strongly antigay attitudes appear to have less intimate nonsexual friendships with other men than do males with tolerant attitudes.").

[20] In fact, BSA learned that Dale was gay because of his participation in a conference that "addressed the unique problems faced by homosexual teenagers struggling to come to terms with their sexual orientation, including an alarmingly high incidence of suicide attempts." 89a n.4.

times more likely to attempt suicide and may comprise up to 30% of youth suicides annually).

Gay people who do not conceal their orientation are also widely subjected to discrimination in jobs, housing, education, access to public recreation facilities, and in many other settings. *See, e.g.*, Herek, *Stigma* at 60-61 (nearly half of gay respondents in survey reported economic or social discrimination). Even where gay people have not been so excluded, they have often been forced by prejudice to remain invisible — in the proverbial closet — to avoid being subjected to the physical, emotional, and economic traumas described above. *See id.* at 74-75. Beyond its psychic toll, this invisibility keeps gay and heterosexual people apart as effectively as a segregated city bus. As late as the mid-1990s, this psychological ghettoization was still so widespread that most heterosexual people believed, contrary to statistical likelihood, that they did not know anyone gay in their daily lives. *See* Gregory M. Herek & John P. Capitanio, *"Some of My Best Friends": Intergroup Controversy, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 Personality & Soc. Psych. Bulletin 412, 415 (1996) (31.3% report knowing someone who is gay or lesbian); Alan L. Ellis & R. Brent Vasseur, *Prior Interpersonal Contact with and Attitudes Towards Gays and Lesbians in an Interviewing Context*, 25 J. Homosexuality 31, 35 (1993) (20% have close friend or relative whom they know to be homosexual).

Whether or not they hide their orientation, gay people "must continually confront societal belief systems which strongly contradict the value of their personhood," Geraldo Lima et al., *The Relationship Between Homophobia and Self-Esteem in Gay Males with AIDS*, 25 J. Homosexuality 69, 74 (1993), and that may have a severe impact on their self-esteem. Some may even internalize the prejudice, that is, their "self-concept will match . . . [their] perception of how others respond." John A. Jacobs & William H. Tedford, Jr., *Factors Affecting the Self-Esteem of the Homosexual Individual*, 5 J. Homosexuality 373, 373 (1980) (citations omitted). These

psychological injuries harm society by depriving it of the full contributions of all of its citizens.

C. The Application of the LAD to Eradicate Sexual Orientation Discrimination Helps Remedy the Harms Suffered by Gay People

The LAD has been a powerful weapon for reducing the harms of discrimination detailed above. Its broad application to remedy sexual orientation discrimination is necessary to effectuate fully the Legislature's goal of eradicating such harms.

Civil rights legislation has had a salutary impact on the lives of racial, ethnic, and religious minorities, reducing violence, opening economic opportunities, and decreasing many of the other ill effects of prejudice. *See Harris v. Marsh*, 679 F. Supp. 1204, 1220 (E.D.N.C. 1987). ("[T]his nation can generally point with some pride to the remarkable progress that has been made in the last four decades in eliminating the effects of past discrimination. Some of the improvement is directly attributable to anti-discriminatory laws passed by Congress and the state legislatures. . . ."). It is no exaggeration to say that civil rights laws generally have saved lives and have opened new horizons of opportunity for thousands of people. Such laws have had another effect that is less readily apparent but no less important in reducing the long-term harms of discrimination: bringing people together and reducing the ignorance and fear that lead to prejudice and hatred.

Social scientists have long understood that one of the root causes of prejudice is simple ignorance. When classes of people are kept apart by law or custom, individuals in one group lack exposure to individuals in the other. In the absence of first-hand knowledge, myths and stereotypes may take on undue credence and fear of the different or unknown may grow into hatred for members of the alien group. Allport, *Prejudice*, at 264-68. Conversely, familiarity tends to dispel prejudice. For example, a person who has gay colleagues, friends, or relatives is substantially less

likely to hate gay people and to harbor false stereotypes about the character and behavior of gay people generally. *See* Herek, *Stigma*, at 76-77 (citation omitted). Thus, in addition to preventing violence and discrimination against individuals, and without targeting expression or the ability to hold contrary beliefs and practices, the LAD helps reduce harmful biases in the long run by helping to reduce economic and social segregation.

Here, the LAD serves the exact purpose for which it was created: It prohibits BSA – which plays such a central role in so many communities – from relying on discredited myths and stereotypes to justify excluding gay scouts simply because of their status. BSA's members do not associate to express the view that homosexuality is immoral, and there is no basis to assume that a gay scout will act in ways that undermine the views and activities that actually do bring scouting's members together. But even if James Dale's mere continued presence, after a dozen years of sterling service, would somehow have some small impact on BSA's First Amendment rights, that intrusion is far outweighed by New Jersey's compelling interest in eradicating sexual orientation discrimination. *See Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548-49 (1987) ("compelling interest in eliminating discrimination" outweighs "some slight infringement" on associational rights). The court below properly so held.

CONCLUSION

The judgment of the New Jersey Supreme Court should be affirmed.

Dated: March 29, 2000

Respectfully submitted,

MARVIN E. FRANKEL
(Counsel of Record)

JEFFREY S. TRACHTMAN
KERRI ANN LAW
Kramer Levin Naftalis &
Frankel LLP
919 Third Avenue
New York, NY 10022

Of Counsel:
WILLIAM S. SINGER
Singer & Fedun
2230 Route 206
P.O. Box 134
Belle Mead, NJ 08502

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In The

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioner,

v.

JAMES DALE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of New Jersey

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

WILLIAM G. PAUL*
President
American Bar Association
JAMES E. HOUGH
ANDREW J. FIELDS
ROBERT H. MURPHY
STEPHEN M. TANNENBAUM
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-5215

Counsel for Amicus Curiae
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION PRESENTED

Whether, in reliance on First Amendment expressive association claims, a federally chartered unselective membership association found to be a "place of public accommodation" under a state non-discrimination statute may lawfully expel a member in contravention of that statute solely because of his sexual orientation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. This Court's Precedents Have Established An Appropriate Framework For Balancing The Compelling State Interest In Eradicating Discrimination Against Competing First Amendment Claims By Private Associations, And The Court Below Properly Applied Those Precedents In This Case 5

A. The *Roberts* Framework Requires Close Judicial Scrutiny Of Assertions That Compliance With Anti-Discrimination Laws Seriously Burdens Constitutional Rights Of Expressive Association 5

B. The New Jersey Supreme Court Properly Held That Compliance With New Jersey's Law Against Discrimination Does Not Unconstitutionally Burden BSA's Right Of Expressive Association 9

1. There Is No Persuasive Evidence That BSA Holds Any Genuine, Non-Pretextual View Regarding Homosexuality, Or That Any Such View Is A Central Or Significant Element Of The Organization's Expressive Purpose 9

TABLE OF CONTENTS – Continued

Page

2. Eradicating Discrimination In Public Accommodations, Including Discrimination Based On Sexual Orientation, Is A Compelling State Interest 12

3. The Holding Below Is Consistent With This Court's Decision In *Hurley* 16

II. Failure To Scrutinize Petitioner's First Amendment Claims As *Roberts* Requires Not Only Would Hinder New Jersey's Laudable Effort To Eradicate Sexual Orientation Discrimination, But Also Would Jeopardize States' Efforts To Combat Other Forms Of Discrimination 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987) 7, 8

Bob Jones Univ. v. United States, 461 U.S. 574 (1984) 14

Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1998) ..... *passim*

Dale v. Boy Scouts of America, 706 A.2d 270 (N.J. Super. Ct. App. Div.), *aff'd*, 734 A.2d 1196 (N.J. 1998) 7

Elks Lodges #719 (Ogden) and # 2021 (Moab) v. Department of Alcoholic Beverage Control, 905 P.2d 1189 (Utah 1995) 17, 20

Fraternal Order of Eagles, Inc. v. City of Tucson, 816 P.2d 255 (Ariz. Ct. App. 1991) 20

Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1 (D.C. 1987).....14, 15

Hart v. Cult Awareness Network, 16 Cal.Rptr.2d 705 (Cal. App. 2d Dist. 1993) 8, 9

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).....16, 17

Isbister v. Boys' Club of Santa Cruz, Inc., 707 P.2d 212 (Cal. 1985) 20

Lloyd Lions Club v. Int'l Ass'n of Lions Clubs, 724 P.2d 887 (Ore. App. 1986) 19

Mailand v. Girl Scouts of the U.S.A., No. 93-C 1994 U.S. Dist. LEXIS 8290 (W.D. Mich. Apr. 11, 1994) 11

TABLE OF AUTHORITIES – Continued

Page

New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988) 7, 8

Roberts v. United States Jaycees, 468 U.S. 609 (1984) ..*passim*

Romer v. Evans, 517 U.S. 620 (1996) 2, 14

United States v. Seeger, 380 U.S. 163 (1965).....7

INTEREST OF AMICUS CURIAE

The American Bar Association, with more than 400,000 members across the United States, is the leading national membership organization of the legal profession.[1] Its members include attorneys in private practice, attorneys for nonprofit organizations and for corporations, prosecutors, public defenders, legislators, law professors and students, and non-lawyer associates in related fields.[2]

The Association has adopted numerous policies that seek to rid the legal profession, the judicial process, and the laws of this country of invidious discrimination in its various forms, including bias against gay men, lesbians, and bisexuals. Among these policies is one adopted by the ABA House of Delegates in February 1989 "urg[ing] the Federal government, the states and the local governments to enact legislation . . . prohibiting discrimination on the basis of sexual orientation in employment, housing

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[1] This brief is filed with the consent of both petitioners and respondents, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, *amicus curiae* ABA states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

and public accommodations." The anti-discrimination law sought to be enforced here is precisely the type of legislation advocated by the Association. In 1995, the Association submitted an *amicus curiae* brief to this Court in the case of *Romer v. Evans*, Docket No. 94-1039, to oppose a restriction on the ability of political subdivisions of a state to adopt such anti-discrimination measures.

The Association also has addressed bias, including bias based on sexual orientation, in the courts, within the profession itself, and in legal education. In 1990, for example, the House of Delegates adopted Canon 3B(5) of the Model Code of Judicial Conduct, requiring judges (and those subject to the judges' direction and control) to refrain from words or conduct that "manifest bias or prejudice, including but not limited to bias or prejudice based upon race, religion, national origin, age, disability, sexual orientation, or socioeconomic status." The judicial canons also bar judges from membership in organizations that engage in discrimination.

As a private membership organization, the Association has a direct and significant concern about discrimination in public accommodations. In 1983, for example, the Association endorsed amendments to Title II of the Civil Rights Act of 1964 to include private clubs that derive substantial revenue from business sources. In 1988, the Association adopted a policy urging its members not to hold business or professional functions at clubs that discriminate.

The common thread running through all these policy statements is that invidious discrimination, including discrimination on the basis of sexual orientation, should be eliminated in all civic and professional settings.

At the same time, the members of the Association share a deep professional and philosophical commitment to the principle of freedom of expression. Many of those members have used their skills as advocates in defense of that principle, often at great personal cost, and the Association remains committed to protecting the First Amendment whenever genuinely expressive activities are at stake. In enacting its anti-discrimination policies, however, the Association has affirmed its belief that the First Amendment does not deny the states the means to guarantee to all their citizens the full benefits of participation in political, economic, and cultural life.

For all of these reasons, the Association has a strong interest in the matter before the Court.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court, having found that Boy Scouts of America ("BSA") is a "public accommodation" under the New Jersey Law Against Discrimination ("LAD"), properly applied the principles of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), to determine that BSA cannot bar individuals from membership on the basis of sexual orientation.

In *Roberts*, this Court fashioned an effective and comprehensive framework for weighing the compelling government interest in eradicating discrimination against competing First Amendment claims asserted by private associations. The *Roberts* framework has enabled courts throughout the United States to protect First Amendment rights without jeopardizing the equally important efforts by the states and the federal government to combat the corrosive effects of discrimination.

A key component of the *Roberts* framework requires a group claiming First Amendment immunity from generally applicable anti-discrimination laws to demonstrate that a protected First Amendment interest is seriously burdened by the law as applied. 468 U.S. at 626. Where the claim concerns the right of expressive association, a court must identify the expressive purposes that bring the group together, assess whether application of the anti-discrimination law at issue imposes a serious burden on the association's expressive activity, and then determine whether any such burden is justified by a compelling state interest unrelated to the suppression of ideas. By taking a hard look at the *bona fides* of the First Amendment claim, the court is able to dispose of weak and pretextual assertions while preserving First Amendment values against genuine encroachment. Without such close scrutiny, efforts to combat invidious discrimination would be blocked by the group's talismanic incantation of First Amendment protection to shield its discriminatory practices.

Here, the New Jersey Supreme Court properly applied the *Roberts* framework by first examining BSA's expressive message, and then determining that enforcing

the LAD does not impose a serious burden on that message.

Reversal of the careful decision below, which appropriately followed this Court's controlling precedents, would have serious and troubling consequences for efforts to combat discrimination of all kinds.

ARGUMENT

I. This Court's Precedents Have Established An Appropriate Framework For Balancing The Compelling State Interest In Eradicating Discrimination Against Competing First Amendment Claims By Private Associations, And The Court Below Properly Applied Those Precedents In This Case.

A. The *Roberts* Framework Requires Close Judicial Scrutiny Of Assertions That Compliance With Anti-Discrimination Laws Seriously Burdens Constitutional Rights Of Expressive Association.

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court addressed freedom of expressive association claims advanced by the Jaycees in its effort to avoid admitting women as required by the Minnesota Human Rights Act. The Jaycees, an all male, private membership organization, was, like BSA, dedicated to worthy civic, patriotic, educational, and personal goals. *See id.* at 612-13. This Court noted the potential threat to the First Amendment right of expressive association embodied in "a regulation that forces the group to accept members that it does not desire," but observed that "[t]he right to

associate for expressive purposes is not . . . absolute." *Id.* at 623. The Court continued:

> Infringements on [the right to expressive association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.

Id. In applying the least restrictive means analysis, the Court held that "the Jaycees has failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." *Id.* at 626. In its inquiry, the Court identified the expressive purposes that brought the Jaycees together, and then determined whether application of the anti-discrimination statute unduly burdened those expressive purposes. The Court did not accept the Jaycees' assertions at face value, but rather looked to the record for evidence that the admission of women would seriously burden the Jaycees' protected expression. After careful review of the facts, the Court found "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to . . . disseminate its preferred views." *Id.* at 627.

The Court rejected the Jaycees' claim that the very fact that the Jaycees was all male was itself an expressive statement, holding that "any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best." *Id.* Significantly, the Court firmly refused to accept the Jaycees' conclusory claim based on sexual stereotyping that admission of

women would change the expressive message of the Jaycees. *Id.* at 628.

This Court reaffirmed the *Roberts* approach in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and in *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1988). In making its determinations, this Court required the membership organizations to demonstrate that complying with a non-discrimination statute would seriously burden their members' expressive purpose in coming together. The Court looked behind the organizations' bare assertions of a First Amendment violation to inquire into their actual expressive purposes and the evidentiary bases for their claims that their organizations' expressive activities would be harmed. Such inquiry into the character and content of the core messages that bring an association together is necessary to prevent the "scuttling" of a valid law by pretextual assertions concealed as First Amendment claims. *See Dale v. Boy Scouts of America*, 706 A.2d 270, 287 (N.J. Super. Ct. App. Div.), *aff'd*, 734 A.2d 1196 (N.J. 1998).

Roberts does not require a reviewing court to judge the *validity* of an association's expressive purpose. It requires only that the court determine whether expression actually is burdened in any significant way by compliance with the anti-discrimination law. Thus, the inquiry is akin to that undertaken in the free exercise context, where a court must inquire, as a threshold question, into whether asserted religious beliefs are sincerely held. *See United States v. Seeger*, 380 U.S. 163, 184 (1965). By contrast, Petitioner's insistence that a reviewing court "must give deference to an expressive organization's

characterization of its own beliefs," Pet. Br. at 26, would force courts to accept fabricated statements of belief as license to discriminate.

In *Roberts, Rotary International,* and *New York Club Association,* this Court concluded that the burden, if any, of an anti-discrimination law on the organizations' respective expressive purposes was not significant enough to outweigh the governmental interest. Application of the *Roberts* test does not, however, invariably result in enforcement of an anti-discrimination statute because the outcome of the analysis depends upon the facts of each case. In appropriate situations, courts have permitted private membership organizations to maintain restrictive membership policies where First Amendment freedoms were genuinely and seriously burdened by anti-discrimination statutes.

For example, in *Hart v. Cult Awareness Network,* 16 Cal.Rptr.2d 705 (Cal. Ct. App. 1993), the Court of Appeal of California completed a thorough analysis relying on *Roberts* and *Rotary International* before concluding that the Cult Awareness Network ("CAN") could exclude members of the Church of Scientology without violating California's Unruh Civil Rights Act. *Id.* at 705-6.

Applying the *Roberts* framework, the *Hart* court ruled that requiring CAN to admit Scientologists as members would "impede [CAN's] ability to engage in protected activities and to disseminate its preferred views," and therefore would seriously infringe upon CAN's freedom of expressive association pursuant to *Roberts. Id.* at 712.

As advocates, the members of the American Bar Association are deeply committed to First Amendment

freedoms, including the right of expressive association. In the case before this Court, however, there is simply no showing comparable to that in *Hart* that enforcement of the LAD would seriously infringe upon BSA's freedom of expressive association. Accordingly, the decision below should be affirmed.

B. The New Jersey Supreme Court Properly Held That Compliance With New Jersey's Law Against Discrimination Does Not Unconstitutionally Burden BSA's Right Of Expressive Association.

The New Jersey Supreme Court properly followed the *Roberts* framework by first examining BSA's expressive message, and then determining that the application of the LAD to prohibit its dismissal of Dale did not impose a serious burden on that message.

1. There Is No Persuasive Evidence That BSA Holds Any Genuine, Non-Pretextual View Regarding Homosexuality, Or That Any Such View Is A Central Or Significant Element Of The Organization's Expressive Purpose.

In its review of the record, the New Jersey Supreme Court found that:

> [BSA's] ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating any views

> on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality.

Dale v. Boy Scouts of America, 734 A.2d 1196, 1223 (N.J. 1998).[3]

BSA concedes that it does not express overt views against homosexuality in its official materials, but rather that any such policy is a tacit one. *See* Pet. Br. at 5 ("Official Scouting materials addressed to the boys do not refer to homosexuality or inveigh against homosexual conduct"); *id.* at 21 ("Boy Scouting does not convey an explicit 'anti-gay' message to the boys under its care"). Similarly, BSA concedes that its view on homosexuality is, at most, incidental to the organization's beliefs. *See* Petition for Writ of Certiorari, at 24 ("Boy Scout members associate in order to promote a certain set of moral values, of which the view that homosexuality is immoral *is merely a small part.*") (emphasis added). These admissions belie BSA's contention here that a view against homosexuality is a central or significant part of BSA's expressive purpose, a contention that is not rescued by an unpublished BSA "position paper" or by statements against homosexuality published by BSA in connection with other litigation, *see* Pet. Br. at 5-6; *Dale*, 734 A.2d at 1204 n.4. Similarly, there has been no credible evidence

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[3] The courts below also found BSA's claim that opposing homosexuality is an important part of its expressive purpose to be inconsistent with the fact that BSA accepts significant amounts of financial support and sponsorship from churches and other organizations that strenuously disagree with BSA's discrimination on the basis of sexual orientation. *Dale*, 734 A.2d at 1224-25; 706 A.2d at 290-91.

presented to support BSA's claim that the values of being "morally straight" and "clean" expressed in the Scout Oath and the Scout Law, respectively, pertain at all to sexuality, much less homosexuality, as opposed to such virtues as "reverence, patriotism, and a desire for self-improvement." *See Roberts* at 636 (O'Connor, J., concurring); *Dale*, 734 A.2d at 1223-25.

The New Jersey Supreme Court's conclusions in this regard are consistent with Justice O'Connor's observation in her concurrence in *Roberts* that "[e]ven the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement." *Roberts* at 636 (O'Connor, J., concurring). Indeed, the New Jersey Supreme Court acknowledged that "Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members." *Dale*, 734 A.2d at 1223. But, as that court noted, encouraging "moral development" does not reflect a specific view on homosexuality, any more than it does on abortion, the use of contraceptives, divorce, euthanasia, or myriad other controversial moral issues on which BSA has no stated position.[4]

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[4] In fact, the Girl Scouts of the U.S.A. has an explicit policy of non-discrimination with respect to sexual orientation. *See Mailand v. Girl Scouts of the U.S.A.*, No. 93-CV-949, 1994 U.S. Dist. LEXIS 8290 (W.D. Mich. Apr. 11, 1994).

2. Eradicating Discrimination In Public Accommodations, Including Discrimination Based On Sexual Orientation, Is A Compelling State Interest.

New Jersey enacted its Law Against Discrimination in 1945. The statute was based in part on a finding by the state legislature that "because of discrimination, people suffer personal hardships, and the State suffers a grievous harm." These personal hardships were found to include:

> [E]conomic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems . . . .

N.J. Stat. Ann. § 10:5-3 (West 1999) (Finding and Declaration of Legislature).

The LAD was intended to combat racial and other forms of discrimination that were recognized at the time of its enactment. In the decades since then, amendments have been adopted to prohibit newly recognized forms of discrimination. New Jersey amended the LAD to cover discrimination based on sexual orientation in 1991, just two years after the ABA adopted its policy encouraging the enactment of such laws. *Id.* § 10:54. The amendment was an "implicit recognition" by the legislature that the "archaic" and "stereotypical" notions so deplored in *Roberts* with respect to gender discrimination, *see Roberts*,

468 U.S. at 625, also "cannot be countenanced" with regard to sexual orientation discrimination. *Dale*, 734 A.2d at 1227 (quoting 706 A.2d at 287). The New Jersey legislature explicitly found that discrimination in places of public accommodation, including discrimination on the basis of sexual orientation, is a matter "of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free and democratic State. . . . " N.J. Stat. Ann. § 10:5-3.

In amending its anti-discrimination law to include prohibitions against sexual orientation discrimination, New Jersey embraced a growing national movement toward recognition that discrimination based on sexual orientation is as debilitating and destructive as other forms of discrimination and that these different manifestations of prejudice are closely linked. *See* Gordon W. Allport, *The Nature of Prejudice* (1954); Albert D. Klassen et al., *Sex and Morality in the U.S.* 206-24 (Hubert O'Gorman ed. 1989). At least nine States, the District of Columbia, 74 cities, and 18 counties have enacted laws that prohibit sexual orientation discrimination in public accommodations. *See* Wayne Van Der Meide, National Gay and Lesbian Task Force, Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States 4-5, 25-82 (2000). Some 1,600 employers, including corporations, law firms, universities, professional associations (including the American Bar Association), and governmental units, have adopted anti-discrimination policies that cover sexual orientation discrimination in employment.

See Human Rights Campaign, WorkNet Employer Database (March 20, 2000) <http://hrc.org/worknet>.

Indeed, this Court itself has recognized that laws against discrimination based on sexual orientation are equal in kind and in legal dignity to anti-discrimination laws benefiting other classes, *see Romer v. Evans*, 517 U.S. 620, 631 (1996), and has held that a state may not constitutionally prohibit local governments from enacting such laws. *Id.* at 635-36; *see also* Brief of American Bar Ass'n, Amicus Curiae, in Support of Petitioners, *Romer* (Docket No. 94-1039).

This Court long has recognized that eradication of discrimination is a compelling state interest. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1984) (race); *Roberts*, 468 U.S. at 623-26 (gender). The District of Columbia Court of Appeals has reached the same conclusion with regard to discrimination based on sexual orientation. *See Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 33 (D.C. 1987) (en banc). In concluding that the state interest was compelling, the court in *Gay Rights Coalition* noted that the District of Columbia Council had:

> determined that a person's sexual orientation, like a person's race and sex, for example, tells nothing of value about his or her attitudes, characteristics, abilities or limitations. It is a false measure of individual worth, one unfair and oppressive to the person concerned, one harmful to others because discrimination inflicts a grave and recurring injury upon society as a whole. . . . Only by eradicating discrimination based on sexual orientation, along with all other forms of discrimination unrelated to individual merit, could the District eliminate recurrent personal injustice and build a society which encourages and expects the full contribution of *every* member of the community in all their diversity and potential.

Id. at 32 (emphasis in original).

As this Court has noted, discrimination "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625. Such discrimination takes many forms and causes many different kinds of harm. In seeking to distinguish *Roberts*, Petitioners suggest that the harm is greater where the purpose of the association is primarily commercial (such as the Jaycees) rather than primarily expressive: "Participation in such business and professional organizations is important to equality of opportunity in the commercial marketplace, and the First Amendment protection of their exclusionary practices is correspondingly lower." Pet. Br. at 35.

Yet this ignores the serious and perhaps irreparable harm that is done to young men who are arbitrarily excluded by BSA. They not only lose the opportunity to develop the kinds of skills that are conveyed as a part of the scouting experience, but also are unable to participate with their peers in what for most communities in this country is an important rite of passage to adulthood. The fact that they may not derive immediate commercial advantage from this activity does not lessen the deprivation to which they are subjected.

The court below examined this theme in detail as part of its determination that, under the New Jersey law,

BSA deprived Dale of the benefits of a "public accommodation." The court found that, among other advantages, BSA "indirectly benefits its members through the 'advantage' of a large influential network, including Air Force Academy, Annapolis and West Point graduates, Rhodes Scholars, astronauts, United States Presidents and Congressmen, as well as businessmen and community leaders." *Dale*, 734 A.2d at 1218. The court also found that BSA maintains and benefits from close relationships with numerous federal, state, and local government entities. *Id.* at 1211-13. BSA affords its members the chance to participate in those relationships, to become familiar with important institutions of self-government, and to develop a confident sense of civic involvement that can serve as the foundation for a lifetime of engaged citizenship.

All in all, BSA is an important training ground for leaders in commerce, politics, and society generally. It is precisely to keep such gateways to opportunity unbarred by prejudice that the American Bar Association has adopted its policies against discrimination and, in keeping with those policies, supports enforcement of the LAD in this case.

3. The Holding Below Is Consistent With This Court's Decision In *Hurley*.

As the New Jersey Supreme Court correctly held, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), is a "pure speech" case that does not control the outcome here. In *Hurley*, the Court held that the organizers of a parade – a quintessential and historically venerated form of speech, *see id.* at 568-69 – could not be forced by anti-discrimination laws to permit marchers to carry banners proclaiming gay rights

messages at odds with the organizers' beliefs.[5] A contrary result would have required the parade organizers "to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own." *Id.* at 578.

Apart from such "pure speech" contexts, however, courts have been unwilling to apply *Hurley* to cases in which the First Amendment is invoked as a license for discriminatory practices. For example, in *Elks Lodges #719 (Ogden) and #2021 (Moab) v. Department of Alcoholic Beverage Control*, 905 P.2d 1189, 1196 (Utah 1995), the Utah Supreme Court rejected a fraternal organization's attempt to use *Hurley* to defend its exclusion of women in violation of the Utah Civil Rights Act. As the Utah court recognized, "*Hurley* addressed only the right to control the content of a parade's 'message' under the First Amendment's guarantee of free speech; it specifically did not address the issue of participation of protected groups in the parade." *Id.* The court concluded that "*Hurley* has no application to the issues presented by [a public accommodation's] decision to wholly exclude an entire class of society from participation." *Id.*

Similarly, in the decision below, the New Jersey Supreme Court correctly ruled that *Hurley* was inapplicable, finding that "Dale's status as a scout leader is not

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[5] It is notable that even in this context, the Court found the Massachussetts statute prohibiting sexual orientation discrimination a legitimate exercise of "the State's usual power . . . when a legislature has reason to believe that a given group is the target of discrimination . . .." 515 U.S. at 572.

equivalent to a group marching in a parade," and that "Boy Scout leadership [is not] a form of 'pure speech' akin to a parade." *Dale*, 734 A.2d at 1229. The court recognized that enforcement of the LAD would not force BSA to endorse homosexuality, or, indeed, to make any statement at all on that or any other subject. *Id.*

Accordingly, even if the issue of homosexuality implicated BSA's right of expressive association, the organization's exclusionary policies bear no rational relationship to the effectuation of this expressive purpose. Dale did not seek to use his role in the organization to advance an expressive purpose of his own that diluted or undermined the message that the organization was attempting to convey. Although Petitioner attempts to paint Mr. Dale as an "activist" who seeks to use a position in Boy Scouts as a "bully pulpit" to promote or celebrate homosexuality, *see* Pet. Br. at 22, 24, in fact none of the statements Petitioner attributes to Mr. Dale was made until after his dismissal by BSA, and none was made in a BSA venue or in the course of Boy Scout activities. *See Dale*, 734 A.2d 1204-05. Indeed, Petitioner concedes that at the time it expelled Mr. Dale, he was away at college and had "very little involvement" with BSA at all. Pet. Br. at 8. Petitioner learned of Mr. Dale's homosexuality and campus-based gay rights activities from a newspaper article, *id.*, *not* from anything Mr. Dale said or did while engaged in BSA activities. In the absence of any credible evidence that Mr. Dale attempted to impose a message upon BSA, BSA's refusal to tolerate his mere presence in the organization is an unjustifiable departure from the requirements of the law.

II. Failure To Scrutinize Petitioner's First Amendment Claims As *Roberts* Requires Not Only Would Hinder New Jersey's Laudable Effort To Eradicate Sexual Orientation Discrimination, But Also Would Jeopardize States' Efforts To Combat Other Forms Of Discrimination.

The American Bar Association is committed to the elimination of discrimination in *all* its forms. *See, e.g.*, Canon 3B(5), discussed above, which is one of numerous Association policies that seek to address bias or prejudice, including bias or prejudice based on sexual orientation, in a comprehensive fashion.

Similarly, the state interest embodied in the LAD should be seen as an undifferentiated whole: the State of New Jersey has a compelling interest in eliminating discrimination in the many forms enumerated in the statute; it does not have a stronger or more compelling interest in combating some forms than in combating others.

For the same reason, there is more at stake in this or any other civil rights case than the rights of the particular group members involved in the matter at hand. What this Court decides will affect not only James Dale and the community to which he belongs, but also those belonging to other communities whose rights have found vindication through the methodology enunciated in *Roberts*.

Since the *Roberts* decision, state courts consistently have declined the invitation to read into the Court's approach a license for private membership organizations to engage in exclusionary practices upon the mere invocation of the freedom of expressive association. *See, e.g., Lloyd Lions Club v. Int'l Ass'n of Lions Clubs*, 724 P.2d 887

(Ore. App. 1986) (rejecting claim of national membership organization that application of Oregon Civil Rights Act to require admission of women violated members' right to freedom of expressive association); *Fraternal Order of Eagles, Inc. v. City of Tucson*, 816 P.2d 255, 258 (Ariz. Ct. App. 1991); *Elks Lodges #719 (Ogden) and #2021 (Moab) v. Dep't of Alcoholic Beverage Control*, 905 P.2d 1189, 1196 (Utah 1995). *See also Isbister v. Boys' Club of Santa Cruz, Inc.*, 707 P.2d 212, 214 (Cal. 1985) (application of California Civil Rights Act to require local boys club to admit girls implicates a compelling state interest and does not substantially infringe on the freedom of expressive association).

Like the New Jersey Supreme Court in the decision below, these state tribunals diligently applied the *Roberts* framework, sensitively balancing the competing claims presented when an anti-discrimination statute is asserted against a private membership organization.

Should the Court now reject the *Roberts* approach, or reinterpret it to permit a less exacting review of First Amendment claims of the kind that Petitioner asserts, it would create a dangerous and unnecessarily broad exception to laws that are the primary means by which the states have chosen to redress discrimination within their borders.

CONCLUSION

The judgment of the New Jersey Supreme Court should be affirmed.

Respectfully Submitted,

WILLIAM G. PAUL*
President
American Bar Association
JAMES E. HOUGH
ANDREW J. FIELDS
ROBERT H. MURPHY
STEPHEN M. TANNENBAUM
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5215

Counsel for Amicus Curiae
**Counsel of Record*

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND
MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

David T. Goldberg
227 Garfield Place
Brooklyn, NY 11215

DENNIS C. HAYES
Counsel of Record
N.A.A.C.P.
4805 Mt. Hope Drive
Baltimore, MD 21215
(410) 486-9191

Attorneys for Amicus Curiae

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

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Table of Contents

Statement of interest 1

Summary of Argument 3

ARGUMENT 7

I. The Existing Framework Provides Strong Protection for Associational Interests 7

A. The Need for a Balance 7

1. The Importance of Private Associations .. 8
2. The Anti-Discrimination Principle 9

B. The Present Framework 10

1. Constitutional Protection of Expressive Association 10

2. Further Safeguards 12

II. This Court's Decisions Offer No Support for the Broad Right to Discriminate BSA Asserts 15

A. Under this Court's Cases, Discrimination is Not "Speech" 16

B. Roberts – as Decided by This Court – Does Not Assist Petitioners 19

III. The Court Should Not Reinterpret the Constitution so as to Broadly License Civic Groups to Discriminate 23

A. Constitutional Text, Structure, and History Do Not Support an Absolute Right to Exclude ... 23

B. There is No Constitutional Warrant To License for "Non-Commercial" Discrimination 27

C. The Approach Embodied in New Jersey Law is a Sound One 29

Conclusion 30

Table of Authorities

Cases

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) 22

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Board. of Dirs., Rotary Int'l v. Duarte Rotary Club, 481 U.S. 537 (1987) ..... *passim*

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Branzburg v. Hayes, 408 U.S. 665 (1972). 25

Castaneda v. Partida, 430 U.S. 482 (1977) 19

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 22

E.E.O.C. v. University of Pennsylvania, 493 U.S. 182 (1990) 6, 22, 24

Evans v. Ross, 57 N.J. Super. 233 (App. Div. 1959) 30

First Nat. Bank v. Bellotti, 435 U.S. 765 (1978) 6, 28

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 25

Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963) . 2

Green v. New Kent County Sch. Bd, 391 U.S. 430 (1968) .. 2

Hausch v. Donrey of Nevada, Inc., 833 F. Supp. 822 (D. Nev. 1993) 24

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Hishon v. King & Spalding, 467 U.S. 69 (1984) . 4, 7, 24, 27

Hurley v. Irish-American Gay, Lesbian and Bisexual Group, Inc, 515 U.S. 557 (1995) 5

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Johnson v. Degrandy, 512 U.S. 997 (1994) 13

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Lochner v. New York, 198 U.S. 45, 76 (1905) 3

Louisiana v. N.A A.C.P., 366 U.S. 293 (1961) 2

Marsh v. Alabama, 326 U.S. 501 (1946) 29

McKennon v. Nashville Banner, 513 U.S. 352 (1995) 15

Meyer v. Nebraska, 262 U.S. 390 (1923) 24

N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964) 2, 8, 10

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 2, 25

New York State Club Association v. New York City, 487 U.S. 1 (1988) ..... *passim*

N.O.W. v. Little League Baseball, Inc., 67 N.J. 320 (1974) 29

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 24

Pittsburgh Press v. Human Relations Comm'n, 413 U.S. 376 (1973) 6, 18, 28

Plessey v. Ferguson, 163 U.S. 537 (1896) 4

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 14

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 27

Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945) 3

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Romer v. Evans, 517 U.S. 528, (1996) 2, 13, 17, 29

Runyon v. McCrary, 427 U.S. 127 (1976) 3, 17-18

Shelley v. Kraemer, 334 U.S. 1 (1948) 2

Smith v. Allwright, 321 U.S. 649 (1944) 2

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United States v. Burke, 504 U.S. 229 (1992) 10

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Ward v. Rock Against Racism, 491 U.S. 781 (1989) 21

Statutes and Rules

10 U.S.C. § 2544 13

16 U.S.C. § 539f 13

42 U.S.C. § 1981 18

42 U.S.C. § 2000a(3) 7

42 U.S.C. § 2000e-1 13

42 U.S.C. §3603(b)(2) 12

Mass. Gen. L. §37.2301 13

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H.Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959) 4

Brief for Resp., Hishon v. King & Spalding 4

http://www.lawnews.net/lawfirms/surveys /1999AmLaw200.html 5

Statement of interest*

Amicus the National Association for the Advancement of Colored People (N.A.A.C.P.) is the Nation's oldest, largest, and strongest civil rights organization. For more than nine decades, it has worked to promote, through peaceful means, equal education and other basic civil rights and to hasten the end of segregation and racial violence.

The N.A.A.C.P. maintains 2,200 chapters in all 50 States, the District of Columbia, and several foreign countries. Its members now number more than 500,000, and -- as has been true since its inception -- include individuals of all racial, religious, and ethnic backgrounds.

The N.A.A.C.P. and its members know first hand the critical contributions that independent, voluntary organizations make to our Nation's civic, cultural, and political life – as well as the personal satisfaction and enrichment that come from service to one's community. N.A.A.C.P. chapters are actively involved in improving the safety, health, education, and economic conditions of the communities where they are located, with special focus on improving opportunities for young people.

The interest of Amicus in and its experience with the legal issues this case presents could hardly be stronger. Were it not for this Court's readiness to acknowledge and enforce the N.A.A.C.P.'s constitutional rights of association, our organization could scarcely have survived, and its achievements – and those of its allies in the movement for African-American civil rights – would have been far fewer. As the United States Reports record, the Association weathered an unrelenting, years-long assault, undertaken by the governments of several States and motivated by intense hostility toward the objectives of

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*Consent to file this Brief has been sought and obtained from both parties. Pursuant to this Court's Rule 37.6, *Amicus* attests that no counsel for a party had any role in authoring this Brief and no outside party has made a monetary contribution for its preparation or submission.

equality and non-discrimination to which the N.A.A.C.P. and its members were committed. See, e.g., Louisiana v. N. A. A. C. P., 366 U.S. 293 (1961); N.A.A.C.P. v. Alabama, 377 U.S. 288 (1964); Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); N. A. A. C. P. v. Button, 371 U.S. 415 (1963).

No less well, however, is the N.A.A.C.P. acquainted with the individual and societal harms that have been defended under the broad banner of "privacy" and "freedom of association." It does not overstate matters to say that almost every significant civil rights victory – from the end of the white primary, Smith v. Allwright, 321 U.S. 649 (1944), to the invalidation of racially restrictive covenants, Shelley v. Kraemer, 334 U.S. 1 (1948), to the fight for desegregated schools, Green v. New Kent County Sch. Bd, 391 U.S. 430 (1968), to the fight for federal equal employment, fair housing, and public accommodations legislation, see 78 Stat. 253 – was opposed on the ground that it posed an intolerable threat to "freedom of association." See also Romer v. Evans, 515 U.S. 528, 536; cf. Brief for N.A.A.C.P. as *Amicus Curiae*, Railway Mail Ass'n v. Corsi, No. 44-631 at 20 (arguing that "voluntary associations" should be open to all, on reasonable terms).

Thus, although the Nation's progress toward equality owes much to judicial recognition of free association rights, so, too is it indebted to the refusal to accord uncritical acceptance to broad assertions of rights of privacy and association.

Although, as even Petitioners presumably would acknowledge, the perceived "threat" at issue here is different in kind from those historically directed at *Amicus*, we do not believe that the freedom of association concerns in cases such as this one are insubstantial, nor, as the Briefs filed by Petitioners and a number of their supporters in this Court seem to assume, does support for the decision below evince an underestimation of the significance of the role civic groups play in our Nation's life.

To the contrary, *Amicus* is convinced that anti-discrimination laws – and judicial review thereof – must operate with sensitivity to speech, associational, and privacy rights; but we also believe that New Jersey's law and this Court's existing doctrine meet that test. If anything, it is not underestimation, but rather our deep appreciation for the role that civic groups play in the lives of their members and their communities that impels the N.A.A.C.P. to urge this Court's adherence to its current, measured approach.

Summary of Argument

General propositions seldom decide particular cases. See Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). If this case were, as some suggest, a simple referendum on "freedom of association," "free speech," or the special importance of civic groups in American life, there is no doubt on which side *Amicus* would come down – indeed, it is hard to imagine that a credible opposition could be mustered, let alone one that could persuade a State Supreme Court to unanimous judgment. First-hand experience has confirmed both the importance of judicial protection for rights of association and the wisdom of Tocqueville's observation that there is a "necessary connection between associations and equality," A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer, ed. 1969) at 514.

But this case cannot be resolved by resort to such majestic abstractions -- nor by invocation of the contemporary bugbears of "compelled diversity" or "political correctness." Rather, this case requires the Court to traverse familiar, albeit sensitive, constitutional terrain. As in several earlier cases, see, e.g., Roberts v. United States Jaycees, 468 U.S. 609 (1984); Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945); Runyon v. McCrary, 420 U.S. 127, 175-76 (1976), the Court is asked to review the balance struck between an entity's asserted interest in

prescribing exclusionary membership criteria and the power of the government to protect members of vulnerable groups from the sting of discrimination.

Like this case, those earlier ones were litigated at a high rhetorical pitch. It was predicted, for example, in New York State Club Association v. New York City, 487 U.S. 1 (1988), that treating large, private clubs as public accommodations would deny "millions of men and women" the benefits of civic participation and would "diminish [the] diversity and pluralism which private organizations have played such an important role in developing," Brief *Amicus Curiae* of Conference of Private Organizations, and in Hishon v. King & Spalding, 467 U.S. 69 (1984), the Court was warned that applying Title VII to a law firm partnership decision would "strike at the very hand that holds the shield against the Executive Branch of Government," Brief for Resp. at 13; cf. H. Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 33 (1959) (suggesting that Court's decision in Brown v. Board of Education impermissibly infringed white parents' rights of free association).[1]

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[1]Petitioners object to the use, in the decision below, of terms such as "prejudiced" or "bigoted" and treat those terms as evidence that the New Jersey Supreme Court's legal judgment was clouded by its animosity toward the Boy Scouts. Pet. Br. at 28, 44. This complaint is not a new one: the defendant in Jaycees took similar umbrage at being labeled a discriminator, as did the Appellant in Bob Jones Univ. v. United States, 461 U.S. 574 (1983). Indeed, such protestations long predate those cases, see, e.g., Plessey v. Ferguson, 163 U.S. 537, 551 (1896) (asserting that plaintiff had no basis for assuming that forced racial separation "stamped the colored race with the badge of inferiority"). The insistence that telling a gay child – or the child of a gay parents – that all homosexuals, including individuals the organization had formerly seen fit to elevate to the rank of Eagle Scout, are morally "[un]clean" is not "anti-gay," Pet. Br. at 46, evinces that same sort

But experience teaches not only that these dire predictions are overdrawn but that the very parties who (unsuccessfully) advanced them have subsequently flourished.[2] This fact is itself a testament to the soundness of this Court's decisions in this area – to (1) their evident respect for the important values on both sides; (2) their care to distinguish between what was truly fundamental and what was bluster; and (3) their admonition that courts confronting demands for exemptions from anti-discrimination laws pay close attention to the particular facts involved, see, e.g., Roberts, 468 U.S. at 620.

Indeed, as much as *Amicus* recognizes the unique role that independent, civic institutions play and the ways in which our national life would be impoverished were the vitality of this sector to be impaired, we respectfully submit that the dangers this case poses all fall on the other side of the ledger. Simply put, Petitioners here do not ask the Court to correct a lower court's misapplication of controlling doctrine: they seek to re-write the legal standards established by this Court's decision in Roberts and its progeny, replacing the nuanced and fact-intensive inquiries called for in those cases with what would essentially be

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of blindness. Although the First Amendment protects Petitioners' freedom to think and say "'hurtful'" things, id. at 25 (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group, Inc., 515 U.S. 557, 574 (1995)Hurley v. Irish-American Gay, Lesbian and Bisexual Group, Inc., 515 U.S. 557, 574 (1995)), it does not require a court to accept a litigant's assertion which is, as a matter of New Jersey law and plain English, prejudice, see Wesbster's New World Dictionary, Second College Edition (1980) at 1122 is, in fact, "respect." Pet. Br. at 47.

[2]Cf. http://www.lawnews.net/lawfirms/surveys/1999AmLaw200.html (noting that defendant in Hishon case had $231 million in annual revenues, reflecting a 20.9% annual rate).

a carte blanche for discrimination by non-governmental actors.[3] Such a departure is neither necessary nor consistent with broader First Amendment principles -- or with this Court's many important anti-discrimination precedents -- and it would needlessly hamper the efforts of State and local governments to secure for all their citizens equal opportunity.

Amicus does not agree, moreover, that a constitutional line should be drawn between commercial and noncommercial entities, whereby the latter would enjoy an absolute immunity under anti-discrimination laws. First, as important as private associations may loom in the contemplation of the First Amendment, the text, structure, and history of the Constitution foreclose the assertion that they have a greater claim to special protection than do university faculties, the press, or labor unions -- all of whom have been subject (over vigorous protest) to civil rights statutes -- as well as to other laws of general applicability, see, e.g., E.E.O.C. v. University of Pennsylvania, 493 U.S. 182 (1990); Pittsburgh Press v. Human Relations Comm'n, 413 U.S. 376 (1973); see also Bob Jones; see generally Associated Press v. NLRB, 301 U.S. 103, 130 (1937). Indeed, if the right to select associates is treated as uniquely determinative of the voice with which an entity speaks, it is hardly clear that the First Amendment could tolerate a distinction between profit-making and not-for-profit entities, First Nat. Bank v. Bellotti, 435 U.S. 765, 784 (1978).

Such a standard, moreover, would not do justice to the values on either side of the equation: the intensity, duration, and interdependence of a person's relationship with a law partner,

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[3]Indeed, it is telling that Petitioners' Brief barely attempts to parse the opinion of the five-Justice majority in Roberts, instead treating a concurring opinion as if it stated the case's holding, see Pet. Br. at 34.

see Hishon , 467 U.S. at 78, can often exceed that experienced with a fellow member of a social club or boy scout troop, and the seriousness of the tangible and intangible harms flowing from being denied access to educational or other non-commercial opportunities can far exceed those which attend being denied access to a "motion picture house . . . or other place of exhibition or entertainment," 42 U.S.C. § 2000a(3).

By contrast, the current legal regime, where laws like New Jersey's, whose application depends primarily on the manner and extent to which an organization holds itself out to the public, are tested under a standard that looks to the actual substance of the allegedly unconstitutional imposition, is more apt to home in on the important constitutional values on both sides.

ARGUMENT

I. The Existing Framework Provides Strong Protection for Associational Interests

A. The Need for a Balance

Petitioners and their *amici* contended that the First Amendment cannot countenance the sort of vigorous application of anti-discrimination protections at issue here, i.e., that the very benefits of civic involvement that contribute so powerfully to the vitality of American political life would be jeopardized if a State could forbid an organization such as BSA from relying on legislatively proscribed criteria in making membership decisions. A decision upholding the New Jersey Supreme Court, Petitioners and their *amici* warn, risks dooming the pluralism and diversity that so enrich the Nation and consigning its voluntary associations to a dreary homogeneity. See Pet. Br. at 19-20.

Petitioners respectfully submit that the stakes are not nearly so high. Experience shows that the benefits of free

association and those of equal treatment are far more compatible in practice than they may be made to look in theory. Where tensions do arise, the present approach, as embodied in statutes like New Jersey's and decisions like Roberts, provides needed safeguards for interests of privacy and expression without stinting the important values on either side.

1. The Importance of Private Associations

There is much in the Brief of Petitioners and those of its *amici* with which we could not disagree. At the outset, we must acknowledge the pivotal role that judicial recognition of associational freedom played in enabling individuals historically subject to class-based discrimination to push to make our Union a "more perfect" one, United States v. Virginia, 518 U.S. 515, 558 (1996); N.A.A.C.P. v. Alabama. In times of unrelenting governmental hostility, voluntary associations, sheltered by the First Amendment, have proved an important -- and often the only -- reliable refuge.

And it should be apparent to the point of being subject to judicial notice that volunteer groups play a unique and salutary role in the political, cultural, religious, and civic life of the Nation. An estimated 82 percent of Americans belong to at least one voluntary association, with the average person belonging to 4.1; over 109 million American adults volunteered in 1998, committing a total of 19.9 billion hours – the equivalent of a full-time work force of 9 million – contributing an estimated $225 billion. In this regard, *Amicus* takes just pride in its contributions: local N.A.A.C.P. chapters sponsor educational, job training, and public health initiatives that make a real difference in young people's lives.

This propensity to establish and join associations, this Court has recognized, is indicative of an important strand of the American national character. And this Court's cases, echoing

Tocqueville's famous observations, have highlighted the close links between private civic activism and the health and vitality of the Republic.

> [C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.

Roberts, 468 U.S. at 618-19.

Finally, the rewards of civic activism do not redound only to the common weal. N.A.A.C.P. members and other Americans who participate in voluntary associations, service organizations, and clubs derive immense personal satisfaction from those activities.

2. The Anti-Discrimination Principle

This case arises out of the efforts of the people of New Jersey to secure these important benefits for all of its people, irrespective of their race, ethnicity, gender, religious background, or sexual orientation. Although the anti-discrimination principle – the proposition that it is wrong to treat a person simply as a member of a disfavored group, rather than judging him or her on individual talents – took far longer to take root in our Nation's constitutional tradition, see, e.g., J.E.B. v. Alabama ex Rel. T.B., 511 U.S. 127 (1994), it is now a permanent fixture.[4] Acts of

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[4]Indeed, Democracy in America itself reminds how late recognition of this truth was in coming. Speaking of the relative status of men and women in the United States, Tocqueville condemned those who would

> attribute the same functions to both [sexes], impose the same duties; [and] have them share everything – work, pleasure, public

invidious exclusion, it is now recognized, can cause grave personal harm, see, e.g., United States v. Burke, 504 U.S. 229, 238 (1992), and, as is true of the benefits of free association, these harms ramify far beyond the individual. Thus, the New Jersey Legislature concluded in enacting the statute at issue in this case, "Discrimination threatens not only the rights and privileges of the inhabitants of [the State], but menaces the institutions and foundations of a free democratic State" N.J.Stat. Ann. 10:5-3.

B. The Present Framework

1. Constitutional Protection of Expressive Association

As has already been noted, every effort to extend the ambit of the anti-discrimination principle has met concerns – often sincerely held, but just as often, badly overstated – that fundamental freedoms would be compromised. Although this Court has met the most overwrought of these contentions with justifiable skepticism, it has also recognized that constitutional considerations can, in some situations, be substantial.

In Roberts, the Court recognized that constitutional protection for associational freedoms extends beyond the right of privacy, i.e., those especially close relationships needed in order to "independently . . . define one's identity that is central to any concept of liberty." Invoking NAACP v. Alabama, 357 U.S. 449 (1958), Roberts affirmed that the First Amendment not only protects individual speech, but also the freedom to band together for expressive purposes.

But the mere fact of a group's involvement in expressive

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affairs. It is easy to see that this sort of equality forced on both sexes degrades them both, and that so coarse a jumble of nature's works could produce nothing but feeble men and unseemly women.

DEMOCRACY IN AMERICA at 601.

activities, Roberts teaches, is not enough in itself to exempt it from regulation under anti-discrimination laws. Rather, the relevant question was whether evidence existed that enforcement of the civil rights law would "impede the organization's ability to engage in these protected activities or to disseminate its preferred views," 468 U.S. at 627. In the case of the service organization respondent, which had a "creed of promoting the interests of young men," id., Roberts refused to presume that admitting women would "require[] [a] change" in that creed, nor would it restrict the organization's ability to exclude individuals with ideologies or philosophies at odds with those of its existing members. The Court then rejected a contention that admission of women as voting members would "impair a symbolic message conveyed by the very fact that women are not permitted to vote" or that it would dampen the effectiveness of Jaycees' expression "because of the gender-based assumptions of the audience," id.[5]

Subsequent decisions have elaborated on this approach. In Board. of Dirs., Rotary Int'l v. Duarte Rotary Club, 481 U.S. 537 (1987), which again involved a challenge to application of a public accommodations statute to an all-male membership organization, the Court looked to whether the evidence in fact showed "that admitting women to Rotary Clubs [would] affect in any significant way the existing members' ability to carry out their various purposes," and concluded that the challenged California law did not require the petitioner club to "abandon or alter" its "basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace."[6]

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[5]See also id. (classing anti-discrimination statutes with other laws that address harms "distinct from their communicative impact").

[6]Id at 548 (noting that "opening membership to leading business and professional women in the community," would likely "broaden[]

In disposing of a facial challenge to a law extending the reach of an anti-discrimination ordinance to large clubs, New York State Club Ass'n once more inquired whether the law would affect "'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints.'"487 U.S. at 13 (quoting Duarte, 481 U.S. at 548).

This trilogy of decisions has, in turn, been applied by numerous State and federal courts confronted with claims that particular anti-discrimination laws or applications thereof unconstitutionally impair rights of association. As would be expected, the outcomes of these cases have depended on the particular groups and statutes involved.

2. Further Safeguards

The Roberts framework is not the sole – or even the primary – source of protection for these important societal and constitutional values. While many States and localities have seen fit to broaden gradually the sweep of their anti-discrimination laws, see Roberts, 468 at 624, 626, the reach of these statutes remains subject to important limitations. See New York Club Ass'n, 487 U.S. at 18 (O'Connor, J., concurring) (finding that challenged statute was an appropriately "sensitive tool[]" for balancing interests). Statutes like New Jersey's expressly exempt from anti-discrimination obligations institutions that are "distinctly private," irrespective of the number of members, for example, and other laws apply only to entities of a particular size, see 42 U.S.C. §3603(b)(2) (so-called "Mrs. Murphy" exemption to the Fair Housing Act); id. § 2000e(b)(2) (limiting Title VII to firms with 15 or more employees).

There is great variation, as well, in the classifications that may or may not be relied upon; thus, in Massachusetts, but

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[Rotary's] capacity for service").

not in Nevada, it is impermissible to base a decision on marital status, see Mass. Gen. L. §37.2301. In other jurisdictions, certain categories of employer or landlord are placed entirely outside the regulatory framework, and in still others, the bar on considering a particular trait is less than complete. The federal laws prohibiting religion- and gender-based employment discrimination allow for reliance on those considerations when they are "bona fide occupational qualification[s]," 42 U.S.C. § 2000e-2(e)(1), and Title VII permits religious or religiously affiliated entities to distribute burdens and benefits based on religion even where the same actors' sex- or race-based discrimination would not be allowed, see 42 U.S.C. § 2000e-1.[7]

These legislatively established rules remain subject to revision through the ordinary "pull[ing]" and "haul[ing]" of the democratic process, Johnson v. Degrandy, 512 U.S. 997, 1020 (1994). See Virginia, 515 U.S. at 561 (Scalia, J., dissenting). And it might be noted that the BSA – which claims some 5 million current members, tens of millions of alumni, and the President of the United States as its Honorary President, is likely not without power in this arena. Cf. 10 U.S.C. § 2544; 16 U.S.C. § 539f (according BSA special right to use certain types of federal property).[8]

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[7]A number of States, including Mississippi, Georgia, and Alabama, have not seen fit to provide any protections against discrimination beyond those provided by Congress.

[8]Nor, of course, would BSA likely have to go it alone. As noted above, many of the more than a hundred million "joiners" in the Nation presumably would give a sympathetic ear to claims that particular laws or enforcement regimes posed an unacceptably high threat to the voluntary sector. Cf. NJ Stat. Ann. 2A:53 A7 (providing limited charitable tort immunity); Mass Gen. Laws h. 231, § 85K (limiting plaintiff's tort recovery to $20,000).

Moreover, as the Court has repeatedly emphasized, anti-discrimination laws do not deprive covered entities of the power to exclude generally or even of the power to exclude individuals who happen to be members of legislatively recognized "protected classes" – only the freedom to base exclusion decisions on characteristics that have been legislatively determined to correlate poorly with individual talent and to have operated systematically to disadvantage classes of people. See New York Club Ass'n, 481 U.S. at 13 (recognizing possibility that some association "might be able to show . . . that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex," but noting that in general, the law "merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of . . .more legitimate criteria for determining membership"); accord Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion) (explaining that "Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice").[9]

Finally, the process self-selection itself operates a potent force. Contrary to the implication of Groucho Marx's celebrated dictum, many people do not want to be a member of a club that would not have them (at least where exclusion would be based

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[9]Ordinarily, Petitioners' contention that their actions were taken on account of Dale's "views" rather than his status, might make the issue a closer one. But Petitioners did not base their decision on Dale's actual "views" – indeed, their policy excludes "known" homosexuals, whatever their views – they inferred the objectionable "philosophy" from his sexual orientation. Even more important, the "views" attributed to Dale, i.e., that there is nothing "unclean" (as that term is used in Boy Scout law) about homosexual orientation, undeniably are held by others whom Petitioners have permitted to continue serving as leaders and sponsors of scouting.

on antipathy to his or her status or minority group membership). Cf. Knights of Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Bd, 578 F.2d 1122, 1127 & n.5 (5th Cir. 1978) (noting unresolved factual question whether KKK maintained racially discriminatory membership policy, noting that no African American had yet joined and that "one may well wonder why any would wish to").

In this respect, this case is an unusual one: it involves an individual whose bona fide commitment to the values of the association he seeks to join is beyond serious question, and who has a track record of discharging the responsibilities for which he is now deemed unfit – including, presumably, those relating to conveying (however obliquely) BSA's "message" as it concerns sexuality and cleanliness – to the evident satisfaction of Petitioners. And it involves an allegedly intolerable belief (imputed by Petitioners' to Dale) that Petitioners' heterosexual members – and religious and governmental sponsors – have continued to voice with far less draconian consequences.[10]

II. This Court's Decisions Offer No Support for the Broad Right to Discriminate BSA Asserts

Although Petitioners insist that their constitutional claim

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[10]Petitioners suggest that Dale's statements after filing this suit are not only relevant but are sufficient to defeat his claim of status-based discrimination, on the ground that his later words are a genie that "cannot be put back in the bottle," Pet. Br. at 29. This argument is a familiar one in anti-discrimination law and generally is resolved by placing the burden on the culpable defendant to show that the otherwise appropriate relief would be inequitable. Cf. McKennon v. Nashville Banner, 513 U.S. 352 (1995). To the extent that BSA contends that the post-expulsion statements represent his "true" purpose in seeking to participate in scouting, that is manifestly inconsistent with a ten-year involvement devoid of any sign of objection to BSA teaching.

is based on a reading of this Court's cases, the unmistakeable thrust of their argument is that the rules developed in Roberts and its progeny are insufficiently solicitous of free association considerations and not appreciative enough of the contribution that voluntary associations play in American life. But the "test" that Petitioners would install as a replacement is one that no discriminator (or at least none represented by counsel) could fail. Indeed, not only would Petitioners' version of the legal standard have yielded different results in the Roberts case and progeny, but, if seriously applied, it would distort First Amendment doctrine more generally and open a "constitutional" loophole in widely accepted anti-discrimination protections.

A. Under this Court's Cases, Discrimination is Not "Speech"

Improbably, Petitioners have chiefly claimed that it is not the Roberts line of cases – all of which dealt specifically with the interplay between voluntary associations' membership policies and State anti-discrimination law – but rather Hurley, that should supply the rule of decision for this case. Like that case, Petitioners insist, this one involves "forced speech": to require those who operate public accommodations to admit homosexuals (or African Americans, women, or disabled people, presumably) on a nondiscriminatory basis, they say, is to force those entities to "conform" their speech and beliefs to a "State-sponsored orthodoxy" on the "issue" of the propriety of equal treatment of members of that minority group. See, e.g. Pet. Br. at 22-23. Compelling BSA to admit James Dale is constitutionally no different (or, if anything, it is worse), Petitioners suggest, than was the order requiring a private parade organizer to allow a gay rights group to march in its parade.

Even in circumstances where subtle distinctions are far less critical, the analogy Petitioners advance would be a doubtful one. Setting aside the differences between a parade – which has

both the purpose and effect of communication with an audience, see Hurley, 515 U.S. at 569 (noting observation that "if a parade or demonstration receives no media coverage, it may as well not have happened'") – and an ongoing membership group such as Boy Scouts, the analytically correct parallel would be a Boston parade that: (1) had excluded all gay or even all openly gay persons, on the ground that their status conveyed a "message," compare Hurley at 572 (noting that "petitioners disclaim[ed] any intent to exclude homosexuals as such"); (2) had permitted to march non-gay groups eager to voice the same message of equal treatment irrespective of sexual orientation that GLIB was prevented from contributing; and (3) excluded GLIB members, based not on what they sought to say in the parade, but rather based on what they were assumed to believe.

The distinctions that Petitioners would brush aside – between the act of discrimination and belief in the rightness of discrimination and between a person's race, gender, or sexual orientation and her set of beliefs on issues pertaining to those topics – are not mere technicalities, they are the lynch-pins of a well-functioning constitutional law. Simply put, if Petitioners were right, every application of anti-discrimination law would be forced speech, in the sense that requiring a defendant to hire, feed, house, or employ an individual would be tantamount to a "compelled endorsement" of the proposition that persons who have that plaintiff's background characteristics should not be excluded from the opportunity in question on that basis.

Such a regime, in which all anti-discrimination law would arrive with a presumption of unconstitutionality, would be unacceptable in its own right, and, indeed, the very argument Petitioners advance has been presented to and explicitly rejected by this Court. The private school defendants in Runyon argued that requiring a black applicant's candidacy to be evaluated on race-neutral grounds would compromise their ability to teach students their views about the desirability of racial segregation.

This Court answered that:

> assum[ing] that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions[,] it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle.

427 U.S. at 176; accord Roberts, 468 U.S. at 627 (observing that admission of women "requires no change in the Jaycees' creed of promoting the interests of young men"); see also Pittsburgh Press v. Human Relations Comm'n, 413 U.S. 376, 390 (1973) (contrasting First amendment protections for advertisements offering employment on a discriminatory basis and those which might express an opinion on the underlying wisdom or legality of the ordinance prohibiting discrimination).[10]

Indeed, even if Runyon were not specifically on point, the "Free Speech" analysis propounded by Petitioners could not prevail. It is a starting point of this Court's jurisprudence that requiring one who objects to federal taxation to pay his statutorily mandated share of taxes is not the same as forcing him to conform to the government's view as to the morality or legality of a graduated income tax, nor does it deprive him of the freedom to express that belief. See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (Scalia, J., concurring) ("[V]irtually every law restricts conduct, and virtually any prohibited conduct

[10]There is no merit to distinguishing Runyon on the ground that the statute involved, 42 U.S.C. § 1981, was enacted pursuant to the extraordinary power conferred by Section 2 of the Thirteenth Amendment. The Section 2 enforcement authority, however, is only extraordinary relative to other powers delegated to Congress, i.e., enabling the federal government to regulate local matters that States can address as a routine exercise of their police powers.

can be performed for an expressive purpose -- if only expressive of the fact that the actor disagrees with the prohibition").[11]

B. Roberts – as Decided by This Court – Does Not Assist Petitioners

Petitioners also maintain that rights of "expressive association" are violated by New Jersey's law. According to Petitioners, the main vice of the decision below was in the New Jersey Supreme Court's determining for itself whether applying the Law Against Discrimination to Petitioners' policy would actually impair BSA's ability to carry out the expressive purposes for which its members have joined together. Petitioners contend that instead of determining independently what BSA's "message" was, the New Jersey courts should have deferred to Petitioners' representations concerning both the meaning of "their message" and the means chosen to transmit it, i.e., "quietly," through negative implications of affirmative commands, and through "role modeling."

Petitioners make only a half-hearted effort to argue that this Court's controlling case law requires, for as the New Jersey Supreme Court rightly perceived, Roberts and its progeny would be decided differently if "expressive association" claims were entitled to the sort of supine deference upon which Petitioners insist. If the Court had been required to accept as controlling an organization's explanation of its "message" -- including "teachings" unknown to the club's own membership – and if it were constrained to defer to the club's chosen "means"of

[11]Nor should the second error of the Hurley analogy be underestimated. To assume that an individual's "views and beliefs" – even on the issue of how people of his race, religion, or sexual orientation should be treated – can be inferred from his or her status as a member of a group would be to unlearn the lessons of this Court's modern anti-discrimination teaching. See J.E.B.; Castaneda v. Partida, 430 U.S. 482, 499-500 (1977).

expressing it – including through silence and "role modeling," then the assertions of the defendants in this Court's Rotary Club and Jaycees cases should have received a different reception. Just as BSA insists that its implicit "message" concerning sexuality must come from a non-homosexual, the Jaycees contended that their speech concerning the interests of young men would be heard differently if uttered by an organization comprised of men and women. See Roberts, 468 U.S. at 627.

And while Petitioners assert that the Court's inquiry was limited to scrutinizing defendant's means to their asserted ends, the Duarte decision, no less than the Supreme Court of New Jersey, inquired what the defendant's "basic" purposes were.[12]

If litigants were granted such boundless freedom to define "ends" and "means" in a manner that would make application of anti-discrimination laws unconstitutional, those statutes would loom as paper tigers. Only the most inept discriminator could not escape liability on "constitutional" grounds, i.e., by asserting that gender or racial difference was a facet of its "message" – if only a small and little-known component of it – and that this philosophy was conveyed by the race and gender of its membership. If Petitioners' "test" were the law, it would, as is claimed, Pet. Br. at 45, protect the power of the Women Anglers of Minnesota to exclude men – but it would also give that group a "constitutional right" to exclude African Americans, disabled people, or Catholics, and it would allow the National Association of Coin Dealers or Cat Fanciers, not to mention the Jaycees, to impose exactly those same restrictions. Whatever one might think of that result, it is surely not the Roberts rule.

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[12]Indeed, the concurring opinion in Roberts looked to the former name of the organization to detect its true purpose, see id. at 639 (O'Connor, J., concurring), an exercise presumably no less constitutionally delicate than the New Jersey Supreme Court's reading for itself the Boy Scout Manual.

But even in a regime that treated as conclusive BSA's contentions concerning its "teaching" concerning homosexuality, i.e., that it has sought to teach, albeit tacitly, that homosexuality is "unclean," BSA would be hard-pressed to explain how Dale's ability to convey that message is more compromised than that of a heterosexual who disagrees with it. Indeed, even where a court gives a party the sort of deference upon which BSA insists, it would be authorized to infer discrimination from the manifest inconsistency between the stated interest – intolerance of certain beliefs about moral "cleanliness" – and actions, i.e., excluding "known" homosexuals while continuing to welcome support of others, the New Jersey government, for example, who are undeniably committed to the view that exclusion of homosexuals is "bigotry."[13]

In fact, the fount of Petitioners's argument – the proposition that the judiciary has no business deciding whether an organization's expression of its message is impaired is itself a misstatement of governing law. Where, as here, there can be no serious claim that the government seeks to target the content of BSA's speech (or that of any other entity subject to the statute), see Roberts, 468 U.S. at 623, it is a mainstay of First Amendment analysis for courts to determine the extent to which a particular regulation impairs a speaker's ability to convey its message.[14] In Ward v. Rock Against Racism, 491 U.S. 781, 801

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[13]Petitioners argue that even if Dale could be acquitted of tacitly endorsing homosexuality, he could be convicted of the Boy Scout sin of hypocrisy and inconsistency – saying one thing while doing or believing otherwise. Pet. Br. at 4. If that were true, of course, Defendants do have an anti-gay policy, after all – because every non-"avowed" homosexual would be excludable as a hypocrite while each "known" one would be an apostate, while equally "inconsistent" non-gay troop sponsors would escape a comparable fate.

[14]There is no basis for suggesting that New Jersey's Law Against

(1989), for example, the Court considered whether the policy of controlling the mix had "a substantial deleterious effect on the ability of [plaintiff] performers to achieve the quality of sound they desired," and in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), the Court upheld a ban on camping in a public park, notwithstanding the recognized effect that would have on the composition of a political protest, see id., (noting that poor and homeless might not participate if not provided a place to sleep); See also Heffron v. Int'l Soc. For Krishna Consc., 452 U.S. 640 (1981).

In Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), and its progeny, the Court has undertaken the no less sensitive task of examining the content of a union's political speech to determine which of it can be said to be "germane" to the union's responsibilities as collective bargaining agent, and in Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 298-99 (1985), the Court declined to credit a religious ministry's contention that its marketplace activities were "churches in disguise -- vehicles for preaching and spreading the gospel," entitled to exemption from the Fair Labor Standards Act.. Cf. United Food & Commercial Workers v. Brown Group, Inc, 517 U.S. 544 (1996) (inquiring in associational standing case whether

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Discrimination was enacted with the intent of silencing those who speak out against homosexuality – or gender equality or religious tolerance; indeed, religious groups, who presumably are some of the loudest voices on that side of the issue are generally exempted from the law's coverage. If New Jersey had wanted to make trouble for those opposed to equal rights for homosexuals, it had many less conspicuous and more effective means at its disposal. See EEOC, 493 U.S. at 200 (observing that unavailability of funds would have far more serious limiting effect on university's protected freedom to decide "who will teach" than would alleged compromise of peer review process).

prosecuting litigation is "germane to an organization's purpose").[15]

III. The Court Should Not Reinterpret the Constitution so as to Broadly License Civic Groups to Discriminate

A. Constitutional Text, Structure, and History Do Not Support an Absolute Right to Exclude

It is a broad leap from recognizing, as does Amicus, the importance of the contribution that civic groups and associations make to insisting, as Petitioners and their supporters have, that this contribution entitles them to a special, constitutional immunity from anti-discrimination laws. As an initial matter, although the distinctive role played by clubs and associations is rightly lauded, the claim for a uniquely privileged place in American constitutional law is not a strong one. However potent an impression associational activities may have left on visiting French aristocrats, the Framers of the First Amendment saw fit to single out two other institutions – the press and religion – for special textual mention, and the Court's decision's concerning these groups' assertions of an absolute First Amendment right

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[15]On BSA's logic, the right approach in cases such as Abood would be to allow individuals who disapprove of collective bargaining in principle to opt out of all dues – or, at the least, to allow dissenters to define for themselves which expenses they believe to be "germane" and which ones are excessively "ideological."

Indeed, the approach taken in the concurring opinion in Roberts, which BSA and *amici* urge upon the Court, see infra, does not avoid these sorts of "entanglements." At the very best, that approach substitutes one set of sensitive constitutional judgments for another, conditioning as it does, "radically" different First Amendment protection on whether an institution's purposes are "predominantly" expressive. 468 U.S. at 638; cf. id. at 637 (acknowledging that the "considerations that may enter into the determination of when a particular association of persons is predominantly engaged in expression are . . . fluid and somewhat uncertain").

not to associate must control any claim to preferred treatment for others. Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937), for example, rejected a news gathering institution's contention that an order requiring reinstatement of an editor was unconstitutional because the First Amendment conferred "absolute and unrestricted freedom to employ and to discharge those who. . . edit the news." Accord Hausch v. Donrey of Nevada, Inc., 833 F. Supp. 822 (D. Nev. 1993) (rejecting publisher's assertion that "if the United States Government, through the judiciary's application of Title VII, may exercise control over who the publisher may choose as editor or associate editor, then the Government is exercising control over the content of that publication").

The Court's ruling in cases involving education, which has also been held to implicate special First Amendment concerns, see Pierce v. Society of Sisters, 268 U.S. 510 (1925), is to similar effect. Thus, in Runyon, the Court held that neither the freedom to operate a private school and determine the substance of its curriculum, see Meyer v. Nebraska, 262 U.S. 390 (1923), nor the "right of parents to send their children to [that] particular private school," required an exemption from anti-discrimination laws with which the school and parents disagreed. See id. (Powell, J., concurring).

And in EEOC v. University of Pennsylvania, the Court affirmed that "academic freedom is a 'special concern of the First Amendment,'"but declined to re-write the rules of Title VII to accommodate a university employer. 493 U.S. at 193 (explaining that "[a]cceptance of petitioner's claim would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society. What of writers, publishers, musicians, lawyers?"); see also Hishon, 467 U.S. at 78 ("Although we have recognized that the activities of lawyers may make a 'distinctive contribution . . . to the ideas and beliefs of our society,' . . . [the defendant] has

not shown how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner for partnership on her merits") (quoting NAACP v. Button, 371 U.S. 415, 431 (1963)).

These decisions, which, no less than the case at bar, have the potential to affect the "voice" with which institutions with strong claims to special First Amendment protection speak on issues of public concern are not outliers. Rather, they represent specific application of the general rule that laws which incidentally or even disproportionately burden the press are not invalid on that ground. See generally Branzburg v. Hayes, 408 U.S. 665 (1972).[16]

The suggestion that the Court must choose between the benefits of a vital independent sector and enforcement of anti-discrimination laws suffers from a further defect: the assumption that there is no constitutionally meaningful difference between a "government takeover" and the limitations on the right to exclude that anti-discrimination laws entail.

As an initial matter, the absolute freedom that such arguments presuppose is not well supported in our constitutional tradition, see 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484,

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[16]Nor, it should be noted, is this a case where reasoning from constitutional text, structure, and precedent lead to an answer that is at odds with original intent. To the contrary, one prominent commentator concluded a survey of the subject by observing that

> [t]he Framers wanted to limit the influence of private associations (factions) . . .None of colonial charters or constitutions address the subject. The virgina Declaration of Rights does not preserve private associations. No state asked the First Congress to put anything about associations in the Bill of Rights – although there was a proposal on almost everything else one can imagine

Easterbrook, Implicit & Explicit Rights of Association, 10 HARV. J.L.PP. 92, 99 (1986).

517 (1996) (Scalia, J., concurring). Even where "distinctly private" clubs were involved, there are numerous early decisions upholding the judiciary's power to order reinstatement of a member who is expelled, based on the court's judgment that (1) the club had failed to follow its own rules; (2) that those rules were contrary to "natural justice"; or (3) that the decision to expel the member was "malicious." See Z. Chaffee. The Internal Affairs of Associations Not for Profit, 43 HARV. L. REV. 992, 1014-15 (collecting cases); see also Easterbrook , 10 HARV. J. L.P.P. at 99 (noting that "[n]one of the history of the colonies hints at a general protection for private associations" and that the "climate of the Eighteenth and Nineteenth century exalted individual rather than associational freedoms").[17]

And while defendants have time and again cast anti-discrimination laws as a total usurpation, this Court's cases have long emphasized the extent to which laws forbidding decision makers from relying on particular characteristics leave intact important prerogatives. Thus, in the Associated Press case, it was observed that:

> The [NLRA] does not compel the petitioner to employ any one; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully

[17]These decisions often analogized the terms of membership to a contract, treating the asserted basis for exclusion as if it were a contractual term that was unenforceable, as contrary to public policy. Summarizing a number of cases in which expulsion was based on a member's views, Professor Chaffee proposed a rule not unlike the test applied in Roberts:

> courts should consider, on the one hand, the seriousness of the injury caused by expulsion and the importance of the [plaintiff's] right; and on the other hand, the desirability of giving full autonomy to the association and of permitting it to maintain the unimpaired loyalty of its members to the purposes for which it is obviously organized.

43 HARV. L. REV. at 1018.

> to edit the news to reflect the facts without bias or prejudice. The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The restoration of [the complainant] to his former position in no sense guarantees his continuance in petitioner's employ. The petitioner is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible.

331 U.S. at 132-33. Accord Hishon, 467 U.S. at 78 (Title VII only requires that partnership candidate be considered on her individual merits); New York Club Ass'n; cf. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (rejecting assertion that "right to exclude" is sine qua non of property or free speech rights).

B. There is No Constitutional Warrant To License for "Non-Commercial" Discrimination

Citing the singular importance of civic participation, Petitioners(implicitly) and various of their *amici* (explicitly) also propose that the Constitution be construed as granting certain "non-commercial" entities absolute immunity from the strictures of anti-discrimination laws. See generally Roberts, 468 U.S. at 632-41 (O'Connor, J., concurring). While that proposal would spare the Court the need to revisit – and overturn -- key (i.e., "commercial") anti-discrimination precedents that Petitioners' arguments might otherwise undermine, it would not be sound constitutional law.

Even leaving aside the awkwardness of giving such entities greater First Amendment license to "creat[e] . . . a voice"

than is enjoyed by the press, see supra,[18] and its poor fit with precedent,[19] the proposal would suffer from other serious weaknesses. First, the commercial/non-commercial distinction is an unreliable proxy for the duration or intensity of any particular association. Although the relationship between fellow club members may be assumed to be less transitory than between the proprietor and a customer of a restaurant, movie theater or other paradigmatic "public accommodations," the contact between club members is by no means more intensive than between neighbors, see Jones v. Alfred O. Mayer, 392 U.S. 409 (1968), classmates, Runyon, or law partners, see Hishon. Nor can this Court's cases easily be read as allowing a "radical[]" distinction between the expressive rights of for-profit, as opposed to not-for-profit entities. First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978); see also Easterbrook, 10 HARV. J.L.P.P. at 98.

Similarly, the harm to the individual is by no means always lesser when "noncommercial," rather than economic, opportunity is what is denied. As Petitioners and their supporters have taken pains to point out – and Amicus readily agrees – civic involvements are an integral aspect of full citizenship and often reward their participants in ways more important than the narrowly mercenary. To deny individuals access to these

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[18]To the extent the difference is explained by the fact that newspaper publishing is a "business," it must contend with the principle that "if a newspaper's profit motive were determinative, all aspects of its operations . . . would be subject to regulation if it could be established that they were conducted with a view toward increased sales" Pittsburgh Press, 413 U.S. 376, 384-85 (1973) (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

[19]The defendants in Roberts and Duarte,, non-profit associations dedicated to "fellowship for service," 481 U.S. at 547, were hardly quintessential commercial enterprises -- nor were the Appellants in Corsi or the schools in Runyon.

benefits for reasons unrelated to their personal talents, values, and potential contributions can cause both individual and societal harm.[20]

C. The Approach Embodied in New Jersey Law is a Sound One

Rather than rely on a distinction based on whether an entity's "predominant" purposes are commercial, New Jersey – and many other States – take a "functional" approach, whereby the obligation to refrain from discrimination attaches depends on the extent the entity can be said, objectively, to hold itself out as "public." See Roberts, 468 at 625; N.O.W. v. Little League Baseball, Inc., 67 N.J. 320 (1974), aff'g 127 N.J. 522, 531 (App. Div. 1974). Not only is such an approach broadly consistent with the common law, see Romer v. Evans, 517 U.S. 620, 629 (1996), but it gives groups substantial control as to whether they will operate truly privately or whether it will seek the benefits of more public membership solicitation, Cf. Roberts, 468 U.S. at 636 (O'Connor, J., concurring) ("An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas"); Marsh v. Alabama, 326 U.S. 501, 506 (1946) ("The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it"). Finally, such a rule protects against

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[20]Indeed, the only textual basis for drawing a constitutional distinction between entities that are engaged in commerce and those which are not can be found in Article I, which confers upon Congress authority to regulate commerce. See Katzenbach v. McClung, 379 U.S. 294, 300 (1964). But while congressional power to address private discrimination is rightly scrutinized for a nexus with commerce, the State police power need not be.

the particular "embarrassment and humiliation of being invited[,] . . .only to find [the] doors barred." Evans v. Ross, 57 N.J. Super. 233, 231 (App. Div. 1959).[21]

Conclusion

Because the New Jersey Supreme Court correctly applied this Court's teaching – and because Petitioners have advanced no sound basis for rewriting the law – the decision below should be affirmed.

Respectfully submitted,

DAVID T. GOLDBERG
227 Garfield Place
Brooklyn, N.Y. 11215
(718) 789-5584

DENNIS C. HAYES
Counsel of Record
N.A.A.C.P.
4805 Mt. Hope Drive
Baltimore, MD 21215
(410) 486-9191

Attorneys for Amicus Curiae

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[21]Indeed, this basic recognition that a party should not "have it both ways"-- "public" for governmental benefits and "private" for resisting burdens -- largely answers Petitioners' insistence that it is perverse to exempt a vehemently anti-gay group from the prohibition on sexual orientation discrimination while"punishing" BSA (with a nondiscrimination obligation) for its relative circumspection. As this case well illustrates, the less loudly an organization declares its exclusionary character, the more likely that it will be treated as "public" in ways. that redound to its benefit There can be little doubt, for example, that a group with the avowed purpose of promoting anti-gay hostility would be less likely to be welcomed into New Jersey's schools, fire departments, and other governmental entities than are Petitioners.